universität
wien

MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

„Combatting the 'hidden crime' of human trafficking – Limitations to national jurisdictions with special focus on Austria and possible ways of addressing human trafficking on an international level"

verfasst von / submitted by

Mag. Lisa Schüller

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2021 / Vienna 2021

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	UA 992 628
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	International Legal Studies
Betreut von / Supervisor:	Univ-Prof. MMag. Dr. Christina Binder, E.MA.

Table of Contents

I. Introduction

According to the United Nations Office on Drugs and Crime, almost every country around the globe is affected by the crime of human trafficking. It is to be presumed that human trafficking is a growing global trend that is increasingly becoming a fixed component of 'the new global economy'.[1] It is an ever-growing phenomenon, with numbers having increased by roughly 38% from 2007 to 2016, bearing in mind that the dark figures ostensibly are much higher due to the 'hidden' nature of the crime. *Alhadi* also rightfully points out that trafficking of human beings gravely violates a series of globally-recognized human rights all across the globe.[2] Despite the international community's efforts of the past decades, victims of trafficking continue to face criminal charges and imprisonment while perpetrators go unpunished.[3] The profits generated from the crime as well as the described 'climate of impunity' will continue to foster what can be referred to as a business of exploitation. *Cohen* warns that the practice of trafficking in persons will grow '*unless met with a strong international response*.'[4]

Despite international legal instruments and corresponding national anti-trafficking regimes, human trafficking is still often referred to as a 'hidden crime'. The transnational nature of the crime, the growing demand of trafficked individuals as well as intimidation of victims, exploitation of particularly desperate situations and perpetrators operating 'in the shadows of the law' result in a lack of accurate data as well as low conviction rates.[5]

It is often argued that national anti-trafficking regimes are not suited to effectively combat the crime of human trafficking for a several reasons.[6] Especially in the European Union, victims of the crime are often trafficked across national borders, making it more difficult to tackle the issue on a national level.[7] Just like in other European countries, Austria faces several obstacles

---

[1] A. Gallagher and P. Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking - Lessons From the Front Line', International Criminal Justice Review, Volume 18 Number 3, 2008, 318-343, 319
[2] N. Alhadi, 546-547
[3] The Human Trafficking Legal Center, 'Using the Optional Protocol under CEDAW to combat Human Trafficking', 12 December 2018, 4
[4] M. Cohen, 232-233
[5] See F. Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, no. IN18-06, 2018
[6] See for example: H. G. van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts', Chinese Journal of International Law 13(2), 2014, 297-334, 315; A.D. Tolar, 'Human Trafficking Analyzed as a Crime Against Humanity', ICLR, Vol. 20, No. 1., 2020, 127–152, 129 or F. Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, no. IN18-06, 2018
[7] G. Oğuz, 'International Cooperation in Combating Human Trafficking in the EU: Evidence from Turkey', Irish Journal of Sociology, 2012; 20(1):39-64, 39

regarding victim protection and prosecution of traffickers.[8] Against the background of the lack of data available on human trafficking and the low conviction rates in countries across the globe, the question arises what exactly the obstacles are that stand in the way of effectively tackling the 'hidden crime' of human trafficking on the national level, especially in countries that are Parties to the Council of Europe Convention on Action against Trafficking. Furthermore, it begs the question of whether it would be beneficial to encounter human trafficking on an international level, what the options are and whether increased inter-state cooperation and ways of international prosecution can help overcome obstacles and challenges of national law enforcement.[9]

The master thesis will examine the most common legal, procedural and factual obstacles to national prosecution of human trafficking cases as well as the difficulties with regard to the protection of victims' rights on a national level before thoroughly analyzing these challenges based on the example of the legal situation in Austria. This will be followed by an examination of possible ways of addressing human trafficking on an international level before concluding with an assessment of added value of such an international approach.

II. Defining human trafficking under international law

Before turning to an evaluation of the challenges of national responses to human trafficking, a proper definition of the crime, a clear delimitation to other offences as well as an overview of the international legal framework will be illustrated. This chapter aims at defining the crime of human trafficking under international law. It will analyze the elements of human trafficking based on the most common definition, provide an overview of the relevant international legal framework and illustrate the differences to similar phenomena.

1. Definition

[8] See for example: Lightup, 'Menschenhandel in Österreich', https://lightup-movement.at/blog/menschenhandel-in-oesterreich#:~:text=Wir%20sind%20Transit%2D%20und%20Zielland,Zwangsarbeit (accessed on 23 May 2021); J. Planitzer, 162

[9] F. Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, no. IN18-06, 2018; A.D. Tolar, 'Human Trafficking Analyzed as a Crime Against Humanity', ICLR, Vol. 20, No. 1., 2020, 127–152, 127-130

The first time human trafficking was defined in international legislation was as late as 2000 in what is considered the most important international treaty on human trafficking[10], the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (hereinafter ' UN Trafficking Protocol') as part of the *United Nations Convention against Transnational Organized Crime* (hereinafter 'UNTOC').[11] It was the first '*legally binding instrument with an internationally recognized definition of human trafficking*.'[12]

In order to grasp the significance of the UN Trafficking Protocol in the field of anti-trafficking, we will have to go back further in time. Prior to the UN Trafficking Protocol, the notion of human trafficking was included in several international agreements. However, due to a lack of consensus, there had not been a definition of human trafficking agreed upon in international law. Consequently, numerous issues were unclear regarding the definition. For instance, there was no consensus regarding whether the purpose of trafficking was restricted to sexual exploitation, whether there must be a transnational aspect to the crime or whether male victims could be subjects of human trafficking.[13] The Council of Europe, for example, originally intended to concentrate on human trafficking solely for the purpose of sexual exploitation and therefore proposed to define the crime in a Plan of Action in 1996 as the exploitation of a woman[14] '*in a country other than her own by another person (natural or legal) for financial gain, the traffic consisting of organising (the stay or) the legal or illegal emigration of a woman, even with her consent, from her country of origin to the country of destination and luring her by whatever means into prostitution or any form of sexual exploitation.'*[15]

Considering the opposing views of states concerning the definition of human trafficking at that point in time, the UN Trafficking Protocol can be regarded as a significant milestone in the

[10] ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases, 2010, 12, https://www.unodc.org/documents/human-trafficking/ASEAN_Handbook_on_International_Legal_Cooperation_in_TIP_Cases.pdf (accessed on 11 April 2021).
[11] A.D. Tolar, 'Human Trafficking Analyzed as a Crime Against Humanity', ICLR, Vol. 20, No. 1., 2020, 127–152, 133; UNODC, 'The Protocol – The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons is the world's primary legal instrument to combat human trafficking', https://www.unodc.org/unodc/en/human-trafficking/protocol.html (accessed on 10 April 2021).
[12] UNODC, 'The Protocol – The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons is the world's primary legal instrument to combat human trafficking', https://www.unodc.org/unodc/en/human-trafficking/protocol.html (accessed on 10 April 2021).
[13] A. T. Gallagher, 'The International Law of Human Trafficking', Cambridge University Press, 2010, 12
[14] A. T. Gallagher, 20
[15] M. Hirsch, 'Plan of Action against Traffic in Women and Forced Prostitution', 1996, 11, cited in Wijers and Lap-Chew, 'Trafficking in Women, Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution', 26

history of the international community's efforts to combat the crime of human trafficking. It entered into force in 2003 and obliges States to criminalize the crime as defined in the Protocol.[16] The definition of human trafficking contained in the Trafficking Protocol has proved to have a role model effect for all subsequent agreements in this field.[17] In the following, it will be used as the main definition of human trafficking under international law and will, as such, be further examined.

Human trafficking or 'trafficking in persons' is defined in Article 3 (a) of the Trafficking Protocol as *'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'*[18] Subparagraph b of the same Article complements the definition by clarifying that the usage of the *means* defined in subparagraph a are sufficient for the crime of human trafficking to be committed, regardless of the victim's consent. Finally, subparagraphs c and d deal with the trafficking of children, stating that the crime of human trafficking is committed if a person under the age of eighteen is being recruited, transported, transferred, harbored or receipted for the purpose of exploitation even if none of the means defined in subparagraph a are involved.[19]

Furthermore, it has been clarified by the United Nations Office on Drugs and Crime (hereinafter 'UNODC') and the United Nations General Assembly that, even though the application of the regime of the UN Trafficking Protocol does require a transnational aspect and the involvement of an organized criminal group, these are not necessarily elements of the crime of human

[16] ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases, 2010, 12 https://www.unodc.org/documents/human-trafficking/ASEAN_Handbook_on_International_Legal_Cooperation_in_TIP_Cases.pdf (accessed on 11 April 2021).
[17] H. G. van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts', Chinese Journal of International Law 13(2), 2014, 297-334, 302
[18] 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
[19] 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

trafficking itself.[20] As a protocol to the UNTOC, in order for the UN Trafficking Protocol to be directly applicable on the international level, a case of international trafficking with the involvement of an organized criminal group is required. These aspects of transnationality and the involvement of an organized criminal group are, however, not required when it comes to criminalizing human trafficking on the domestic level. They are only prerequisites for implementing the UNTOC and therefore the UN Trafficking Protocol on an inter-state level.[21]

The three core elements of trafficking in persons which can be deduced from the definition are: action, means and purpose.[22] In the following, they will be further analyzed.

a. The first element: action

As we have seen, a certain *action* is needed in order for human trafficking to be able to take place, including, but not limited to, recruitment, transportation, transfer, harboring or receipt of a person. The named activities are not further defined. The peculiarity of the element of *action* lies in the fact that it clarifies that not only the process but also the end result falls within the scope of the definition of human trafficking, which is highlighted by the inclusion of the terms such as 'harboring' and 'receipt'. In practice, this implies an extensive scope of the definition of trafficking in persons as it includes not only the recruitment, transport or brokering, but also, for example, the management or supervision of places of exploitation, as long as the other elements of means and purpose are met. It might even be argued that this leads to such an extended scope of the definition of trafficking that it includes exploitative environments which do not precede any trafficking process, such as a work situation which has gradually turned into exploitation. It can be concluded that, since a person in such an environment is being 'harbored' for the purpose of exploitation, provided that the element of *means* is fulfilled as well, the situation qualifies as human trafficking. However, a closer look at the *travaux préparatoires* suggests otherwise. By establishing a rather strict regime consisting of a three elements test,

[20] UNODC, Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 2004, 275; UNGA, Interpretive notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, para. 59, UN Doc. A/55/383/Add.1 (Nov. 3, 2000)

[21] ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases, 2010, 12-13 https://www.unodc.org/documents/human-trafficking/ASEAN_Handbook_on_International_Legal_Cooperation_in_TIP_Cases.pdf (accessed on 17 April 2021); H. G. van der Wilt, 302-303

[22] ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases, 2010, 6 https://www.unodc.org/documents/humantrafficking/ASEAN_Handbook_on_International_Legal_Cooperation_in_TIP_Cases.pdf (accessed on 11 April 2021).

States Parties most likely aimed at limiting the scope of the concept of trafficking in persons without including *all* situations of coerced or forced exploitations. As a result, not every situation of forced labor falls within the definition of human trafficking under this regime.[23]

b. The second element: means

The action must be performed by using one of the *means* mentioned in Article 3 (a) of the UN Trafficking Protocol: threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another. However, Article 3 (c) clarifies that this does not apply to children, meaning that a child is to be considered trafficked if the aspects of action and purpose are met.[24]

The majority of the listed means are self-explanatory. Nevertheless, some of them have caused controversies. It is not entirely clear, for example, at what exact threshold a certain behavior amounts to coercion, deception, or fraud in order to be considered a *means*. This has led to debatable interpretations in the past, such as the assumption that economic pressure can, under certain circumstances, be a form of 'coercion'.[25] Moreover, the term 'abuse of power' is not further defined in the UN Trafficking Protocol. The *travaux préparatoires* suggest that this was a highly contested issue in the drafting process. Similarly, the term 'abuse of a position of vulnerability' is not further explained. However, an interpretative note can be found in the *travaux préparatoires,* explaining that the abuse of a position of vulnerability '*is understood as referring to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved.'* As a complementary means of interpretation, one could also consider the Explanatory Report to the Council of Europe Convention on Action against Trafficking (hereinafter 'CoE Convention'), which clarifies that, '*the vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's immigration status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation*

[23] A.T. Gallagher, 30-31
[24] 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
[25] See for example, L.A. Malone, 'Economic Hardship as Coercion Under the Protocol on International Trafficking in Persons by Organized Crime Elements', 25 Fordham International Law Journal, 2001, 55

flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce.'

A number of different approaches to the definition of 'abuse of power' have been voiced in recent years, suggesting that this and other terms of the *means* element leave considerable room for interpretation.[26]

c. The third element: purpose

Eventually, all of this must be carried out for the *purpose* of exploitation as defined in Article 3 (a) of the UN Trafficking Protocol.[27] The UN Trafficking Protocol lacks a definition of the term 'exploitation'. However, Article 3 (a) does provide an exemplary list, naming '*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*'.[28]

In this context, it is important to note that the intention to exploit is sufficient and trafficking in persons can therefore be committed before the actual exploitation takes place[29], as pointed out by UNODC[30] as well as the Council of Europe.[31] This special intent to exploit has led UNODC to call human trafficking a *dolus specialis* crime. It does not matter which one of the individuals involved in the crime has the intention to exploit the victim or at what stage. In other words, for an offence to constitute a case of human trafficking, one of the people involved in one or more of the acts of recruitment, transportation, transfer, harboring or receipt, must have the intention to exploit the victim. The intent to exploit may of course be difficult to establish at the early

---

[26] A.T. Gallagher, 31-33; Council of Europe, Explanatory Report on the Convention on Action against Trafficking in Human Beings, ETS 197, 16.V.2005 (European Trafficking Convention Explanatory Report) at para. 83

[27] 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; A.T. Gallagher, 29

[28] A. T. Gallagher, 34; 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

[29] ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases, 2010, 7 https://www.unodc.org/documents/humantrafficking/ASEAN_Handbook_on_International_Legal_Cooperation_in_TIP_Cases.pdf (accessed on 11 April 2021).

[30] UNODC, Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 2004, 268

[31] Council of Europe, Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings, 2005,para. 225, CETS No. 197

stages of trafficking, such as transport or recruitment, where the actual traffickers are often not involved.[32]

d. Problems of the three element definition

In conclusion, despite the significance of the universally recognized definition, the three element definition of human trafficking is rather vague and bears some problematic aspects. First of all, the activities that can constitute an *action* are not further defined, neither in the UN Protocol nor in the interpretative material available. This lack of definition leads to diverging opinions on what exactly is to be criminalized by national legislations. Criminalization, however, is one of the key elements in states' efforts to tackle human trafficking, which will be elaborated on below.[33] Another objective of the UN Trafficking Protocol arguably was the harmonization of the definition of the crime among states so that law enforcement can be more uniform and inter-state cooperation can be facilitated. The lack of definition of the terms of the *action* element, however, might stand in the way of the desired harmonization and could be one of the reasons why many domestic legal frameworks with respect to anti-trafficking differ significantly from one another.[34] For example, a major area of human trafficking concerns forced labor. Unfortunately, due to the lack of a clear definition of the *action*-element which leaves room for speculation, serious scenarios of forced labor might not fall under the offense of trafficking in persons in some domestic legislations.[35]

Similar issues arise from the two remaining elements: While most of the listed terms of the *means*-element are self-explanatory, there still is room for controversy, as we have seen regarding the notion of 'coercion'.[36]

As for the term 'exploitation' as part of the *purpose*-element, although the UN Trafficking Protocol does provide an exemplary list[37], there also is considerable room for interpretation. As

---

[32] A. T. Gallagher, 34
[33] A. T. Gallagher, 371; 29
[34] See F. Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, no. IN18-06, 2018; A. T. Gallagher, 373; M. Cohen, 234
[35] See A.T. Gallagher, 30-31
[36] See A.T. Gallagher, 31-33; Council of Europe, Explanatory Report on the Convention on Action against Trafficking in Human Beings, ETS 197, 16.V.2005 (European Trafficking Convention Explanatory Report) at para. 83
[37] A. T. Gallagher, 34; 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

with the lack of definition regarding the *action*-element, this can potentially lead to the hampering of uniform criminalization and standardization of the understanding of human trafficking across states, thus leaving room for legal uncertainty.

As we will see below, the lack of standardization and the different implementations of the obligation to criminalize contribute to states' inability to effectively counter the crime of human trafficking on the national level.[38]

2. International legal framework

Over the course of the past years, a comprehensive international legal framework has been created with regard to human trafficking. This has not only resulted in the recognition of an internationally accepted definition of a crime which had long been confused with other situations such as illegal migration, but it also shows the consensus within the international community on the fact that trafficking in persons has become a global issue which must not be underestimated.[39]

In the following, an overview of the relevant international framework will be provided. A special focus will be laid on the most significant international treaties in the area of human trafficking, the UNTOC and the UN Trafficking Protocol. In terms of regional instruments, in light of the evaluation of the situation in Austria below, special emphasis will be placed on the *Council of Europe Convention on Action against Trafficking in Human Beings*. Other regional instruments like the *SAARC Convention*, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,* the *American Convention on Human Rights*, the *Arab Charter on Human Rights* and other sources of law will be mentioned exemplarily. This overview is meant to demonstrate the growing efforts within the international community as well as the general recognition of the urgency to fight human trafficking that has developed ever since the adoption of the UN Trafficking Protocol.

---

[38] See H. G. van der Wilt, 316
[39] A. Gallagher and P. Holmes, 319

a. UNTOC and the Trafficking Protocol

As stated above, the UNTOC as well as its Trafficking Protocol are arguably the two most important international instruments with regard to human trafficking. The UNTOC being the core international treaty in the field of inter-state cooperation in order to address transnational organized crime at an international level, its three protocols concern trafficking in persons, smuggling of migrants and illicit manufacturing of and trafficking in firearms.

The UNTOC's main objective is to foster inter-state cooperation for the purpose of combating transnational organized crimes and to eradicate 'safe havens' for criminals. Under the UNTOC, states are primarily obliged to criminalize certain offenses. Moreover, the UNTOC contains a number of methods aiming at the improvement of cooperation between states with a special focus on mutual legal assistance. Additionally, the UNTOC focuses on the protection of victims and witnesses.[40] As for the UN Trafficking Protocol, its three purposes are the prevention and the combat of human trafficking, the protection of victims and the improvement of inter-state cooperation in this regard.[41]

The application of the UNTOC presupposes that the offence in question has a transnational aspect (with the exception of the obligation to domestically criminalize certain offences), that an organized criminal group is involved and that it constitutes a 'serious crime', which is defined as *'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'*.[42] The generic definition of 'serious crime' enables states to address almost all criminal offences of significant gravity, including trafficking. This is of particular importance considering that it is possible for states to ratify the UNTOC without ratifying any of the Protocols. For the sake of completeness, it should be noted that on the contrary, states may not ratify any of the Protocols without having ratified the UNTOC first.[43] Both the UNTOC and the Trafficking Protocol contain provisions regulating the relationship between the two agreements. Four core principles can be derived:

[40] A. T. Gallagher, 75-76
[41] A. T. Gallagher, 79-80
[42] Art. 2, UN General Assembly, United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25
[43] ASEAN Handbook, 11; A. T. Gallagher, 70

Firstly, since the UNTOC and the Trafficking Protocol were never meant to be two separate agreements, States Parties are obliged to ratify the UNTOC before ratifying any of the Protocols. States Parties to the UNTOC who have not ratified a Protocol, however, are not bound by it. Secondly, the two texts have to be interpreted together, while considering their purposes. Thirdly, the regime of the UNTOC applies *mutatis mutandis* to its Protocols, meaning that alternate interpretations or ways of application are to be made only to the extent necessary. Eventually, the Protocols' rules are to be seen as *lex specialis* to the *lex generalis* of the UNTOC. Therefore, the crimes established by the Protocols are to be considered crimes under the UNTOC and the general regime of the UNTOC regarding issues like mutual legal assistance or protection of victims, applies when implementing the more detailed stipulations of the Protocols.[44]

As for the interpretation of the UNTOC and its Protocols, there is a considerable amount of relevant material. Apart from the *travaux préparatoires* which were released in 2006, including numerous so-called 'Interpretative Notes' issued by the drafters of the UNTOC and its Protocols during the negotiations which contribute to consistent interpretation, there is a Legislative Guide to the Convention and its Protocols published by UNODC.[45]

As illustrated above, under the Trafficking Protocol, the requirements of a transnational aspect and the involvement of an organized criminal group only apply to the obligations revolving around cooperation of States Parties. When it comes to criminalizing trafficking in persons on a domestic level, States Parties are required to do so regardless of whether there is an organized criminal group involved or whether there is some kind of transnational aspect. The obligation for States Parties to criminalize, investigate and punish the crime of trafficking in persons, when committed intentionally, and the attempt, participation, organization or direction of others to commit such a crime as well as the obstruction of justice can be found in Article 5 of the Trafficking Protocol.[46]

As for legal obligation, both the UNTOC and the Trafficking Protocol contain provisions with different levels of obligation, which range from requiring consideration or effort to being mandatory for States Parties.[47]

---

[44] A. T. Gallagher, 73-74
[45] A. T. Gallagher, 72-73
[46] A. T. Gallagher, 79-80
[47] A. T. Gallagher, 72-73

In the opinion of the author, the UNTOC and its Trafficking Protocol are of utmost importance considering the internationally accepted definition of human trafficking they have created and the strong symbolic meaning they carry, showing consensus within the international community on the gravity of trafficking in persons as well as the comprehensive framework they contain with regard to international cooperation.[48] However, bearing in mind the problems arising from the complex nature of the crime of human trafficking, the regime of the UNTOC and its Trafficking Protocol also contains a number of shortcomings.

Firstly, one of the key issues when it comes to eradicating safe havens for traffickers concerns jurisdiction. Provisions on jurisdiction aim at ensuring that all stages of a human trafficking case can be prosecuted regardless of where they took place.[49] As will be further examined below, the UNTOC foresees the *principle of territoriality,* the *active nationality principle*, and the *passive personality principle*. This is complemented by the '*aut dedere, aut judicare'-principle* which implies that states shall establish jurisdiction in cases where the offender is on its territory and is not being extradited. Unlike *the principle of territoriality* and *the aut dedere aut judicare principle*, the *passive personality principle* and the *active personality principle* are optional under the UNTOC regime. It can be argued that the rather narrow possibilities of jurisdiction the UNTOC creates contribute to the phenomenon of impunity. Under the UNTOC regime, a state can only exercise its jurisdiction where the crime was committed on its territory, where the crime was committed by one of its nationals and where it was committed against one of its nationals.[50] This will be further analyzed below. It is for this reason that some criticize that the principle of universal jurisdiction has not been included in the UNTOC.[51] By doing so, it could be ensured that cases could be prosecuted even if they do not fall under the jurisdiction of any state as a result of the principles of jurisdiction contained in the UNTOC.

Furthermore, Article 5 of the UN Trafficking Protocol, which regulates the obligation to criminalize the crime of human trafficking, has been called a '*central and mandatory obligation of all States Parties*' in the Legislative Guide to the UNTOC and its Protocols.[52] At the same time, however, as mentioned above, some of the core elements of the definition included in the

[48] See A. T. Gallagher, 89
[49] See A. T. Gallagher, 379
[50] See J. Planitzer, 'The Council of Europe Convention on Action against Trafficking in Human Beings and the Human Rights-Based Approach to Trafficking in Human Beings', 2013, 146
[51] See for example *Tavakoli* in H. G. van der Wilt, 321
[52] A. T. Gallagher, 371

UN Trafficking Protocol are vague and do not contribute to the desired standardized criminalization.

In general, there are a number of issues that do not seem to be addressed sufficiently by the UNTOC and its Trafficking Protocol. For example, even though the Trafficking Protocol contains numerous provisions regarding the protection of victims, a lack of comprehensive obligations can be observed, with regulations being more general or even vague in nature. The provision concerning victim protection merely states that states shall '***consider*** *adopting legislative or other appropriate measures to provide for the physical, psychological and social recovery of victims of trafficking*'.[53] In the opinion of the author, this set of rules is not adequate taking into account the highly vulnerable situation of trafficked individuals and their urgent need for support and assistance. It only provides for a low standard of victim protection which leaves States Parties with a choice on whether they want to assist victims in their recovery or not. What is more, they have the possibility to only provide conditional support, linking the assistance of victims to their readiness to cooperate with law enforcement.[54]

In terms of the right to residence, the Trafficking Protocol contains a similarly restricted approach. Again, it requests states to '***consider*** *adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases*.'[55] From a victim-centered approach, this is of course problematic, considering the high risk and dangers victims might be exposed to when forced to return to their country of origin.

b. Regional treaties

At the regional level, the 2005 *Council of Europe Convention on Action against Trafficking in Human Beings* (hereinafter 'CoE Convention') is likely to be one of the most significant legal instruments with respect to human trafficking. It was adopted in 2008 and contains a higher standard of obligations, especially in the field of protection of victims' rights as well as criminal

[53] Art. 6(3), 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; See A. T. Gallagher, 81-83
[54] A. T. Gallagher, 83
[55] Art. 7(1), 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; See A. T. Gallagher, 85

justice responses, for States Parties than the UN Trafficking Protocol.[56] The Committee of Ministers pointed out the added value of such a regional agreement on an issue already covered by an international one. In its explanation of the Convention it highlighted that this provides the opportunity for stricter and better defined standards.[57]

In terms of definition, the CoE Convention includes the exact same notion of trafficking as the UN Trafficking Protocol. However, it broadens the scope of application by recognizing that trafficking can be committed within a country and irrespective of whether or not an organized criminal group is involved. It thereby explicitly eradicates these two elements of the definition of human trafficking, with the result of expanding the scope.[58]

Moreover, it also defines 'victims' of trafficking, placing special emphasis on the protection of their rights.[59] In contrast to the UN Trafficking Protocol, which mainly focuses on criminal justice, the CoE Convention also strongly focuses on prevention as well as distinct punishments.[60]

As the CoE Convention appeared shortly after the first international definition of trafficking was adopted with the UN Trafficking Protocol, the Protocol can be seen as the basis of the anti-trafficking framework, with the CoE Convention supplementing it. Article 39 of the CoE Convention is specifically designed to address the relation between the Convention and the UN Trafficking Protocol, regulating that it *'shall not affect the rights and obligations derived from the provisions of the Protocol (...) and is intended to enhance the protection afforded by it and develop the standards contained therein.'*[61] *Gallagher* describes the CoE Convention as *'adding value to a regime that is implicitly recognized as an international minimum standard.'*[62] One of the decisive differences between the two instruments can be seen in the UN Trafficking Protocol's emphasis on crime prevention and the CoE Convention's focus on the protection of victims' human rights. This can even be concluded from the CoE Convention's preamble which draws attention to the need for improvement regarding the protection granted under the UN

[56] ASEAN Handbook, 13
[57] A. T. Gallagher, 112 and 126
[58] A. T. Gallagher, 114; H. G. van der Wilt, 302-303
[59] A. T. Gallagher, 46
[60] H. G. van der Wilt, 302-303
[61] Art. 39, Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197
[62] A. T. Gallagher, 114

Trafficking Protocol and which explicitly recognizes that trafficking is a violation of human rights.[63]

Apart from binding obligations, the CoE Convention also contains a number of regulations that might be referred to as soft law, such as the wordings '*aim to promote*' gender equality or '*consider adopting*' measures.[64]

There are a number of other examples of regional treaties addressing trafficking in persons, some of which will be introduced in the following. Nevertheless, the already mentioned CoE Convention is arguably the one with the broadest scope and highest importance.

As for the Southern Asian region, the *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution* is another example of a regional treaty addressing the crime of trafficking in persons. It was adopted by the South Asian Association for Regional Cooperation (SAARC) in 2002. However, as the name of this Convention indicates, its scope is far narrower than the ones of the UN Trafficking Protocol and the CoE Convention.[65]

In the ASEAN region, the *ASEAN Convention against Trafficking in Persons Especially Women and Children* (ACTIP) mainly follows the UNTOC and the UN Trafficking Protocol. It includes the exact same definition of human trafficking and identical measures with regard to prevention and victim protection as the Trafficking Protocol as well as the UNTOC's regulations regarding criminalization and other areas. The significance of the ACTIP lies in its binding nature and the resultant consequence that all member states, even those who did not ratify the UNTOC or the Trafficking Protocol, are obliged to comply with the rules set up by the ACTIP.[66]

Another example would be the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. Its Article 4 (2) (g) stipulates that States Parties have to take appropriate and effective measures to '*prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk'*.[67]

---

[63] A. T. Gallagher, 114
[64] A. T. Gallagher, 139
[65] ASEAN Handbook, 13
[66] F. Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, no. IN18-06, 2018
[67] Art. 4 (2) (g), African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003

Relevant provisions are also to be found in the *American Convention on Human Rights*, which prohibits slavery, involuntary servitude, slave trade, traffic in women and forced labor.[68]

The *Arab Charter on Human Rights* of 2004 contains provisions related to anti-trafficking as well. Article 10 prohibits all forms of slavery and trafficking in human beings under all circumstances, as well as forced labour, trafficking in human beings for the purposes of sexual exploitation, exploitation of children in armed conflict and trafficking in human organs.[69]

These examples illustrate how the UNTOC and the UN Trafficking Protocol marked the start for significant developments on regional levels with regard to anti-trafficking.

c. Human rights treaties

Many international human rights treaties also contain provisions directly or indirectly related to trafficking in persons. In fact, two of the most important human rights treaties, the *Convention on the Elimination of All Forms of Discrimination Against Women* (hereinafter 'CEDAW') and the *Convention on the Rights of the Child* (hereinafter 'CRC') both prohibit trafficking and exploitation. What is more, the CRC also incorporates the protection of children's rights who have been trafficked.[70] CEDAW and the CRC are in fact the only international human rights treaties of our time that expressly refer to human trafficking.[71] In the following paragraphs, their contribution and value to anti-trafficking efforts will be explored.

CEDAW's Article 6 stipulates that States Parties have to take '*all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women*'.[72] This provision is vague and its key terms 'appropriate measures', 'all forms of traffic in women' and 'exploitation of the prostitution of women' remain undefined.[73] From the *travaux préparatoires* it can be concluded that 'traffic in women' only refers to trafficking for

---

[68] Art. 6 (1) and (2), Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969
[69] Art. 9 and Art. 10, League of Arab States, Arab Charter on Human Rights, 15 September 1994
[70] ASEAN Handbook, 13-14
[71] A. T. Gallagher, 65
[72] Art. 6, UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249
[73] A. T. Gallagher, 64

the purpose of sexual exploitation.[74] Until recently, it therefore seemed that CEDAW had a very limited scope when it comes to trafficking in women. On 20 November 2020, however, the Committee on the Elimination of Discrimination against Women issued its *General recommendation No. 38 on trafficking in women and girls in the context of global migration*[75]. Its Article 11 (a) quotes the UN Trafficking Protocol's definition of human trafficking, clarifying that the meaning of 'traffic in women' goes beyond exploitation for the purpose of sexual exploitation.[76] What remains unclear, however, is the vague notion of 'exploitation of prostitution' and critics argue that the Committee ignores sex worker's *'voices and lived experiences'*, blending sex work with human trafficking and exploitation in its General recommendation No. 38.[77]

On the other hand, however, the Convention can be seen as a progressive tool in more than one way: It includes provisions aimed at addressing the underlying causes of trafficking instead of merely focusing on trafficking and exploitation itself. This results from an interpretative reading of CEDAW, especially in light of its purpose to eradicate discrimination. Article 6, which requires states to take '*all appropriate measures*' and Article 5, which requires '*to modify the social and cultural patterns of conduct of men and women'* aimed at combating practices based on *'stereotyped roles for men and women'* have to be read together.[78]

Probably the most significant result of CEDAW is that, even if trafficking is only mentioned briefly in the Convention, this means that the anti-trafficking in women efforts are being subjected to the monitoring of an expert treaty body for the first time.[79] The Committee on the Elimination of Discrimination against Women is a group of 23 international women's rights experts which is, apart from publishing general recommendations and carrying out other tasks, mandated to receive communications regarding claims of violations of rights protected by CEDAW where the state in question has accepted this procedure by having ratified the Optional

[74] J. Planitzer, 'The Council of Europe Convention on Action against Trafficking in Human Beings and the Human Rights-Based Approach to Trafficking in Human Beings', 2013, 38
[75] UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, 20 November 2020
[76] Art. 11 (a), UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, 20 November 2020
[77] Global Network of Sex Work Projects, NSWP Statement on CEDAW committee general recommendation no. 38 (2020) on trafficking in women and girls in the context of global migration, November 2020, https://www.nswp.org/resource/nswp-statements/nswp-statement-cedaw-committee-general-recommendation-no-38-2020-trafficking (accessed on 26 July 2021).
[78] A. T. Gallagher, 65; J. Planitzer, 39
[79] J. Planitzer, 38

Protocol of 2000.[80] The Committee's case law is, however, not very extensive. As of 2018, only 33 of the 72 completed communications had been decided on the merits.[81] As more than half of the Committee's communications[82], the only one concerning human trafficking has been rejected on inadmissibility grounds.[83] As a result, no communication concerning trafficking has yet been decided on the merits despite the mentioning of trafficking in CEDAW's Article 6.[84] The 'Human Trafficking Legal Center' has identified this shortcoming and published a report presenting a toolkit on how the Committee's communication procedure could be used in the fight against human trafficking.[85]

In conclusion, with the Convention focusing not only on trafficking itself but also on addressing the underlying causes as well as with it subjecting the topic to the monitoring of an expert treaty body, CEDAW holds great potential with regard to anti-trafficking efforts. However, as we have seen, this potential has not yet been fully exploited.

The relevant provisions of the CRC require States Parties to '*undertake to protect the child from all forms of sexual exploitation and sexual abuse*'[86] and to '*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*'[87]. Article 39 requires states to take measures for the purpose of the recovery of child victims.[88]

As in CEDAW, the term of trafficking is not defined in the CRC. Nevertheless, in its concluding observations, the monitoring body established under the CRC, the Committee on the Rights of the Child, mentions trafficking in children and child prostitution on a regular basis, in the direct

---

[80] United Nations Human Rights Office of the High Commissioner, COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, Introduction, https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx (accessed on 26 July 2021).
[81] The Human Trafficking Legal Center, 'Using the Optional Protocol under CEDAW to combat Human Trafficking', 12 December 2018, 14
[82] The Human Trafficking Legal Center, 'Using the Optional Protocol under CEDAW to combat Human Trafficking', 12 December 2018, 14
[83] Committee on the Elimination of Discrimination against Women, Forty-second session, 20 October-7 November 2008, Communication No. 15/2007, Ms. Zhen Zhen Zheng vs. The Netherlands
[84] The Human Trafficking Legal Center, 'Using the Optional Protocol under CEDAW to combat Human Trafficking', 12 December 2018, 4
[85] The Human Trafficking Legal Center, 'Using the Optional Protocol under CEDAW to combat Human Trafficking', 12 December 2018, 4
[86] Art. 34, UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577
[87] Art. 35, UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577
[88] Art. 39, UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577

context of Articles 34 and 35. The Committee's case law does not only focus on sexual exploitation but, more recently, also on trafficking for the purposes of economic exploitation and adoption.[89]

The CRC's Optional Protocol stipulates that States Parties are to criminalize the sale of children, child prostitution and child pornography and requires States Parties to offer support and assistance to trafficked children throughout legal proceedings as well as when it comes to seeking compensation and to reintegration and recovery.[90]

Taking a closer look at the Committee's case law, which results from States Parties' obligation to submit reports on the rights of the child[91], it soon emerges that it is not only significantly more comprehensive than the CEDAW Committee's case law, but it also contains important references to exploitation for the purpose of forced labor, adoption and other forms of exploitation, unequivocally clarifying that the CRC's scope of the notion of trafficking goes beyond sexual exploitation.[92]

In conclusion, the CRC contains a number of highly relevant rules, focusing on the issues of criminalization, prevention and support of victims. Moreover, as can be seen from the CRC Committee's case law, its scope clearly covers all forms of trafficking in children, regardless of the purpose. The CRC can therefore be seen as a helpful tool with regard to states' efforts to combat trafficking in children.

In addition to CEDAW and the CRC, numerous international human rights treaties contain regulations that are relevant to human trafficking, such as the *International Covenant on Civil and Political Rights (ICCPR)* as well as its First Protocol, the *International Covenant on Economic, Social and Cultural Rights,* the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* or the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, to name only a

[89] J. Planitzer, 39; A. T. Gallagher, 65
[90] J. Planitzer, 40
[91] Art. 8, UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000
[92] See for example UN Committee on the Rights of the Child , 'Concluding Observations: Chile', UN Doc. CRC/C/OPSC/CHL/CO/1, Feb. 18, 2008; 'Concluding Observations: Sweden', UN Doc. CRC/C/OPAC/SWE/CO/1, June 8, 2007 or 'Concluding Observations: Kenya', UN Doc. CRC/C/KEN/CO/2, Feb. 2, 2007

few.[93] The Human Rights Committee under the International Covenant on Civil and Political Rights (CCPR), for example, has mentioned trafficking in persons in numerous of its General Comments. In General Comment No. 36 on Article 6 ICCPR, it is clarified that resulting from the right to life, states are required to take special measures aimed at protecting individuals in particularly vulnerable situations. In this context, victims of human trafficking are listed.[94] By linking the protection of trafficked persons to the obligation to protect the right to life itself, the CCPR highlights the seriousness of the issue of human trafficking and the close link between the granting of basic human rights and the protection of trafficking victims. Interestingly, in General Comment No. 28 on article 3 ICCPR, trafficking in persons is mentioned in the context of states' obligation to protect from slavery, slave-trade, servitude and forced labor. Paragraph 12 states, *'Having regard to their obligations under article 8, States parties should inform the Committee of measures taken to eliminate trafficking of women and children, within the country or across borders, and forced prostitution.'*[95]Thereby, the CCPR clarifies that it views human trafficking as a violation of the prohibition of slavery, slave trade and/or forced labor.

As already mentioned in chapter II. 2., also several regional human rights treaties concluded in regions all across the globe contain provisions directly or indirectly concerning trafficking and the protection of victims' rights.[96]

To sum up, even though CEDAW and the CRC are the only international human rights treaties that explicitly refer to human trafficking, a large number of other international and regional human rights agreements include regulations related to the issue of human trafficking in one way or another. Not only does this create new ways of addressing and drawing attention to the issue of trafficking, but it also clearly illustrates the close link between the crime of human trafficking and the violation of human rights. By different human rights treaty bodies mentioning and dealing with human trafficking regularly, they at least contribute to bringing states' obligations revolving around the combat of human trafficking to the focus.

d. Treaties of International Criminal Law or Crime Control Treaties

93 ASEAN Handbook, 13-14
94 Para. 23, Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, CCPR/C/GC/36
95 Para. 12, Human Rights Committee, General comment No. 28 (2000) on article 3 of the International Covenant on Civil and Political Rights, CCPR/C/21/Rev.1/Add.10
96 ASEAN Handbook, 13-14; See chapter II., 2.

Within the international legal framework, treaties relating to criminal law contain specific provisions regarding human trafficking as well.

The Rome Statute establishing the International Criminal Court regulates the Court's jurisdiction over genocide, war crimes, crimes against humanity and the crime of aggression. The Rome Statute identifies a number of crimes closely related to human trafficking, such as enforced prostitution, as crimes against humanity provided that the crime in question is part of a *'widespread or systematic attack directed against any civilian population, with knowledge of the attack'*.[97] However, the Rome Statute lacks a definition of human trafficking as such. Even though human trafficking is mentioned in the Rome Statue in the context of enslavement, the exact scope of this mention has caused confusion among scholars. Critics argue that the Statute needs to be modified to include the definition of human trafficking as regulated in the UN Trafficking Protocol. We will return to this issue in Chapter V.2. .[98]

Other treaties criminalizing offences related to human trafficking such as slavery, forced labor and child labor include the *ICCPR*, the *Forced Labor Convention*, the *Abolition of Forced Labor Convention*, the *Worst Forms of Child Labor Convention*, the *Slavery Convention*, the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* and the *United Nations Convention against Corruption.*[99]

e. Soft Law

In the area of soft law the most important instrument with regard to human trafficking is most likely the 2002 *United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking*. They provide guidance for states in relation to victims' rights, criminal responses, inter-state cooperation and lawmaking and are referred to by the UN Human Rights Council on a regular basis. The Principles were drafted by a group of UN officials and experts, without the direct participation of any states.

[97] Art. 7 (1), UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6
[98] J. N. Aston and V. N. Paranjape, 'Human Trafficking and its Prosecution: Challenges of the ICC', 2012; A. T. Gallagher, 215-216
[99] ASEAN Handbook, 15-16

Furthermore, the *UNICEF Guidelines on the Protection of Child Victims of Trafficking* and the *UNHCR Guidelines on International Protection* provide specific recommendations with regard to the approach of the crime of trafficking in persons.

A number of soft law instruments on the issue of human trafficking have also been adopted in this area at the regional or the bilateral level. They complement and sometimes even extend international standards.[100]

f. Evaluation of standards

The variety of international legal standards introduced above clearly reflects the universal recognition of the seriousness of the issue and the willingness of states to position themselves to combat human trafficking. We have seen that, despite the abundance of different relevant legal instruments, the numbers presented in the introduction of the thesis show that they have not resulted in the tackling of the issue and that they all have their weaknesses.

However, when it comes to international or regional agreements, it has to be kept in mind that, naturally, they reflect the lowest common denominator of states with completely opposing political interests trying to reach a consensus. Against this background, many of the agreements, particularly the UNTOC as well as its Trafficking Protocol, are a major success. They marked the beginning of a number of positive developments among states with regard to their efforts to combat trafficking in persons as well as a basis for international cooperation in this area.

Regional agreements are especially valuable since they have the potential to establish stricter and more specialized standards on an issue already regulated by an international agreement.[101] In the case of the CoE, this is reflected in the high standards of victim protection, as shown above. Additionally, regional agreements on the fight against human trafficking have the advantage of being able to oblige member states to safeguard certain standards even if they are not parties to the UNTOC or the Trafficking Protocol and are therefore not bound by the overarching standards, as is the case with the ACTIP.

[100] ASEAN Handbook, 16; A. T. Gallagher, 140
[101] See ASEAN Handbook, 13 and Chapter II. 2. b.

Several human rights treaties and treaties of international criminal law as well as soft law instruments complement these standards and contribute to a wider range of possibilities to address the issue of trafficking.

In summary, an evaluation of the international standards shows that awareness and efforts to combat the scourge of human trafficking have increased notably since the UNTOC was adopted and many of the legal instruments bear the potential to successfully address issues resulting from the crime of trafficking. However, statistics show that human traffickers still operate successfully across the globe, suggesting that the instruments described are clearly not enough and more radical approaches are needed. Apart from already existing agreements, instruments of soft law and monitoring bodies, the establishment of new mechanisms for the purpose of prosecution, such as specialized tribunals, or the expansion of the competence of existing institutions would be necessary to tackle the global issue of trafficking in persons more effectively. The difficulty in this regard lies, as mentioned above, in the nature of international law being the result of finding the smallest common denominator. Possible ways of prosecuting human trafficking cases on an international level will be examined further below.

3. Delimitation

In practice, the crime of human trafficking is often conflated with other phenomena, which can easily result in trafficked individuals being misidentified as 'illegal migrants' or asylum seekers. This further contributes to the issue of impunity and the 'hidden' nature of trafficking. Furthermore, the differentiation between human trafficking and slavery can be particularly difficult and has caused controversy in the past. In the context of finding ways to address human trafficking on an international level, it is crucial to delimit the two phenomena. This will be further discussed in Chapter V. The following subchapters aim at highlighting fundamental differences between human trafficking on the one hand and slavery and migrant smuggling on the other hand.

a. Slavery

Human trafficking is often referred to as 'modern day slavery' or 'modern slavery'.[102] Identifying a practice as a form of slavery not only carries strong political weight, it also has significant legal consequences. Slavery is prohibited by customary international law, its prohibition constitutes a legal obligation *erga omnes* and forms part of *jus cogens*.[103] However, taking a closer look at both the international conventions addressing slavery and relevant international case law, crucial differences between the two crimes emerge.

The first multilateral agreement abolishing slavery was the League of Nations' *Slavery Convention*[104] of 1926.[105] It regulates two forms of slavery, namely slavery as a mere condition and slavery as a process: It defines slavery as '*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised*.' Slave trade is defined as '*all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves*.'[106]

The Supplementary Convention of 1956[107] widened the scope of the Slavery Convention to situations and activities similar to slavery such as debt bondage and servitude. Nevertheless, these conventions still did not cover every form of commercial exploitation of persons but rather focused on scenarios of permanent ownership over human beings.[108]

The definition of human trafficking in the UN Trafficking Protocol on the other hand, names, as already illustrated, slavery as one of the end purposes of human trafficking. Forced labor and sexual exploitations are listed separately from slavery as other forms of exploitation. It is therefore difficult to argue that slavery and human trafficking can be used as synonyms. From a comparative perspective, it appears that slavery and human trafficking are to be seen as two separate offences. However, since slavery is explicitly mentioned in the internationally

---

[102] See for example: J. N. Aston and V. N. Paranjape, 'Human Trafficking and its Prosecution: Challenges of the ICC', 2012; A. T. Gallagher, 177 and Empact THB – Projekt ETUTU, 'Operative Kooperation zur Bekämpfung von nigerianischem Menschenhandel & moderner Sklaverei, 2016
[103] A. T. Gallagher, 178
[104] Slavery Convention, Geneva 25 September 1926, entered into force on 9 March 1927, UN Treaty Series, Volume 212, 17
[105] H. G. van der Wilt, 300
[106] H. G. van der Wilt, 300
[107] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Geneva, 7 September 1956, entered into force on 30 April 1957, UN Treaty Series, Volume 266
[108] H. G. van der Wilt, 301

recognized definition of human trafficking, a certain relationship between the two crimes cannot be denied.[109]

The relationship between slavery and human trafficking will be further analyzed in the course of Chapter V. dealing with the question of possible ways of addressing human trafficking at an international level.

b. Migrant smuggling

In practice, the distinction between human trafficking and migrant smuggling can be particularly difficult. One and the same vehicle could potentially transport victims of human trafficking and smuggled migrants at the same time. The difference lies in the fact that trafficked persons are being transported for the purpose of exploitation whereas smuggled migrants pay a fee in order to be transported across a border. It may well be the case that an individual does not know which scenario applies to them at every stage of the process. Individuals could turn from smuggled migrants to victims of trafficking within seconds. This results in a rather high risk of wrongfully categorizing trafficked individuals as 'illegal migrants'.[110]

According to the *UN Protocol against the Smuggling of Migrants by Land, Sea and Air* which, just as the Trafficking Protocol, supplements the UNTOC, defines smuggling of migrants as *'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'*.[111]

Therefore, a crucial difference between trafficking in persons and migrant smuggling is that in the former scenario, a human being is victimized whereas in the latter, there is no 'victim' in the traditional sense. Human trafficking can thus be described as a 'crime against a person'.[112] In contrast, in cases of migrant smuggling, the smuggled person can be referred to as a 'client' rather than a 'victim' of the smuggler. Even though it should be borne in mind that smuggled persons are at high risk of being extorted or mistreated as well, they are paying in exchange for

[109] A. T. Gallagher, 189
[110] A. T. Gallagher, 52
[111] Art. 3 (a), UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000
[112] B. Iselin and M. Adams, 'Distinguishing between Human Trafficking and People Smuggling', UN Office on Drugs and Crime, Regional Centre for East Asia and the Pacific, 2003, 3

a service and are therefore not victims as long as they are 'merely' being smuggled. It is for this reason that, in contrast to human trafficking, migrant smuggling can be referred to as a 'crime against public order' rather than against a person. The migrant consents to be smuggled whereas consent to be exploited as described in the Trafficking Protocol is not possible.[113]

In conclusion, migrant smuggling can be defined as the illegal transport of human beings across borders in exchange for financial compensation, whereas human trafficking involves the buying, selling and transport of individuals within or across national borders through certain means (provided that the victims are adults) for the explicit purpose of exploitation.[114]

c. Concluding remarks

All things considered, as a prerequisite for the successful identification of victims of human trafficking, which can then lead to effective criminal proceedings against perpetrators and the granting of protection and assistance to victims, it is crucial to differentiate between human trafficking and other scenarios.

Furthermore, as trafficked individuals often remain undetected, they seem to be mistaken for refugees on a regular basis. It is therefore worth mentioning that, although refugees can fall victims to human trafficking,[115]not all victims of trafficking can automatically be referred to as refugees. Under international law, refugees are individuals who are outside their home country and are in need of protection due to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, without the possibility of obtaining protection from their country of origin.[116] Since the legal procedures with regard to residence permits, criminal proceedings and receiving compensation are different for victims of trafficking, it is important to not confuse them with refugees.

III. Obstacles and challenges to national anti-trafficking responses

[113] B. Iselin and M. Adams, 3-4
[114] A. Gallagher and P. Holmes, 319
[115] A. T. Gallagher, 197
[116] Art. 1, N General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

Despite the comprehensive legal framework illustrated above and the apparent international recognition of the gravity of the global issue of human trafficking it reflects, states still deal with numerous obstacles and challenges concerning the combat of the crime and oftentimes struggle to prosecute trafficking cases as well as to safeguard victims' rights.

There seems to be consensus within the international community that the problem of human trafficking needs to be addressed with criminal justice responses and that the first step to do so is to criminalize the crime of trafficking. However, the investigation, prosecution and conviction of traffickers is still the exception rather than the rule. The numbers of investigations and prosecutions remain low, even in progressive and committed countries. While trafficked women, children and men often end up being arrested, detained as illegal migrants or convicted for offences such as prostitution or document fraud, their traffickers almost always go unpunished and keep up their criminal activity.[117] The generic failure of states to identify victims as well as to prosecute perpetrators of human trafficking leads to what *Gallagher* refers to as a '*general culture of impunity*'[118] and to the view that many states are unwilling or unable to prosecute traffickers.[119] Oftentimes it is a combination of intertwined issues that hamper criminal proceedings of traffickers on the national level, as we will see below.[120]Apart from the issue of prosecution, a number of problems arise in relation to the protection of trafficked persons and the safeguarding of their rights.

This chapter will provide an overview of barriers to both domestic prosecution of human trafficking cases as well as to the protection of victims' rights and further analyze the most common ones in the two areas.

1. Legal and procedural obstacles to law enforcement

a. Jurisdiction

Even though under the UN Trafficking Protocol, the element of transnationality is not a requirement for the criminalization on the national level, a considerable amount of human

[117] M. Vandenberg, 'Complicity, Corruption, and Human Rights: Trafficking in Human Beings', 34 Case W. Res. J. Int'l L., 2002, 323-333, 325
[118] A. T. Gallagher, 370; 385; A. Gallagher and P. Holmes, 320
[119] See, for example M. Cohen, 'The Analogy between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction', Buffalo Human Rights Law Review, Volume 16, 2010, 201-235, 203
[120] H. G. van der Wilt, 317

trafficking cases involve an individual being trafficked across a border, which leads to a complex situation with regard to jurisdiction and it often remains unclear which state is competent to prosecute the perpetrators.[121] As trafficking regularly occurs at different stages and in different countries, with a number of agents involved, the question of criminal jurisdiction often is uncertain.[122]

The relevant international and regional agreements regarding human trafficking introduced above provide several rules on jurisdiction. Aiming at eradicating safe havens for perpetrators by guaranteeing that all stages of the crime can be prosecuted regardless of where they took place, as well as facilitating inter-state cooperation, the rules on jurisdiction can be seen as key elements of the international anti-trafficking regime.[123]

First of all, both the CoE Convention and the UNTOC, which is, as shown above, applicable *mutatis mutandis* to the crimes regulated in the Trafficking Protocol, stipulate that states are required to secure their jurisdiction over crimes committed on their territory *(principle of territoriality).* Secondly, both conventions contain the possibility of the *active nationality principle*, implying that a state may exercise jurisdiction over crimes committed by their nationals abroad. Both conventions extend this principle to stateless individuals who habitually reside within the territory of the state. Thirdly, the conventions contain the possibility for States Parties to exercise jurisdiction based on the *passive personality principle*, which is tied to the nationality of the victim. What is more, the two conventions include the '*aut dedere, aut judicare'-principle.* This implies that states must establish jurisdiction in cases where the offender is on its territory and is not being extradited. The conventions do not foresee universal jurisdiction for human trafficking. Unlike *the principle of territoriality* and the *aut dedere aut judicare principle*, the *passive personality principle* andthe *active personality principle* are optional under the UNTOC regime.[124] In conclusion, a state has jurisdiction in cases where the crime was committed on its territory or when the perpetrator is within the territory of the state and the state does not extradite them and, optionally, where the crime was committed by one of its nationals and where it was committed against one of its nationals.[125]

[121] A.D. Tolar, 'Human Trafficking Analyzed as a Crime Against Humanity', ICLR, Vol. 20, No. 1., 2020, 127–152, 129
[122] A. T. Gallagher, 379
[123] A. T. Gallagher, 379
[124] H. G. van der Wilt, 317-318; 29; UNODC, www.unodc.org/e4j/en/organized-crime/module-8/key-issues/jurisdictions.html (accessed on 7 May 2021); A. T. Gallagher, 379-380
[125] J. Planitzer, 'The Council of Europe Convention on Action against Trafficking in Human Beings and the Human Rights-Based Approach to Trafficking in Human Beings', 2013, 146

This regime creates a number of loopholes. Firstly, it shows that it is not always possible to lead criminal proceedings in the jurisdiction of a state, either due to the state being unable or 'unwilling' to exercise its jurisdiction. The 'unwillingness' might result from certain acts not being (sufficiently) criminalized by the domestic legislation of a state, as will be further explained below. This can lead to the unsatisfactory result that human trafficking cases do not fall under the competence of any state.

Furthermore, in order to facilitate a comprehensive reconstruction of all stages of a crime as well as to encourage the participation of victims, a criminal process should ideally be carried out within one and the same jurisdiction. Unfortunately, due to the particularly complex nature of the process of trafficking in persons and the number of people, countries and nationalities involved through all stages of the crime, it is often not possible to prosecute all offenders within the same jurisdiction. In practice, this could mean, for example, that the person who initially recruited a woman for the purpose of sexual exploitation in her country of origin cannot be tried by the state which prosecutes the trafficker harboring the woman in the receiving state due to a lack of jurisdiction.[126]

The UNTOC, unlike the CoE Convention, does include a helpful provision in this regard, namely Article 15 (2) (c), which establishes the possibility of an extended territorial jurisdiction. This provision foresees that territorial jurisdiction may be extended over acts or conspiracies taking place abroad but aim at committing a crime on the territory of the respective State Party. This considerably broad expansion of the principle of territorial jurisdiction reflects the compound nature of the crime of human trafficking: Although the common final objective is the exploitation of an individual, trafficking in persons involves a number of different stages and agents. Accordingly, human trafficking can be classified as a 'continuous crime' and the extended principle of territorial jurisdiction as provided in the UNTOC enables an appropriate procedural response by ensuring that all traffickers involved in a case may be prosecuted within the same jurisdiction. This extended principle of territorial jurisdiction as regulated in the UNTOC has since been applied by several domestic criminal courts. It is based on the assumption that cases of transnational human trafficking constitute a single criminal offence

[126] H. G. van der Wilt, 316

consisting of a number of activities and stages which may well occur on the territory of different states.[127]

All things considered, it shows that one of the reasons why human trafficking cases often go unpunished is the lack of jurisdiction of states willing to exercise their jurisdiction or the unwillingness of states that are able but not obligated to exercise their jurisdiction. However, even if a state exercises its jurisdiction, criminal proceedings are oftentimes not successful. As mentioned, due to its complexity, the crime of human trafficking ideally requires a comprehensive criminal justice response, with all perpetrators being investigated and prosecuted in one and the same proceeding. These issues could be overcome by detaching the prosecution of human trafficking cases from the question of domestic jurisdiction of states and by dealing with it on an international level in ways to be evaluated further below instead.

b. Failure to criminalize human trafficking in a standardized manner

As already mentioned, criminalization is a crucial element when it comes to combating trafficking in persons and the obligations for states to do so is to be found in relevant international treaty law. The corresponding provision of the UN Trafficking Protocol has even been referred to as '*a central and mandatory obligation of all States Parties*' in the Legislative Guide to the UNTOC and its Protocols. An identical norm is to be found in the CoE Convention.[128]

Furthermore, one of the desired results of the UNTOC and its Trafficking Protocol arguably was the harmonization of the definition of human trafficking among States Parties. The hope was that the standardization would lead to uniform law enforcement with respect to human trafficking and would help to facilitate inter-state cooperation.

However, even though the requirement to criminalize human trafficking can be found in all major international agreements relating to the issue of trafficking, states are not compelled to take over the exact same legal definition provided by the UN Trafficking Protocol and the CoE Convention. In practice, a number of national legal frameworks with respect to anti-trafficking therefore differ significantly from each other and from the Trafficking Protocol and domestic

[127] H. G. van der Wilt, 318
[128] A. T. Gallagher, 371

laws are oftentimes insufficient when it comes to anti-trafficking because they do not criminalize certain offences at all or because they are not effective enough.

A closer look at the ASEAN region, for example, shows, that even though a regional framework has been adopted in which the definition of human trafficking of the Trafficking Protocol is to be found without any changes (*ASEAN Convention Against Trafficking in Persons, Especially Women and Children*), the domestic laws of the States Parties include different definitions of the crime. It should be noted that the definition of human trafficking eventually agreed upon in the Trafficking Protocol was the lowest common denominator of many states with contrasting legal and political backgrounds and interests. The definition settled for in the Trafficking Protocol has been criticized for being difficult to reasonably implement in national laws.[129]

While the obligation to criminalize the crime of human trafficking as well as its attempt and complicity is clear, there is uncertainty as to other acts, such as trafficking-related conduct, the use of services of a trafficked individual, forced labor or sexual exploitation. Consequently, these and other notions are to be further defined in domestic legislations. Thus, several terms are given different meanings and entail divergent consequences in different domestic legislations. For example, while the threshold for forced labor can be extremely low in some countries, other cultural backgrounds can lead to an entirely different and significantly higher threshold. In other words, what is considered forced labor in one state could be merely classified as 'poor working conditions' causing a violation of labor law in another.[130] By way of example, the French Criminal Code defines exploitation in employment as imposing working conditions incompatible with human dignity by *'abusing the victim's vulnerability or dependence'*.[131] Additionally, the French Court of Cassation has clarified that nationals from third countries in 'irregular situations' are presumed to be in a vulnerable state under this regulation.[132] In addition to exploitation in employment, forced labor is criminalized by the French Criminal

[129] F. Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, no. IN18-06, 2018; A. T. Gallagher, 373; M. Cohen, 234
[130] A. T. Gallagher, 373; F. Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, no. IN18-06, 2018; European Commission, 'Study on case-law relating to trafficking in human beings for labour exploitation, Final report', 2015, 36
[131] Art. 225-13 and 225-14, France, Penal Code (Code Pénal), consolidated text as of 14 February 2015; FRA, 'Severe labour exploitation: workers moving within or into the European Union, Annexes on criminal law provisions and inspection authorities', 2015, 7
[132] FRA, 'Severe labour exploitation: workers moving within or into the European Union, Annexes on criminal law provisions and inspection authorities', 2015, 7

Code.[133] The legislation of Romania, on the other hand, criminalizes exploitation in employment only in a very restrictive manner. It regulates that employing nationals of third countries in irregular situations may, under certain circumstances, amount to a criminal offence only if more than five persons are being exploited in employment. If less than five persons are being employed under exploitative conditions, it merely constitutes a misdemeanor. What appears even more concerning is that forced labor is not explicitly criminalized at all in Romanian Criminal Law.[134] These comparative examples show that, even within the European Union, standards and thresholds for conduct related to human trafficking can be at completely different levels and what is punishable by criminal law in one state might merely amount to an administrative violation or even have no consequences at all in another country.

These differing implementations of the core framework as foreseen by the relevant conventions described above signify another serious impediment of the effective prosecution on the national level. By way of example: A state might be unable to prosecute, for example, a person who has acted as a recruiter with the intention to deliver the victim to its territory where the exploitation shall take place. At the same time, the state where the recruitment took place could lack jurisdiction if it failed to implement, or only partly implemented, the regulations as set out in the international framework. This often leads to the unsatisfactory result of impunity.[135]

c. Non bis in idem

The *non bis in idem principle,* also referred to as the *rule against double jeopardy* might pose yet another problem when it comes to the prosecution of human traffickers. The essence of the principle is that nobody can be prosecuted for the same criminal offence more than once.[136]
The principle forms part of the majority of national laws of states across the globe and has been included in numerous international instruments as well.[137]

---

[133] Art. 225-14-1, France, Penal Code (Code Pénal), consolidated text as of 14 February 2015; FRA, 'Severe labour exploitation: workers moving within or into the European Union, Annexes on criminal law provisions and inspection authorities', 2015, 7

[134] See FRA, 'Severe labour exploitation: workers moving within or into the European Union, Annexes on criminal law provisions and inspection authorities', 2015, 11; Romania, Criminal Code (Nou Cod Penal), 24 July 2009; Romania, Labour Code (Codul Muncii), 24 January 2003, Romania, Government Ordinance no. 25/2014 concerning the employment and transfer of foreign workers on Romanian territory and amending several legal acts concerning the regime of aliens in Romania, 26 August 2014.

[135] H. G. van der Wilt, 316

[136] H. G. van der Wilt, 317; G. Conway, 'Ne Bis in Idem in International Law', International Criminal Law Review 3, 2003, 217–244, 217

[137] Oxford Public International Law, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e66#:~:text=Literally%20translated%20ne%20bis%20in,eadem%20re%20ne%20sit%20actio. (accessed on 7 May 2021).

In practice, this means that if a suspect of human trafficking is acquitted as a result of insufficient evidence, deficient provisions of domestic criminal law or other reasons, the *non bis in idem principle* will most likely prevent the prosecution of the individual in another state.[138]

d. Failure to identify victims

One of the major obstacles in prosecuting human trafficking cases arguably results from a lack of substantial knowledge of frontline law enforcement personnel. In numerous countries, victims are oftentimes not identified or are misjudged as illegal migrants or smuggled persons, as these classifications are the easiest for authorities to make. This may be one of the root causes for the fact that, until this day, so many human trafficking cases go undetected, and, as a result, unpunished. Without the participation of victims, criminal proceedings against traffickers are extremely difficult or even impossible, as their testimonies are the key, or even the only, piece of evidence.[139]

Studies have shown that oftentimes, law enforcement personnel lack critical knowledge on the differences between illegal migration and human trafficking and the indicators of the crime of trafficking in persons itself.[140] It has also been observed that officers tend to focus only on specific kinds of human trafficking, not being able to detect more rare forms.[141] UNODC found, for example, that officers working in the field of anti-trafficking in 14 different countries were not able to adequately distinguish between some of the most relevant notions, such as slavery, practices similar to slavery and forced labor. States often fail to make available the means and resources that are necessary to identify victims of trafficking and thoroughly investigate suspected cases. This creates major problems when it comes to the identification of victims, which is not only the basis for the prosecution of traffickers, but also necessary in order to grant

[138] H. G. van der Wilt, 317
[139] A. T. Gallagher, 317; 385; 278
[140] See for example A. Farrell, C. Owens and J. McDevitt, 'New Laws but Few Cases: Understanding the Challenges to the Investigation and Prosecution of Human Trafficking Cases', Crime, Law and Social Change 61, No.2 (2013), 139–168, 139; 141; 157; 162; A. Farrell, J. McDevitt, and S. Fahy, 'Understanding and Improving Law Enforcement Responses to Human Trafficking: Final Report', Boston: Northeastern University Institute on Race and Justice, 2008, 12
[141] See for example A. Farrell, J. McDevitt, and S. Fahy, 'Understanding and Improving Law Enforcement Responses to Human Trafficking: Final Report', Boston: Northeastern University Institute on Race and Justice, 2008, 23; A. Farrell, C. Owens and J. McDevitt, 'New Laws but Few Cases: Understanding the Challenges to the Investigation and Prosecution of Human Trafficking Cases', Crime, Law and Social Change 61, No.2 (2013), 139–168, 154

the victims assistance and protect their rights instead of wrongfully criminalizing them. We will therefore return to this issue when dealing with challenges from a victim-centered approach. The criminalization of trafficked persons unavoidably severely hampers investigations and prosecution of traffickers as the arrest of and investigations against victims contributes to the lack of trust in state authorities and the unwillingness to cooperate in criminal proceedings of any kind.[142]

The Program on Human Rights of the *Center on Democracy, Development, and the Rule of Law* (hereinafter 'CDDRL') finds that there is a strong need for further training of law enforcement personnel as well as other actors involved on the identification of and general interaction with victims of human trafficking across European countries. According to CDDRL, training often focuses on the identification of trafficked persons for the purpose of sexual exploitation, without addressing human trafficking for the purpose of labor exploitation or other forms of exploitation.[143]

e. Lack of victims' participation in criminal proceedings

In this thesis, it is argued that the issues of effective criminal justice responses to trafficking and the safeguarding of victims' rights are closely intertwined.

Trauma, fear, suspicion and (oftentimes justified) mistrust of authorities lead to difficulties with regard to authorities' persuasion of victims to contribute to criminal proceedings against their perpetrators. The willingness of victims of human trafficking to cooperate strongly depends on the extent to which their rights are protected and whether they receive the necessary information. Factors like the level of difficulty to file a complaint, the awareness on and existence of a system protecting their rights, the possibility of residence permits, the assurance that they will not be criminalized and/or prosecuted themselves and, arguably most importantly, the level of awareness they possess with regard to the crime of human trafficking as well as the

[142] F. Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, no. IN18-06, 2018; A. T. Gallagher, 278; 370; A. Gallagher and P. Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking - Lessons From the Front Line', International Criminal Justice Review, Volume 18 Number 3, 2008, 318-343, 331
[143] H. Konrad and N. Marques, 'International Cooperation and Coordination: The European Challenge to Combating and Preventing Human Trafficking', Program on Human Rights, Center on Democracy, Development, and the Rule of Law, Freeman Spogli Institute for International Studies, 6

understanding that they are victims and not perpetrators, all contribute to victims' willingness to cooperate.[144]

As mentioned, the success of the prosecution of trafficking cases strongly depends on the participation of victims as the main, or sometimes only, piece of evidence. If states do not provide assistance to victims by encouraging and facilitating complaints against perpetrators, it is considerably more difficult to identify, investigate, prosecute and convict traffickers.

f. Resources and capacity

Successful national prosecution of trafficking cases often is a matter of financial resources and capacity. It can be very problematic if states do not have systems in place that provide law enforcement authorities with the necessary powers, knowledge or technical equipment required to lead thorough investigations.[145] Lack of resources for the purpose of effective cooperation between prosecution and law enforcement further hampers criminal proceedings.[146]A UNODC regional advisor has remarked in the past that in countries across Southeast Asia, intelligence-led policing is either weak or not existing at all. As a result, if perpetrators are arrested, they are most likely not those in charge of organizing the crime on a larger scale.[147]

These issues can oftentimes be attributed to the level of willingness of states to fulfil their obligations to prevent and effectively address the crime of human trafficking.[148]

This is also reflected in data collections on human trafficking in many states. Most commonly, there is either no or insufficient criminal justice data on human trafficking or it is not accessible or not reliable, contributing to the 'hidden' nature of the crime. A reliable and comprehensive data collection that shows the number of prosecutions, investigations and convictions is essential in order to be able to assess the quality of a state's efforts.[149]

---

[144] A. T. Gallagher, 383-384; A. Gallagher and P. Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking - Lessons From the Front Line', International Criminal Justice Review, Volume 18 Number 3, 2008, 318-343, 331

[145] A. T. Gallagher, 383-384

[146] M. Cohen, 233

[147] The New Humanitarian, IRIN, 'Southeast Asia's human trafficking conundrum', https://www.thenewhumanitarian.org/analysis/2013/05/06/southeast-asia-s-human-trafficking-conundrum (accessed on 3 July 2021).

[148] A. T. Gallagher, 383-384

[149] A. T. Gallagher, 385; F. Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, no. IN18-06, 2018; A.T. Gallagher, 283

g. Corruption and complicity

In many countries, corruption of law enforcement personnel as well as complicity of public officials further sincerely deteriorate the situation by rendering prosecutions impossible.[150] Victims are often in poor physical or psychological condition and traumatized. This particularly vulnerable situation is often taken advantage of by authorities or government officials. There are states in which corruption and complicity of authorities lead to a continuous situation of exploitation or even the creation of a new one.[151] *Cohen* concludes that especially the involvement of law enforcement agents in human trafficking has an enormous impact on the impunity of traffickers and the continuing global growth of the 'industry' of trafficking. Oftentimes, corrupt public officials are willing to impede investigations or criminal proceedings in order to derive their own benefits.[152]

Human Rights Watch found that police complicity and corruption is a widespread problem in many countries. A report on Bosnia and Herzegovina describes how local police officers hold the passports of trafficked women in order to prevent them from escaping and officers visiting local brothels openly demonstrate their friendships with the perpetrators to female victims working there. In one particular town, the police even partly owned a nightclub where women where trafficked for the purpose of prostitution. Another report reveals that trafficked persons in Prijedor, Republika Srpska, were forced to perform free sexual services to police in exchange for illegal visas or work documents. *Human Rights Watch* also found that a number of Greek police officers were convicted for corruption offences related to human trafficking.[153]

This shows very clearly that corruption and complicity are serious issues when it comes to combating human trafficking. Unfortunately, the cooperation of frontline workers often is an indispensable requirement for any kind of criminal justice response. It appears highly unlikely that cases of trafficking ever come to light where the police are not willing to offer support. This leads to trafficked individuals remaining unidentified and perpetrators going unpunished. Whether there are ways of overcoming this very serious obstacle will be discussed further below.

[150] H. G. van der Wilt, 315; M. Cohen, 232
[151] A.T. Gallagher, 297-298
[152] M. Cohen, 232-233
[153] M. Vandenberg, 326; 330; Human Rights Watch, 'Hopes betrayed: Trafficking of women and girls to post-conflict Bosnia and Herzegovina for forced prostitution, Volume 14 No. 9 (D), 2002

2. Challenges from a victim-centered approach

Many states have been hesitant when it comes to granting victims of trafficking certain rights and taking on corresponding responsibilities for a long period of time. However, as international awareness of the issue of trafficking in persons is growing, so is the willingness of states to take on obligations relating to the protection of victims' rights and to present themselves as progressive in this regard. Moreover, it is a well-known fact among criminal justice experts that the protection as well as the support of trafficked persons is vital in order to ensure their effective participation in criminal proceedings.[154]

As a result, it can be argued that the protection and support of victims is key in the combat of the crime of human trafficking. Unfortunately, states still face numerous challenges with regard to the protection of victims in the course of their efforts to address human trafficking on a domestic level. This chapter will provide an overview of some of the most striking issues.

2.1. Misidentification from a victims' rights-based approach

This issue already illustrated in the previous chapter as a procedural obstacle also presents a challenge regarding the protection of victims' rights: The identification of an individual as a trafficking victim often is the prerequisite for the granting of certain rights under national law. Misidentification of victims as illegal migrants regularly leads to criminal charges, arrest, prosecution and deportation of victims without granting them any assistance.[155]

The European Court of Human Rights (hereinafter 'ECtHR') has emphasized the importance of the identification of trafficked persons by state authorities in its judgement *Rantsev v. Cyprus and Russia*[156]. By concluding that state authorities have to ensure to be informed on indicators of trafficking situations, the ECtHR clarified that states have a responsibility to suspect and identify trafficking victims based on the general information on human trafficking. In this particular case, the ECtHR concluded that police officers violated this obligation by not

---

[154] A. T. Gallagher, 276

[155] F. Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, no. IN18-06, 2018; A.T. Gallagher, 283; J. Planitzer, 'The Council of Europe Convention on Action against Trafficking in Human Beings and the Human Rights-Based Approach to Trafficking in Human Beings', 2013, 89-90

[156] Rantsev v. Cyprus and Russia (European Court of Human Rights, 7 January 2010) 25965/04

recognizing a female victim in spite of public reports on the situation of trafficking in women in Cyprus.[157]

This judgement is a good example for the importance of dealing with the issue of human trafficking on an international level. Even though the topic of identifying victims concerns, first and foremost, states themselves, the ECtHR as an international court contributes to the raising of awareness on the importance of identification by highlighting it in its decisions. By concluding that states have a responsibility to suspect and identify victims, it pushes and obliges them to adopt measures ensuring and improving the practice of victim identification by state authorities. As already mentioned above, if victims of trafficking are being misidentified, it means that they are not only unable to contribute to criminal proceedings, but they are also denied some of their basic rights as victims. Both of these consequences constitute major obstacles in the combat of human trafficking. By addressing this domestic issue on an international level, like the ECtHR has done in the past, states are being encouraged to adapt their policies accordingly.

The following subchapters will show problems which arise from the misidentification of trafficked individuals from a victim-centered approach.

a. Criminalization of victims

Article 26 of the CoE Convention contains the requirement of non-punishment, which shall ensure that victims are not penalized for offences they might have committed as part of the trafficking process, such as immigration-related or criminal offences.[158] However, the already discussed failure to identify victims of trafficking inevitably leads to the criminalization of victims regularly.

A trafficked individual who is not identified as such by a host state runs the risk of being charged with a number of delinquencies such as illegal border crossing, illegal work, possession of forged documents or illegal prostitution.[159] By criminally charging victims, states gravely violate their duties under international law to protect victims of crimes and grant them the

[157] J. Planitzer, 'The Council of Europe Convention on Action against Trafficking in Human Beings and the Human Rights-Based Approach to Trafficking in Human Beings', 2013, 89
[158] R. Piotrowicz in J. Planitzer and H. Sax, 'A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings', Elgar Commentaries series, 2020, 310-322, 310
[159] A.T. Gallagher, 283

protection they need and are entitled to. Accordingly, *Gallagher* refers to criminalization of trafficked individuals as *'the antithesis of a victim-centered approach.'* Similarly, the UN Special Rapporteur on Trafficking *Joy Ezeilo* deems the criminalization of victims incompatible with a rights-based approach to human trafficking. What is more, misidentified victims who are deported might even be charged with criminal offences by their state of origin upon their return, criminalizing them for illegal departure.[160]

Unfortunately, there is reason to believe that criminalization of victims constitutes the rule rather than the exception. *Gallagher and Holmes* report that criminalization takes place even in situations where cases of human trafficking seem to be obvious.[161]

b. Right to residency

Taking a closer comparative look at the Trafficking Protocol and the Migrant Smuggling Protocol, another crucial issue resulting from the misidentification of victims of human trafficking emerges.

Different from to the Trafficking Protocol, the Migrant Smuggling Protocol does not include an obligation for States Parties to consider granting smuggled migrants the right to remain on their territory. Additionally, states of origin are required to cooperate when it comes to repatriation processes and accept returns of smuggled migrants without delay. Neither the host state nor the state of origin are required to carry responsibility for the safety in the course of returns of smuggled migrants or for granting them certain protections under the Migrant Smuggling Protocol. The Trafficking Protocol, on the other hand, promotes the granting of specific protections to victims regarding their safety and well-being by States Parties.[162] In other words, smuggled or illegal migrants in general do not enjoy the same rights regarding the possibility to remain in the state of their destination as victims of human trafficking.

As a result of misidentification as illegal migrants, trafficked persons are often detained and deported. It may even occur that once identified, victims do not receive a permit of residency

[160] A.T. Gallagher, 283; UN - General Assembly, Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ezeilo. A/HRC/20/18 (2012) para. 25; J. Planitzer, 'The Council of Europe Convention on Action against Trafficking in Human Beings and the Human Rights-Based Approach to Trafficking in Human Beings', 2013, 113
[161] A. Gallagher and P. Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking - Lessons From the Front Line', International Criminal Justice Review, Volume 18 Number 3, 2008, 318-343, 331
[162] A.T. Gallagher, 279

in the host country as a result of later mischaracterization of the situation. This could mean, for example, that a state denies a victim of human trafficking international protection as a consequence of improper legal evaluation.[163]

Another highly criticized issue with regard to granting trafficked persons the right to remain arises if a residence permit is only reserved for those victims who are willing to collaborate with state authorities, which is the case in most countries. The CoE Convention foresees that the right to remain can be granted for reasons of facilitation of criminal proceedings through the presence of victims in the country or on personal grounds regarding the personal situation of victims. It is within the competence of States Parties to decide whether they want to enable the granting of permits of residence solely on one or on both grounds.

There are strong proponents of unconditional residence for trafficked persons, which has also been echoed by UN human rights mechanisms. However, critics argue that such an instrument would encourage traffickers and illegal migrants to abuse the system.[164] In the opinion of the author, granting trafficked individuals the right to remain is crucial in the context of a victims'-based approach. Not only is it the prerequisite for victims to be able to cooperate in criminal proceedings, but, more importantly, it ensures that they are not forced to return to their countries of origin where they run the risk of being in great danger after escaping from a trafficking situation. Due to this high need of protection which states seem to agree upon in several international agreements, the author therefore argues that tying the right of victims to remain to conditions is the wrong approach. It should not be the value victims could add to criminal proceedings, but their characteristic as a victim which entitles them to protection from their perpetrators. Oftentimes, this protection might only be guaranteed if the trafficked individual in question is not forced to return to their country of origin. Against the background of the basic human rights resulting from Articles 2 and 3 ECHR which are also reflected in all other major human rights instrument, this important need of protection cannot outweigh the general interest of states to protect their asylum and immigration system from abuse.

c. Arbitrary detention and the right to free movement

[163] A.T. Gallagher, 279-280

[164] J. Planitzer, 'The Council of Europe Convention on Action against Trafficking in Human Beings and the Human Rights-Based Approach to Trafficking in Human Beings', 2013, 118; 120

Victims of human trafficking often end up in detention centers, whether it may be for criminal reasons or reasons relating to migration laws. In some countries, victims are also detained in special facilities that serve as shelters which they are not allowed to leave with the objectives to protect victims from future harm on the one hand, and to ensure their cooperation in the criminal proceedings on the other hand. Such 'shelter based victim detention' is a well-established practice in a number of countries, for example in Central and Eastern Europe and Nigeria.[165]

Even though these practices might be lawful under national and international law, it can be reasoned that they are harmful to individuals who have been trafficked and run counter to the already mentioned victim-centered approach. Detention of victims of crimes, irrespective of the reasons, infringes some of their inherent rights, such as the right to freedom of movement and potentially the prohibition of arbitrary detention. Moreover, it should be noted that detention has different impacts on men, women and children and that it can become extremely difficult to take into account the different needs of detainees.[166]

2.2. Dangers for victims when participating in criminal proceedings

The participation of victims of human trafficking in criminal proceedings against their exploiters comes with a number of risks, dangers and challenges. Some even deem criminal prosecution an inappropriate response to the issue of human trafficking due to the harm it can cause to victims involved. Others, however, argue that criminal justice responses are key to the successful combat of the crime of human trafficking, provided that the protection of victims' rights is secured.[167] Either way, it cannot be denied that victims participating in criminal proceedings against traffickers run a number of high risks, especially in states where the national law does not provide sufficient protection or rights for them. As a result, victims often refuse to participate in criminal prosecutions due to fear of dangerous consequences for themselves and their families.[168]

a. The right to privacy

[165] A.T. Gallagher, 288; J. Planitzer, 'The Council of Europe Convention on Action against Trafficking in Human Beings and the Human Rights-Based Approach to Trafficking in Human Beings', 2013, 113
[166] A.T. Gallagher, 288
[167] A.T. Gallagher, 370
[168] A.T. Gallagher, 317-318

Failure to protect the right to privacy of victims can expose them to sincere harm. If a victim's privacy is not sufficiently protected in the course of a criminal proceeding, the individual will inevitably run the risk of being further threatened, humiliated or retaliated. Due to the stigma that is attached to trafficked persons, protection of privacy is also crucial when it comes to the recovery and social reintegration of victims and their families. Naturally, victims will be hesitant to testify and engage in any criminal proceeding if this means that their identity will be publicly displayed and their personal stories of trauma and abuse might even end up in the media. Another reason for a victim's unwillingness can be the need for them to face their perpetrator in order to testify.[169]

The need for victims' privacy to be protected is also recognized by the UN Trafficking Principles and Guidelines, which acknowledge that, in order to protect trafficked individuals from their perpetrators, public disclosure with regard to victims' identities must be prevented. Similarly, the UN human rights treaty bodies have emphasized the need to protect the right to privacy of victims.[170] All in all, it can be reasoned that the protection of the right to privacy of victims and the prevention of intimidation is not only critical in relation to their safety and personal well-being, but also to the credibility of criminal justice proceedings against traffickers. This is also reflected in the UNTOC, which provides that States Parties shall ensure that witnesses are protected from any form of damage and intimidation in criminal proceedings.[171]

Therefore, in states where there are no special measures in place aimed at protecting victims' right to privacy in criminal proceedings, such as video or closed hearings[172], the victims' understandable unwillingness to testify can significantly hamper prosecutions of traffickers. Moreover, the intimidation and fear of retaliation also lead to victims being reluctant to report to state authorities in the first place. This is one of the reasons why statistics on trafficking in persons do not reflect the reality of the magnitude of the crime. It is not least because of this underreporting that human trafficking is often referred to as a 'hidden crime'.[173]

---

[169] A.T. Gallagher, 297-298
[170] A.T. Gallagher, 303-305
[171] A.T. Gallagher, 318-319
[172] A.T. Gallagher, 319-320
[173] F. Yen Ne, 'Human Trafficking: In the Shadows of the Law', NTS Insight, no. IN18-06, 2018; A.T. Gallagher, 283

b. Conditional assistance

As victims of crime and human rights violations, trafficked individuals are entitled to certain types of assistance, such as medical support and psychological care, by states. The *United Nations Declaration of Basic Principles for Victims of Crime and Abuse of Power* provides that victims ought to receive the '*necessary material, medical, psychological and social assistance through governmental, voluntary, community- based and indigenous means'* and UN human rights treaty bodies demand that states provide victims with medical care.

However, under some domestic laws, the support of victims and the granting of protection from further harm is tied to the condition that they cooperate and participate in criminal prosecutions. In many countries, medical and other kinds of support for victims are only granted to those who are willing to participate in criminal investigations or fulfill certain obligations with respect to proceedings. Even though there are a few states where assistance to victims of human trafficking is unconditional under domestic laws, victims are likely to feel under pressure to assist the authorities, for example by providing information or testifying, against their will.

The problems arising from the practice of attaching conditions to victim protection and support are manifold. On the one hand, it potentially further infringes trafficked individuals' basic human rights. On the other hand, victims who feel obligated to cooperate with authorities against their will in order to receive support are likely not a reliable source of evidence in a criminal proceeding, especially if they are still suffering the physical and emotional consequences of trauma and abuse they experienced. Conditional assistance can therefore be more harmful than useful for the credibility and effectiveness of investigations.[174]

c. Right to legal remedy

Article 2 of the *International Covenant on Civil and Political Rights* and Article 13 of the *European Convention on Human Rights* both reflect the general responsibility of states to make available effective remedies to persons who have been violated in their rights. Accordingly, states are obliged to provide legal counselling and legal support as a necessary condition for

[174] A.T. Gallagher, 297-299; J. Planitzer, 86-87

victims to claim their rights. This is, for example, stipulated in the *UN Declaration of Basic Principles for Victims of Crime and Abuse of Power.*

However, trafficked persons often lack critical information with regard to their status as a victim and the legal rights which derive from it, such as the right to protection or the right not to be prosecuted for crimes which are status-related. As a result, if victims are not provided with legal assistance by the domestic law of a state, there is a high possibility for them to not be able to claim their rights. The granting of legal assistance can therefore be seen as the basis for the realization of other crucial victims' rights.[175]

The failure of states to provide effective remedy has, for example, been found in the ECtHR judgement *L.E. v. Greece.*[176] The case concerned a Nigerian victim of human trafficking who was forced to wait more than nine months for the authorities to grant her victim status after having already been identified as a victim. Aside from violations of Greece to prohibit slavery and forced labor and the right to a fair trial within a reasonable time, the Court found that the State Party had violated the victim's right to an effective remedy by failing to make available legal instruments to enforce the victim's right to a hearing within a reasonable time.[177] This case constitutes yet another example of an international institution pointing out the shortcomings of a state's approach to tackle human trafficking. It once again demonstrates the importance of addressing domestic issues on an international level.

2.3.Concluding evaluation

This overview of issues from a victim-centered perspective shows that the shortcomings of states' efforts to protect victims of human trafficking are manifold. It can be concluded that a large proportion of problems result from the failure of states to identify trafficked individuals as victims. As we have seen, this often leads to criminalization, detention and deportation of victims. Another way of victims being at risk of having their rights violated is their participation in criminal proceedings, especially if a state does not guarantee sufficient protection for them during ongoing investigations and prosecutions.

[175] A.T. Gallagher, 315; J. Planitzer, 87
[176] L.E. v. Greece (European Court of Human Rights, 21 January 2016) 71545/12
[177] European Court of Human Rights, Press Unit, 'Trafficking in human beings' – Factsheet, February 2021

It appears obvious that no measures of international law can fully tackle the issues of non-identification or misidentification of victims and the dangers victims face when participating in criminal proceedings against their perpetrators. However, we have seen that international or regional agreements, such as the ECHR and the jurisprudence of international or regional tribunals have an indirect effect on the way states address victim protection on the domestic level. However, in order to effectively address the issues illustrated in the above chapters, stronger national measures are needed with a clear focus on trainings of frontline workers as well as justice and law enforcement personnel.

IV. Example: The situation in Austria after the implementation of the CoE Convention

The most common forms of human trafficking in Austria are trafficking in children and trafficking for the purpose of slavery-like domestic work or for the purpose of sexual exploitation. Austria is considered both a country of transit and destination for trafficking in persons with victims often being of Bulgarian, Romanian, Nigerian or Philippine nationality.[178]

Even though little official data on the human trafficking situation in Austria is available, the numbers accessible and the dark figures that are estimated to be exceedingly high reflect the 'general culture of impunity' of human trafficking that is being observed in states all across the globe. According to the Austrian Ministry of the Interior/Criminal Intelligence Service, hardly any charges in relation to human trafficking are filed. One of the reasons for this is the fact that human trafficking cases in Austria are regularly linked to illegal prostitution, illegal employment or illegal residence of victims. Furthermore, the willingness to cooperate with the police, even on the part of witnesses or third parties, is reportedly very low.[179] In 2020, 41 preliminary proceedings were conducted on suspicion of trafficking in human beings and 14 investigations on suspicion of cross-border prostitution trafficking were concluded in Austria. In these completed proceedings, 61 suspects were brought to justice.[180] Accordingly, the *Group of Experts on Action against Trafficking in Human Beings* ('GRETA'), which was established pursuant to the CoE Convention Council of Europe Convention and is tasked with the

[178] Austrian Ministry of the Interior/Criminal Intelligence Service, 'Delikte & Ermittlungen – Menschenhandel', https://bundeskriminalamt.at/303/start.aspx (accessed on 23 May 2021); J. Planitzer, 159-160
[179] Austrian Ministry of the Interior/Criminal Intelligence Service, 'Delikte & Ermittlungen – Menschenhandel', https://bundeskriminalamt.at/303/start.aspx (accessed on 23 May 2021); J. Planitzer, 159-160
[180] Austrian Ministry of the Interior/Criminal Intelligence Service, 'Lagebericht Schlepperei und Menschenhandel 2020', Wien 2021, 25

monitoring of the implementation of the Convention, concludes that the number of convictions in Austria remains low. The same observation was made by the European Commission.[181]

Austria claims to be committed to the fight against trafficking in persons[182] and it did ratify relevant international legal instruments aimed at combating the crime. Especially the CoE Convention arguably brought about significant improvement in this regard. Austria signed the Convention on 16 May 2005, ratified it on 12 October 2006 and it entered into force on 1 February 2008.[183] Against the background of the lack of a distinct Act against human trafficking in Austria, the CoE Convention is mainly implemented by amendments to several legal codes as well as by the work of the members of the Austrian Task Force on Combating Human Trafficking.

However, NGOs, monitoring bodies and other critics voice concerns, arguing that despite Austria being a signatory of several relevant European and International documents, their implementation is still missing in a number of areas. It is indicated that there is a lack of state funding which is necessary in order to effectively combat human trafficking. For example, the department of the Criminal Intelligence Service that is responsible for this area is comparatively small and simply lacks the necessary resources to carry out bigger operations that would be essential for the prosecution of many cases of human trafficking.[184]

In the following chapter, common barriers to both domestic prosecution of human trafficking cases as well as to the protection of victims' rights illustrated in the previous chapters will be exemplarily analyzed based on the situation in Austria. Special focus will be placed on the value added through the implementation of the Council of Europe Convention.

1. Criminal proceedings

[181] GRETA, 'Evaluation Report Austria, Third evaluation round, Access to justice and effective remedies for victims of trafficking in human beings', 2020, 6; European Commission, 'Together Against Trafficking in Human Beings – Austria', https://ec.europa.eu/anti-trafficking/member-states/austria_en (accessed on 15 June 2021).
[182] See for example: Task Force gegen Menschenhandel, 'Was unternimmt Österreich gegen Menschenhandel?', https://www.gegen-menschenhandel.at/08-index.php (accessed on 23 May 2021) or Austrian Ministry of the Interior/Criminal Intelligence Service, 'Lagebericht Schlepperei und Menschenhandel 2020', Wien 2021
[183] J. Planitzer, 15; 161
[184] See for example: Lightup, 'Menschenhandel in Österreich', https://lightup-movement.at/blog/menschenhandel-in-oesterreich#:~:text=Wir%20sind%20Transit%2D%20und%20Zielland,Zwangsarbeit (accessed on 23 May 2021); J. Planitzer, 162

In Austria, human trafficking is criminalized by a number of provisions. Although the main regulation which also reflects the definition established by the CoE Convention is section 104a of the Austrian Criminal Code, section 217 of the Criminal Code, which regulates the criminalization of 'transnational prostitution trade', is applied far more often in practice. Other related provisions that are applied less often can be found in section 116 of the Austrian Aliens' Police Act ('exploitation of a foreign person') as well as in the Austrian Corporate Criminal Liability Act which creates criminal accountability of legal persons in relation to human trafficking.[185] Despite the criminalization of human trafficking, the prosecution of traffickers is hampered in Austria for a number of reasons, some of which will be discussed below.

a. Failure to identify victims

The identification procedure is regulated by Article 10 of the CoE Convention and its failure has been described above as one of the root causes for impunity. In Austria, a number of actors play an important role in the context of the identification of victims of trafficking, such as police, social workers and NGOs. When police officers identify a victim of human trafficking in Austria, they ideally provide information about their rights and then refer female victims to the NGO LEFÖ-IBF and male victims to the NGO MEN VIA. Training is conducted by different ministries and NGOs and a hotline that can be contacted anonymously was set up by the specialized unit of the Federal Criminal Intelligence Service of the Ministry of Interior investigating trafficking in human beings and migrant smuggling. However, the identification of trafficked persons in Austria continues to be an obstacle and the European Commission considers it one of the most important challenges Austria is struggling with in relation to human trafficking, together with the improvement of data collection.[186]

The reasons for misidentification are manifold. Particularly, the majority of victims of labor exploitation in Austria remain unidentified due to a lack of involvement of actors with the ability to detect them, such as labor inspectorates, or as a result of the fact that a closer look might be necessary in order to conclude that male victims fulfill the criteria of the definition of human trafficking.[187] Even though the Federal Ministry of Labor, Social Affairs, Health and Consumer Protection has published an updated version of the internal decree for labor

[185] J. Planitzer, 161-162
[186] J. Planitzer, 162; GRETA, 14; European Commission, 'Together Against Trafficking in Human Beings – Austria', https://ec.europa.eu/anti-trafficking/member-states/austria_en (accessed on 15 June 2021).
[187] J. Planitzer, 163; 179-189

inspectors on human trafficking in 2017, GRETA remarks in its recent report that labor inspectors should be given an expanded mandate and should be enabled to serve as a key actor when it comes to the identification of victims of human trafficking, including in private households. Furthermore, GRETA calls upon the Austrian authorities to establish a National Referral Mechanism based on a multi-disciplinary approach that ensures the involvement of different actors who frequently come into contact with trafficked persons, such as social workers or officials interviewing asylum seekers, and that contains specific definitions on the procedures.[188] Similarly, the European Commission identifies labor exploitation as one of the major challenges regarding human trafficking in Austria and calls for a proactive approach aiming at identifying persons trafficked for the purpose of labor exploitation.[189]

Another problematic field concerns trafficked persons detained in detention centers pending deportation. Relevant NGOs only have limited access to these facilities and the identification of victims remains extraordinarily difficult. As a result, many victims of trafficking in persons are detained in detention facilities pending deportation for offences with regard to prostitution or labor laws.[190] In this regard, GRETA recommends that Austrian authorities should give more consideration to the identification of victims of trafficking in persons in detention facilities pending deportation and among asylum seekers. Furthermore, GRETA advises Austria to guarantee independent observation of the legal support services asylum seekers receive in reception centers.[191]

b. Effective criminal proceedings

As illustrated above, the success of the prosecution of trafficking cases strongly depends upon the participation of victims and the lack thereof is one of the many challenges to national criminal proceedings.

In this regard, Article 27 (1) of the CoE Convention regulates that investigations into or prosecution of cases of trafficking in persons must not be limited to victims' complaints. The competent authorities shall prosecute such cases *ex officio*, without the need for a report filed

[188] GRETA, 6; 51
[189] European Commission, 'Together Against Trafficking in Human Beings – Austria', https://ec.europa.eu/anti-trafficking/member-states/austria_en (accessed on 15 June 2021).
[190] J. Planitzer, 163; 179-189
[191] GRETA, 51

by a victim.[192] This provision aims at preventing traffickers from subjecting their victims to any kind of pressure in order to keep them from turning to authorities.[193]

If one follows the recent GRETA report, Austria needs improvement on the prompt, proactive and effective investigation of human trafficking cases, irrespective of whether a complaint has been filed or not. In order to do so, GRETA recommends that Austria should take further measures, such as the usage of special investigation techniques that help collect evidence other than testimonies of victims or witnesses. It is also advised in the report that Austria should foster educational measures of prosecutors and judges with regard to the right approach to human trafficking cases.[194]

This shows that investigations and prosecutions with regard to human trafficking are not satisfactory in Austria and that there is a lot of improvement to be done.

c. Resources and capacity

As explained above, successful national prosecution of trafficking cases often is a matter of financial resources and capacity. In Austria, a major challenge with regard to the effective combat of trafficking in persons lies in budgetary constraints. As in other countries, human trafficking is not a priority on the political agenda. Therefore, the implementation of measures against human trafficking is hampered.[195]

2. The protection of victims' rights

a. Criminalization

As explained above, the CoE Convention contains the requirement of non-punishment, which shall ensure that victims are not penalized for crimes they might have committed as part of the trafficking process, such as immigration-related or criminal offences.[196]

---

[192] K. Simonova in J. Planitzer and H. Sax, 'A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings', Elgar Commentaries series, 2020, 323-332, 324

[193] GRETA, 25

[194] See GRETA, 33

[195] J. Planitzer, 197

[196] R. Piotrowicz in J. Planitzer and H. Sax, 'A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings', Elgar Commentaries series, 2020, 310-322, 310

Taking a closer look at the application of the non-criminalization requirement in Austria, documented cases show that the protection of victims from criminalization is flawed in practice. Despite the general consensus that trafficked persons shall not be penalized, the principle of non-criminalization is not distinctly regulated by Austrian law. This has been justified by the Austrian government with the existence of general principles of Austrian criminal law which render an explicit regulation of the non-punishment principle unnecessary. As a consequence, the fact that identified trafficking victims in Austria face sanctions of other than criminal nature on a regular basis is in conformity with the law. For instance, administrative sanctions are imposed on trafficked women for violating prostitution or residence laws. In other words, a general principle of Austrian criminal law cannot prevent victims from receiving administrative sanctions or from facing detention pending deportation.[197] It can also be assumed that this general principle of criminal law is not suitable to prevent victims from being criminalized in practice.

Despite the internal decree by the Federal Ministry of Justice of 2017 raising awareness of the non-punishment principle and the circular issued by the Federal Chancellery on the application of non-punishment in the field of administrative law, GRETA finds that Austria should implement an explicit legal provision on the non-punishment of trafficked persons for offences committed under duress. Additionally, it should ensure that the decree mentioned above is being observed in the course of training of judges and prosecutors.[198]

b. Right to residency

Article 13 of the CoE Convention regulates a recovery and reflection period, aiming at providing victims of trafficking with a safe space and enough time to reflect before taking action. In this period of at least 30 days *'it shall not be possible to enforce any expulsion order'*[199] against the victim in order to ensure recovery and well-informed decision making, free from the influence of traffickers.[200]

[197] J. Planitzer, 182-184
[198] GRETA, 6; 34
[199] Art. 13, Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197
[200] H. Sax in J. Planitzer and H. Sax, 'A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings', Elgar Commentaries series, 2020, 183-200, 184

Even though States Parties are obliged to implement the recovery and reflection period as a crucial prerequisite of an effective combat of human trafficking, Austria has failed to do so.[201] Firstly, as the recovery and reflection period is to be found in an internal decree of a ministry, it cannot be the legal basis for a right victims are entitled to.[202] What is more, it is not used at all in practice. GRETA criticizes that the recovery and reflection period is not enshrined in law and that according to civil society representatives, victims are not systematically informed about the recovery and reflection period. It therefore calls upon Austrian authorities in its recent report to improve the information of victims with regard to their right to a recovery and reflection period and keeps urging Austria to implement a specific provision in Austrian law containing the recovery and reflection period and to guarantee that it is being offered to presumed trafficked persons. It finds that officers carrying out identifications of victims need to be educated on the importance of informing presumed victims about the recovery and reflection period, regardless of whether they cooperate with the authorities or not.[203]

In addition to the recovery and reflection period regulated by the mentioned decree, trafficking victims in Austria do have the right to the residence permit 'special protection' according to section 57 of the Austrian Asylum Act. However, this permit is not issued unless there are criminal or civil proceedings, which creates a significant obstacle. In practice, this means that victims of trafficking have to cooperate in criminal proceedings as witnesses in order to receive a residence permit. Even though such cooperation is not explicitly required by the law, in case of a closure of investigations resulting from a lack of evidence, no residence permit can be issued, which creates a *de facto* obligation to cooperate with the authorities in practice.[204]

This concept is, however, in compliance with the CoE Convention which leaves States Parties the choice whether they want to implement unconditional residence permits for trafficked persons or the 'residence for cooperation-option'. However, it can be argued that in order to fulfil the obligations contained in the CoE Convention to protect, to conduct effective investigations and prosecution as well as to provide reparation, States Parties do have an obligation to grant victims of human trafficking unconditional residence permits. Accordingly, it is reasoned by some that unconditional residence is an essential part of a human rights-based

[201] J. Planitzer, 196
[202] J. Planitzer, 163-164
[203] GRETA, 5-6; 16; 55
[204] See Austrian Asylum Act s. 57, Federal Law Gazette I No. 100/2005 as amended by Federal Law Gazette I No. 70/2015; J. Planitzer, 187-189

approach to the combat of human trafficking and Austrian NGOs call for unconditional residence permits for trafficked persons.[205] Similarly, GRETA stresses in its recent report that the conditional nature of section 57 in practice undermines the requirement of unconditional assistance to victims of human trafficking.

Moreover, even though the competent Austrian authority has to decide on the grant of a residence permit 'special protection' within six weeks according to section 57 (3), the procedure leading to a residence permit may be delayed and take a long time, leaving trafficking victims in a legal limbo.[206]

The situation of trafficked persons in Austria with regard to residence can therefore be described as unsatisfactory, despite the ratification of the CoE Convention. GRETA calls upon Austrian authorities to work towards a less bureaucratic and more prompt procedure leading to 'special protection' residence permits as well as to guarantee the unconditional grant of such residence permits to victims of human trafficking.[207]

c. Right to legal remedy

As observed by GRETA, potential victims of trafficking in persons are not being sufficiently informed about their rights in Austria. Since numerous victims are not identified by the police, they are not being referred to competent NGOs or educated on their legal options. The GRETA report illustrates exemplarily the situation of Chinese trafficked women who were not identified as victims because they had not complained as well as cases of trafficked persons among asylum seekers who are being supported by (non-profit) lawyers but do not receive sufficient information about their rights due to a lack of knowledge on the lawyers' part. Furthermore, the Austrian police seems to fail in systematically referring potential victims to the competent NGOs. Consequently, GRETA suggests that further training should be established for law enforcement personnel as well as for personnel working at asylum reception centers and detention centers on how to effectively explain to presumed victims and individuals at risk of being trafficked their rights and refer them to NGOs. In this context, the sensitization of interpreters must not be forgotten.[208]

---

[205] J. Planitzer, 187-192; GRETA, 6
[206] J. Planitzer, 163-164; 55
[207] GRETA, 55
[208] GRETA, 15-17

Furthermore, legal aid for potential victims of trafficking needs to become more accessible in Austria. GRETA finds that it should be guaranteed that a lawyer is being appointed as soon as *'there are reasonable grounds for believing that a person is a victim of human trafficking, including in the case of asylum seekers and persons place in detention prior to deportation, before the persons concerned have to decide whether or not they want to co-operate with the authorities and/or make an official statement.'* What is more, bar associations are recommended to provide trainings of lawyer on the issue of legal support of trafficked persons.[209]

d. The right to privacy

In Austria, cooperation between the police and NGOs specialized on victim protection is meant to ensure a comprehensive assessment of the safety and potential dangers for victims. The NGOs provide shelter, psychological assistance and legal support.

Austrian national law installs a number of regulations with regard to the protection of witnesses. For instance, there is the possibility for witnesses to testify anonymously if there is a danger to them or a third party. Another option is for witnesses to be interrogated at a different place or with the use of technical methods.

However, GRETA identifies a significant gap in the protection of victims: threats might still occur via the victims' family members or social media networks. GRETA therefore encourages Austria to guarantee effective protection measures to victims and their families and to provide relevant NGOs with sufficient financial means in this regard. As for MEN VIA in general, GRETA urges Austria to grant it an official intervention status as well as to guarantee long-term funding.[210]

This country example illustrates how some of the most typical obstacles to tackling human trafficking on a national level can stand in the way of effective criminal justice responses and the protection of victims. We have seen that, like many other countries, Austria struggles to implement a comprehensive and successful framework to combat the crime of trafficking as

[209] GRETA, 19
[210] GRETA, 36; 6

foreseen by the international legal framework. This often results in the wrongful criminalization of victims and the failure to conduct successful criminal proceedings against perpetrators.

In the following part, we will turn to possible ways of overcoming some of the domestic issues that have been examined and portrayed exemplarily based on the example of the situation in Austria.

V. Possible ways of addressing human trafficking at an international level

Against the background of the obstacles illustrated exemplarily above, the question arises what alternative ways of addressing human trafficking exist on an international level and whether they are suitable to encounter human trafficking more effectively.

The following chapter will provide an overview of possible ways to address trafficking in persons on an international level, focusing on inter-state cooperation on the one hand and possibilities of international prosecution on the other hand.

1. Inter-state cooperation

1.1. Different forms of inter-state cooperation with regard to anti-trafficking

International cooperation in the context of anti-trafficking can be roughly divided into two categories: informal and formal ways of cooperation. Formal cooperation include, for example, mutual legal assistance (hereinafter 'MLA') and extradition. Through MLA states can formally demand information and evidence from other states in the course of investigations or prosecutions. As MLA aims at authorizing another state to collect evidence that must be admissible in judicial proceedings, it is based on a rather strict regime of rules. Through extradition a requesting state can ask a requested state to extradite an individual for the purpose of prosecution or imprisonment in the requesting state.

On the other hand, informal inter-state cooperation for this purpose describes ways of exchanging information and intelligence between law enforcement and other authorities of different states without the need for a formal request. They may be based on Memoranda of

Understanding and regional agreements and complement formal forms of cooperation as less complicated means.[211]

Considering the transnational characteristic of most human trafficking cases, both formal and informal cooperation tools can be significantly helpful for the purpose of investigation and prosecution. Accordingly, UNODC identifies a lack of inter-state cooperation as one of the reasons for failed prosecutions of human trafficking cases.[212]

1.2. Best practice – Examples of successful inter-state cooperation

In the field of prevention, effective inter-state cooperation can be shown by way of example of Austria. Austria cooperates with countries of origin, particularly in the region of South East Europe, through numerous informal cooperation activities in order to address the root causes of human trafficking. Through the raising of awareness, the support of the socio-economic situation among the local population as well as through assistance in the field of law enforcement trainings on identifying and protecting trafficked persons and their families, Austria contributes to the prevention of human trafficking in high-risk regions. It also cooperates with countries of origin when it comes to issuing visas to third country nationals.[213]

As for successful mutual legal assistance, 'Operation Wasp Nest' can be mentioned as an example. In the so-called 'Wasp Nest Investigation', Denmark has cooperated with Romania and a joint investigation team was established by Danish and Romanian authorities. Romania contributed by wiretapping, interviewing witnesses and conducting searches on Romanian territory. Through large-scale joint investigations, the perpetrators of the first trafficking in persons case for the purpose of forced criminality in Denmark were prosecuted and sentenced to three to eight years or were permanently expelled. The 'Wasp Nest Investigation' is a prime example of successful inter-state cooperation in the tackling of trafficking in persons and the protection of victims.[214]

---

[211] UNODC, Regional Programme Office for South Eastern Europe, 'Trafficking in Persons & Smuggling of Migrants, Guidelines of International Cooperation', 2010, 17-19; UNODC, 'Anti-human trafficking manual for criminal justice practitioners Module 6', 2009, 11-12

[212] UNODC, 'Annual Report Covering activities during 2015', 42

[213] European Commission, 'Together Against Trafficking in Human Beings – Austria', https://ec.europa.eu/anti-trafficking/member-states/austria_en (accessed on 16 June 2021).

[214] European Commission, 'Together Against Trafficking in Human Beings – Denmark', https://ec.europa.eu/anti-trafficking/member-states/Denmark (accessed on 16 June 2021); Conference Report Nordic-Baltic Conference on Human Trafficking 10 & 11 November 2016 in Tallinn, Estonia,

Another example of inter-state cooperation can be seen by means of the example of a transnational case of human trafficking in 2019: A criminal group whose members were of Bulgarian and French nationality recruited underprivileged Bulgarians through an agency and then sent them to France where they were exploited for the purpose of labor. The cross-border nature of the case led to joint investigations between France and Bulgaria. Eurojust established a joint investigation team and assisted the two countries in their cooperation. This enabled the states' authorities to exchange information swiftly and develop a joint strategy. Eventually, the joint investigation team succeeded in taking down the criminal network.[215]

In general, the number of Europol-coordinated inter-state investigations of trafficking cases between two or more states has increased in previous years, leading to the arrest of several suspects as well as to sequestrations of assets acquired through human trafficking.[216]

In the field of victim protection, Bulgaria and Switzerland have established a Cooperation Programme, with a long-term project implemented by the European Commission providing support services and enabling sharing knowledge and relevant information.[217]

1.3. Added value

In general, international cooperation is considered crucial in areas of international concern and anti-trafficking can be seen as a 'global public good' in this regard due to the effect it has on multiple states at the same time and to the common interest of all states to combat human trafficking.[218] This subchapter focuses on the importance of the role international cooperation plays in the context of tackling human trafficking and how it can help overcome shortcomings of domestic responses described above.

https://www.norden.ee/images/heaolu/inimkaubanduse_konverents/Conference_report_THB_Tallinn_10-11.11.2016.pdf (accessed on 16 June 2021).

[215] Eurojust, 'Human traffickers' ring busted in France and Bulgaria', 2019, https://www.eurojust.europa.eu/human-traffickers-ring-busted-france-and-bulgaria (accessed on 16 June 2021).

[216] H. G. van der Wilt, 327

[217] European Commission, 'Together Against Trafficking in Human Beings – Bulgaria', https://ec.europa.eu/anti-trafficking/member-states/Bulgaria (accessed on 16 June 2021).

[218] M. C. Brand, 'International cooperation and the anti-trafficking regime', Working Paper Series No. 7, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, 2010, 8-9

The need for international cooperation is reflected and highlighted repeatedly both in the UN Trafficking Protocol and in the CoE Convention. The promotion of international cooperation on action against trafficking in persons constitutes one of the core purposes of the CoE Convention. Its Article 32 establishes three purposes of inter-state cooperation, namely preventing and combating human trafficking, protecting and providing assistance to victims as well as investigations or prosecutions concerning crimes established in accordance with the Convention.[219]

As GRETA rightfully acknowledges, functioning inter-state cooperation is crucial when it comes to the tackling of the crime of human trafficking as it is often of a transnational nature.[220] Similarly, UNODC emphasizes that although the crossing of national borders does not constitute one of the mandatory characteristics of the crime of human trafficking, in practice, there are usually multiple countries involved. Victims, traffickers, witnesses and evidence may be within the territory of different states, which complicates the investigations into and prosecution of such cases. Therefore, international cooperation is crucial in order to effectively lead judicial proceedings. The importance of inter-state cooperation is also broadly acknowledged in numerous international and regional agreements.[221]

The best practice examples referred to above illustrate the key role of inter-state cooperation in the field of anti-trafficking. As for formal forms of inter-state cooperation, there are numerous obstacles that hamper the added value these ways of cooperation could have concerning investigations into and prosecutions of trafficking cases. As illustrated in Chapter III. 1. b., differing implementations of the anti-trafficking framework as foreseen by the relevant international conventions constitute one of the impediments to prosecution on the domestic level. Not only do differing legal frameworks at the national level hamper domestic prosecutions, they also complicate inter-state cooperation through extradition.

Extraditions of criminal suspects from the 'host state' to the state leading the investigations are supposed to '*reconcile jurisdictional competence and physical power*'.[222] However, due to the *double criminality rule*, according to which the offence in question needs to be punishable by

[219] Art. 32, Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197; GRETA, 13; 38; Planitzer, 43
[220] GRETA, 13; 38
[221] UNODC, Regional Programme Office for South Eastern Europe, 'Trafficking in Persons & Smuggling of Migrants, Guidelines of International Cooperation', 2010, 15
[222] H. G. van der Wilt, 317

the laws of both the requesting and the requested state in order for a state to extradite an individual, perpetrators of human trafficking might go unpunished. Even though human trafficking was included on the list of crimes for which the requirement of double criminality has been in part abolished by the Framework Decision of the European Arrest Warrant[223], this may lead to the unsatisfactory result that, even if a state is willing to prosecute a perpetrator based on the extended principle of territoriality, the requested state might not be able to extradite or cooperate with respect to a certain suspect.[224]

It can therefore be concluded that, although extradition might be an effective and helpful tool to bring traffickers to justice, the requirements for extraditions to take place are strict and can lead to unsatisfactory results in practice.

Mutual legal assistance for the purpose of investigating and prosecuting human trafficking cases, as shown in best practice examples, has the potential to help overcome obstacles of national proceedings. In Chapter III. 1. c, the issue concerning the *non bis in idem principle* has been illustrated. Lack of sufficient evidence often leads to the acquittal of traffickers, with the *non bis in idem principle* preventing another state from prosecuting them. Through MLA, evidence can be obtained on the territory outside of the requesting state's jurisdiction, which minimizes the possibility for a trafficker to be acquitted as a result of insufficient evidence. It can thereby also help overcome obstacles resulting from insufficient resources and capacity of a state to lead investigations along with prosecutions.

As far as informal inter-state cooperation is concerned, examples show that this form of inter-state cooperation proves particularly helpful in the field of prevention. Unlike formal cooperation like mutual legal assistance or extradition, through the informal exchange of knowledge and information or joint activities in countries of origin, the root causes of trafficking in persons can be addressed and crimes can be prevented from occurring in the first place. This also applies to inter-state cooperation when it comes to issuing visas to nationals of countries of origin. Joint strategies and prevention concepts undoubtedly increase the chances of protecting potential victims from being trafficked and preventing potential traffickers from operating in secret. Against the background of the transnational nature of the majority of human

[223] EU Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the Surrender procedures between Member States (2002)
[224] H. G. van der Wilt, 316-317; 324

trafficking cases, collaboration between countries of origin, transit and destination is crucial when it comes to prevention.[225]

As a result, a key issue already addressed in previous chapters can be tackled more effectively through international cooperation: the failure to identify victims. As elaborated on above, law enforcement personnel's or other actors' failure to identify trafficked persons constitutes a major obstacle in the fight against human trafficking in most countries. Chapter IV. 1. a. has illustrated that one of the reasons for the lack of victim identification in Austria is the fact that labor inspectorates are not being involved in identification processes. Statistics show that 15 % of trafficked persons in the European Union are being exploited for the purpose of labor exploitation and many countries clearly fail to detect these victims. Inter-state cooperation can be particularly helpful in this regard by raising awareness, accumulating knowledge as well as sharing best practice examples. Moreover, in order to identify victims and their exploiters on a larger scale, states have the opportunity to perform extensive inspections in high risk sectors through cooperation with Europol and with the European Labor Authority.[226]

Another area that benefits from inter-state cooperation are investigation procedures and prosecutions themselves. Due to the repeatedly mentioned nature of human trafficking as a transnational crime, with traffickers operating across national borders, states often lack the capacity needed to conduct effective investigations and, as a consequence, prosecutions. It therefore is essential for states not only to share know-how and information but also to invest in interoperable information systems and to find other ways of strengthening communication and coordination with each other. EU agencies like Europol or Eurojust support states in their efforts in joint investigations.[227]

What is more, as discussed above, states are oftentimes likely to fail at granting victims of human trafficking long-term residency permits. In such cases of domestic failure, but also in cases of voluntary returns, international cooperation can be of utmost importance when it comes to the safe repatriation of victims. Through inter-state cooperation platforms as mentioned in

[225] G. Oğuz, 'International Cooperation in Combating Human Trafficking in the EU: Evidence from Turkey', Irish Journal of Sociology, 2012; 20(1):39-64, 56-57

[226] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025', 14.4.2021 COM(2021) 171 final, 7-8

[227] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025', 14.4.2021 COM(2021) 171 final, 4

the best practice examples above, individual support and protection can be provided to victims in the course of their repatriation process.[228]

2. International prosecution

2.1. Possibilities of international prosecution of human trafficking

Van der Wilt describes human trafficking as a '*transnational crime (...) somewhere in between ordinary crimes and international crimes stricto sensu.*'[229] It is not least for this reason that some scholars argue that the crime of human trafficking should be included in the mandate of the International Criminal Court (hereinafter 'ICC') or other international tribunals. In *Cryer et al.*, for example, it is predicted that if the international community agrees on the global importance of the values at stake, transnational crimes, such as human trafficking, might eventually fall under an international jurisdiction in the future.[230]

Van der Wilt, like a number of other scholars, recognizes the danger of impunity that comes with the ineffective responses of states to the scourge of human trafficking. It is therefore suggested that international or regional tribunals shall be tasked with the prosecution of human trafficking cases, replacing or at least supplementing national proceedings.[231] Considering the shortcomings of national prosecution of human trafficking analyzed above, the question arises which options are available on an international or regional level. The following subchapters are dedicated to exploring different approaches in this regard.

a. Human trafficking in international criminal law

In this part, special attention will be placed on the possibility of tackling the issue of human trafficking under international criminal law through the ICC.

[228] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025', 14.4.2021 COM(2021) 171 final, 4-5
[229] H. G. van der Wilt, 315
[230] R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, An Introduction to International Criminal Law and Procedure (2007), 282; H. G. van der Wilt, 315
[231] H. G. van der Wilt, 315-316

Considering the danger of impunity discussed above and the fact that the fight against it is one of the declared goals of the ICC, it seems at first glance reasonable to expand the Court's jurisdiction *ratione materiae* so that it explicitly covers the crime of trafficking in persons. However, taking a closer look at the conditions under which the ICC can exercise its jurisdiction, it emerges that the issue is far more complicated. Due to the principle of complementarity, the ICC can only take on a case if national criminal justice is not available because the state concerned is unable or unwilling to prosecute the case in question. As for human trafficking, this could be difficult to argue. States usually do not commit or condone the crime of trafficking in persons 'on a massive scale'. If this is the case, however, it could fall into the category of crimes against humanity, over which the ICC has jurisdiction. This will be analyzed in more detail in the paragraph below. Neither is it common that states are challenged by a criminal network responsible for human trafficking to the extent that it becomes unable to prosecute such cases. As *Van der Wilt* concludes, '*(...)though states may have problems in prosecuting traffickers in human beings, they are not chronically "unwilling or unable" to do so.*'[232]

However, as already mentioned, under narrow circumstances, the ICC already possesses the competence to prosecute human trafficking cases provided that they fulfil the criteria of a crime against humanity: Article 7 (1) of the Rome Statute contains a list of offences that constitute crimes against humanity provided that they are '*committed (1) as part of a widespread or systematic attack (2) directed against any civilian population, (3) with knowledge of the attack*'.[233] Therefore, in order for human trafficking to qualify as a crime against humanity in accordance with the Rome Statute, it must constitute one of the offences named in the list of Article 7 (1) and it has to fulfill the three elements required by the same Article.

Human trafficking is only mentioned in the Rome Statute in the context of enslavement. In the Statute, enslavement is defined as '*the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children*'[234] in Article 2 (1) (c). As a result, if a case of human trafficking fulfills the other criteria of a crime against humanity (committed as part of a

232 H. G. van der Wilt, 331

233 A.D. Tolar, 'Human Trafficking Analyzed as a Crime Against Humanity', ICLR, Vol. 20, No. 1., 2020, 127–152, 140

234 Art. 2 (1) (c), UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6

widespread or systematic attack, directed against any civilian population, with knowledge of the attack), the ICC is able to prosecute it in the context of enslavement. This mention of trafficking in persons in the enslavement paragraph has caused confusion among scholars. While many take the view that this reference to human trafficking implies that trafficking can be seen as a *form* of enslavement under international criminal law and can therefore be prosecuted as the crime against humanity[235] of enslavement or even as a separate crime against humanity, others argue that, on the contrary, human trafficking can merely be a *means* in the process of committing the crime of enslavement. Future jurisprudence will show whether the more extensive or the more restrictive interpretation will prevail.[236] As for now, neither the ICC nor any other international criminal tribunal has prosecuted a case explicitly concerning human trafficking yet.[237]

However, attention should be drawn to the *Kunarac case*[238] in this context: In this case, the International Criminal Court for the Former Yugoslavia (hereinafter 'ICTY') followed the traditional definition of enslavement as enshrined in the Slavery Convention, implying that the requirements of '*exercise of any or all of the powers attaching to the right of ownership over a person*' must be fulfilled in order for a crime to qualify as enslavement. However, the ICTY did acknowledge at the same time that '*enslavement as a crime against humanity*' can potentially be '*broader than the traditional and sometimes apparently distinct definitions of slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law*.'[239] This judgement is of importance in the context of the potential prosecution of human trafficking cases by international criminal tribunals because it recognizes that the concept of enslavement is evolving, with human trafficking being one of the separate forms of enslavement.[240] As *Gallagher* rightfully highlights, the ICTY accepts an evolution of the crime of enslavement, '*away from highly prescribed notions of property and ownership and toward a more nuanced understanding, reflected in the definition of trafficking, of the many and varied ways in which individuals can and do exercise complete and effective control over others*.'[241]

---

235 See for example J. N. Aston and V. N. Paranjape, 'Human Trafficking and its Prosecution: Challenges of the ICC', 2012
236 A. T. Gallagher, 215-216
237 N. Alhadi, 'Increasing Case Traffic: Expanding the International Criminal Court's Focus on Human Trafficking Cases', Michigan Journal of International Law, Volume 41, Issue 3, 2020, 541-580, 542
238 Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment), IT-96-23-T & IT-96-23/1-T, 22 February 2001
239 H. G. van der Wilt, 304
240 A. T. Gallagher, 217; H. G. van der Wilt, 303-304
241 A. T. Gallagher, 217

Another significant case in this context is the ECtHR case *Rantsev v. Cyprus and Russia*[242] in which the Court dealt with the question of whether Cyprus and Russia had violated their obligations of prohibiting slavery and servitude as well as forced or compulsory labor in accordance with Article 4 of the European Convention on Human Rights (prohibition of slavery and forced labor). In its judgement, the ECtHR pointed out that human trafficking 'is described' as modern slave trade. Without explicitly stating whether human trafficking constitutes slavery or not, the Court held that human trafficking as defined in the UN Trafficking Protocol and the CoE Convention is a violation of Article 4 of the European Convention on Human Rights, regardless of its qualification as 'slavery', 'servitude' or 'forced and compulsory labour'. The Rantsev judgement has therefore clarified that human trafficking falls within the scope of Article 4 of the European Convention on Human Rights, although it does not provide any explanation as to why this is the case.[243]

However, even if the ICC were to take on human trafficking cases as crimes against humanity on a regular basis, there are numerous other limitations to the Court's prosecution of crimes under the Rome Statute. Not only is there the already mentioned principle of complementarity, but states are also often reluctant to cooperate with or support the ICC's investigations and prosecutions. Since the ICC does not have any executive powers, it relies on states to collaborate with it. In addition, due to the nature of international crimes, the ICC's technical and logistic opportunities are limited. It lacks sufficient funds to cover all costs revolving around travelling, residence and victim protection.[244] This raises the question whether the ICC taking on human trafficking cases as crimes against humanity would be an effective way to address the global phenomenon.

Nevertheless, it should be mentioned that in case the ICC would openly demonstrate its willingness to deal with human trafficking, this may cause a chain reaction among states, pushing and facilitating the extension of the concept of universal jurisdiction to such crimes as it would reflect a strong international consensus on their gravity.[245] The application of universal jurisdiction to human trafficking cases will be examined below.

[242] Rantsev v. Cyprus and Russia (European Court of Human Rights, 7 January 2010) 25965/04
[243] A. T. Gallagher, 188-189
[244] J. N. Aston and V. N. Paranjape, 'Human Trafficking and its Prosecution: Challenges of the ICC', 2012
[245] C. F. Moran, 'Human Trafficking and the Rome Statute of the International Criminal Court', The Age of Human Rights Journal, 3, 2014, 32-45, 40

All things considered, an expansion of the ICC's jurisdiction *ratione materiae* with regard to the crime of human trafficking would, as illustrated, not prove very helpful and there already exist various pathways to address human trafficking cases due to the mention in the Rome Statute in the context of enslavement. ICTY jurisprudence has shown that the definition of enslavement is not rigid and there might be room for more extensive interpretation with regard to trafficking in persons. Even though the ICC has not followed suit yet, it will be interesting to see how its case law will shape the perception of human trafficking as a form of enslavement, and therefore a crime against humanity, in the future. It should also be noted that, while the prosecution of trafficking cases by the ICC would have a strong symbolic effect, investigations and prosecutions would be subject to constraints in terms of time and resources. However, the ICC taking on human trafficking cases might, as mentioned, cause a chain reaction among states, pushing and facilitating the extension of the concept of universal jurisdiction.

b. Universal jurisdiction

A second option in the international prosecution of human trafficking could be the concept of universal jurisdiction. In this paragraph, the definition of universal jurisdiction will be analyzed, international developments in this matter will be mentioned along with discussions on the advantages and disadvantages.

As a concept aimed at fighting the impunity of perpetrators, universal jurisdiction enables states to exercise their criminal jurisdiction over certain crimes committed outside of their territory and without any link to the victim's or the perpetrator's nationality. It was originally developed to tackle the crime of piracy on the high seas and evolved to a doctrine applicable to a number of human rights offences over time. Universal jurisdiction can be based both on customary international law and international treaty law.[246]

Due to the issues resulting from the transnational character of human trafficking cases, a considerable amount of scholars plea for the application of universal jurisdiction for the prosecution of the crime of trafficking in persons.[247] It is reasoned by many that the gravity of the crime and the harm it causes to all states would legitimize the extension of universal

[246] M. Cohen, 'The Analogy between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction', Buffalo Human Rights Law Review, Volume 16, 2010, 201-235, 201; 210
[247] H. G. van der Wilt, 299

jurisdiction to human trafficking cases. This would allow the prosecution of traffickers in any state and therefore help overcome the limitations of domestic criminal justice regimes.[248]

As analyzed below, considering that the mechanism of universal jurisdiction was established as a response to crimes that have a widespread effect on all states and that are of a grave nature, it can clearly be argued that the crime of human trafficking may fall into the category of crimes universal jurisdiction can be applied on.[249]

Taking a closer look at the concept of 'gravity' in this context, it shows that there is no consensus on the precise circumstances under which a crime can be considered 'grave' and that it is, first and foremost, based on the universal condemnation of certain offences. Although there are a number of theories and explanations as to when a certain offence fulfils the criterion of 'gravity', the concept remains rather vague. However, if one follows the abstract definitions of 'grave crimes' as offences that '*shock the conscience of humanity*' or a '*of such exceptional gravity that it affects the fundamental interest of the international community as a whole*', there undeniably is room for argumentation that the crime of trafficking in persons fulfils these criteria.[250]

As for the second criterion of 'widespread effect on all states', it can undoubtedly be argued that human trafficking, often being transnational in nature, involving a series of criminal activities and causing harm to countless individuals all across the globe, constitutes a threat and a danger to the international community as a whole.[251]

Another possibility of bringing the prosecution of trafficking cases under the scope of universal jurisdiction would be, as reasoned by many scholars, to identify human trafficking as a form of another crime to which universal jurisdiction is already applied, such as slavery.[252] *Tavakoli*, for example, criticizes the UN Trafficking Protocol for not providing for universal jurisdiction of human trafficking and suggests that the crime shall be classified as slavery for this purpose.[253]

[248] M. Cohen, 201-202
[249] See M. Cohen, 216
[250] See M. Cohen, 218-219
[251] See M. Cohen, 230
[252] M. Cohen, 226-227
[253] H. G. van der Wilt, 321

Over the past few years, a trend towards ways of expanding jurisdiction can be observed. In this context, the ICJ has remarked already in 2002[254] that there is '*a gradual movement towards bases of jurisdiction other than territoriality (...) This slow but steady shifting to a more extensive application of extraterritorial jurisdiction by States reflects the emergence of values which enjoy an ever-increasing recognition in international society. One such value is the importance of the punishment of the perpetrators of international crimes.*'[255]

The advantages of the application of universal jurisdiction to human trafficking cases are obvious: any state willing to prosecute a case could use it to tackle the legal and procedural obstacles of the judicial proceedings of another state:
First and foremost, it would help in addressing the problem of lack of jurisdiction described in chapter III. 1. a. by enabling all states to prosecute traffickers regardless of their nationality, the victims' nationalities or the territory the crimes were committed on. Secondly, universal jurisdiction can potentially be used to overcome the issue analyzed in chapter III. 1. b. regarding the lack of provisions criminalizing human trafficking in some countries. What is more, other obstacles, such as a state's lack of resources necessary to effectively investigate and prosecute a human trafficking case can be corrected through the extension of universal jurisdiction in this context.[256]

On the other hand, however, the concept of universal jurisdiction has many critics and is considered controversial.[257] Furthermore, it should also be noted that even if the scope of universal jurisdiction was expanded to the crime of human trafficking, it would not automatically mean that all trafficking cases would be covered, as a certain threshold would have to be reached in order to fulfil the requirements of a grave crime affecting the international community.[258] Moreover, it should be kept in mind that universal jurisdiction is a default mechanisms meaning that it cannot be applied unless the competent state is unable or unwilling to exercise its jurisdiction.[259] As such, it should not be seen as a solution to all problems.

---

[254] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002, ICJ Rep 3, at para. 73 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal)
[255] A. T. Gallagher, 379
[256] See M. Cohen, 234
[257] See for example D. Hovell, 'The Authority of Universal Jurisdiction', The European Journal of International Law, Vol. 29 no. 2, 2018, 427–456, 443
[258] C. F. Moran, 'Human Trafficking and the Rome Statute of the International Criminal Court', The Age of Human Rights Journal, 3, 2014, 32-45, 40
[259] H. G. van der Wilt, 321

c. Establishment of specialized tribunals

Another suggestion that has been made in the context of combating trafficking in persons on an international scale is the establishment of international or regional specialized tribunals tasked with the prosecution of trafficking cases. As an enhancement of inter-state cooperation, it is proposed that regional tribunals would enable states to considerably improve the cooperation of authorities and the sharing of intelligence. In contrast to regional courts like the ECtHR, the proposed tribunals would solely focus on the crime of human trafficking.

Apart from the possibility of establishing specialized tribunals on an international or regional level, *Boister* pleas for the creation of a 'transnational criminal court' ('TCC'), provided with jurisdiction over the prosecution of transnational crimes.[260] He recommends such a tribunal to be of a horizontal nature based on the autonomy of states, leaving them the opportunity to turn to the tribunal in addition to the *aut dedere, aut iudicare* – principle, according to which a state either has to prosecute a suspect of a foreign nationality or extradite him to the competent state. This 'TCC' would then apply the law of the state which has seized it. *Boister* further explains that there would have to be a threshold of gravity, transnationality and the involvement of criminal networks in order to impede an otherwise infinite caseload.

A possible obstacle of an international or regional specialized tribunal would be its inevitably limited competence, which would prevent it from prosecuting crimes connected to human trafficking. Similarly, as for the 'TCC', the above discussed thresholds might pose a problem as they would prevent the tribunals from prosecuting numerous cases that do not fulfil the strict criteria.[261] Nevertheless, both a new specialized tribunal and a 'transnational criminal court' would result in new possible ways of prosecuting human trafficking cases, fostering inter-state cooperation and sending a strong signal.

2.2. Added value

[260] N. Boister, 'International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?', 23 Criminal Law Forum, 2012, 295

[261] H. G. van der Wilt, 332; See also J. C. Green, 'A Proposal Leading to an International Court to Combat Trafficking in Human Beings', Third Annual Interdisciplinary Conference on Human Trafficking, 2011, 34

Having examined these possible ways of prosecuting the crime of human trafficking on an international level, we now turn to the question of whether their implementation would help to effectively overcome the shortcomings of national responses discussed above. Therefore, the added value of all three concepts – addressing human trafficking cases through the ICC, applying the principle of universal jurisdiction and establishing specialized tribunals – will be examined.

When it comes to the ICC's competence, for the reasons illustrated, the prosecution of human trafficking cases as part of an extensive interpretation of the crime of enslavement, and therefore as a crime against humanity, would be the best option. As for the exercise of universal jurisdiction in relation to human trafficking, just like the ICC, this could serve as a default mechanism, complementing efforts of states to eradicate impunity for traffickers. Even though both the ICC and the application of universal jurisdiction do have their general limitations when it comes to investigations as well as prosecutions of crimes against humanity, both options would tackle some of the issues regarding national criminal proceedings. As an instance of complementarity, the ICC is meant to fill gaps in domestic criminal justice responses. Similarly, universal jurisdiction can only be claimed in cases where the competent state is unable or unwilling to conduct a judicial proceeding. As a result, whenever a state fails to prosecute a human trafficking case for the above described reasons, the ICC or the application of universal jurisdiction could compensate for the state's deficiencies. Taking into account the hesitance of some states to cooperate with the Court, ICC proceedings of human trafficking as a form of enslavement would be complicated. However, there can be no doubt that the existence of yet another instance tasked with the prosecution of trafficking in persons cases would be an additional step to combat the crime on a global level. The same applies to states extending the practice of universal jurisdiction to human trafficking. Not only could it compensate for some of the states' shortcomings of domestic prosecution, but it would also serve as an additional way to fight impunity, sending a strong signal to traffickers and victims across the globe. Thus, even though both solutions have their limitations, they could contribute to the global fight against trafficking in persons in several ways.

In the opinion of the author, the symbolic meaning of the International Criminal Court taking on cases of human trafficking cannot be overemphasized. By doing so, the ICC would present itself openly as a strong advocate for the fight against human trafficking and thereby acknowledge the gravity of the crime for mankind. It would undoubtedly shed light on the atrociousness of human trafficking, as it would place it on the same level as the most heinous crimes of humanity as listed by the Rome Statute. Similarly, by applying the concept of universal jurisdiction, states would openly recognize trafficking in persons as a crime of global concern, reflecting the calls of many to add it to the category of '*serious crimes viewed with such abhorrence that they warrant universal condemnation*.'[262] This would be of particular importance with regard to the trivialization sometimes surrounding human trafficking cases by comparing them to prostitution or other offenses. Identifying human trafficking as a crime punishable under the Rome Statute or as a crime of universal concern through universal jurisdiction would arguably have a strong political effect on states and their efforts with regard to anti-trafficking. *Cohen* points out, for example, that the application of universal jurisdiction to human trafficking would '*encourage States to strengthen their human trafficking laws, and would be a step towards increasing the political will needed to effectively tackle the problem*'.[263]

What is more, in the opinion of the author, the establishment of a specialized regional, international or transnational tribunal could be of considerable added value in the fight against trafficking in persons as well. It would inevitably enhance inter-state cooperation and would provide an additional mechanism solely dedicated to the prosecution of trafficking cases. Naturally, the jurisdiction of such a tribunal would be limited as well, but it would take the fight against human trafficking to a higher level, raise awareness and enable states that might be overwhelmed with the complexity and workload that comes with investigations into trafficking cases to seize a court specialized on the issue. Furthermore, one of the core issues surrounding victims' rights in the context of human trafficking can be seen in the criminalization and the failure of states like Austria to effectively implement and apply the principle of non-punishment for status-related offences. It can be argued that the prosecution of a trafficking case on the international level, for example by a specialized transnational tribunal as recommended by *Boister*[264], would put enough public pressure on the state in question to uphold this principle and protect victims from being charged with criminal offences committed as part of the trafficking.

[262] C. F. Moran, 40
[263] M. Cohen, 234
[264] See chapter V. 2.1.c.

The author of this thesis argues that although international or internationally coordinated responses to the scourge of human trafficking cannot solve all problems concerning the combat of human trafficking, they do bear the potential to help overcome some of the obstacles and challenges that arise on the domestic level presented above. In the following part, this will be further illustrated.

First of all, as analyzed above, one of the main reasons why such a large part of human trafficking goes unpunished is the often unresolved question of jurisdiction, may it be due to a lack of jurisdiction of any state, the uncertainty which state is competent or the failure to lead a comprehensive criminal proceeding within one and the same jurisdiction. Some of the issues revolving around jurisdiction could be overcome by detaching prosecutions from the question of national prosecution and by conducting criminal proceedings on an international level instead, for example, by a specialized tribunal. Similarly, the failure of states to criminalize human trafficking in a standardized manner could be tackled by leaving the prosecution to an international institution which would be based on uniform case law and operate in a standardized way.

Another major obstacle concerns the successful identification of trafficked individuals which, as we have seen, is the requirement for the granting and protection of a number of important victims' rights. It has been argued above that this is an issue that primarily has to be addressed on the national level. The same applies to providing assistance to victims with regard to encouraging and facilitating complaints against their perpetrators as well as combating corruption and complicity of officials. Nevertheless, we have seen that international agreements as well as the jurisprudence of international tribunals contribute to more awareness and states feeling the pressure to adopt more suitable and effective measures. Similarly, monitoring institutions such as numerous UN human rights treaty bodies or GRETA regularly highlight current shortcomings of states' responses to human trafficking and oblige them to adopt more effective measures. Ways of criminally prosecuting human trafficking cases on an international level are, however, not suitable to tackle the issue of lack of victim identification and the problems resulting from it. They may, as mentioned, put enough public pressure on states to uphold principles of victim protection and protect victims from being charged with criminal offences committed as part of the trafficking. However, the proper identification of migrants, refugees and trafficked individuals will inevitably remain the task of frontline workers, which makes it a domestic issue. Without the identification of victims of trafficking, no further processes, national or international, can be initiated.

VI. Conclusion

As the numbers presented in the introduction of this thesis show, the importance of exploring ways to enhance anti-trafficking strategies is indisputable.

The general acknowledgement of the urgency of the topic is reflected in the comprehensive international legal framework which has been created with respect to human trafficking over the past years. As we have seen, national responses to tackle the problem of human trafficking are insufficient on many levels. The most alarming issues concern procedural obstacles such as limited jurisdiction, failure to identify victims or corruption on the one hand, and severe negative consequences for victims, including human rights violations, on the other hand.

Taking a closer look at the particular situation in Austria, we have seen that issues like the failure to identify victims and to conduct effective proceedings and proceedings *ex officio* or the lack of financial resources contribute to low conviction numbers. Regarding the protection of victims' rights, Austria still fails to effectively implement some of the principles foreseen in the CoE Convention, such as the required principle of non-punishment or, in many cases, the granting of the right to residency as well as the right to legal remedy and the right to privacy.

Against the background of the repeatedly mentioned transnational aspect of human trafficking crimes, both formal and informal ways of inter-state cooperation have proven helpful in the past, as the best practice examples have shown. In the opinion of the author, international cooperation is particularly important in the field of prevention. It therefore is not surprising that GRETA repeatedly stresses the relevance of inter-state cooperation and that UNODC identifies the lack thereof as one of the reasons for failed prosecutions of human trafficking cases and therefore, as one of the reasons for impunity. This importance of inter-state cooperation is also highlighted both in the UN Trafficking Protocol and in the CoE Convention. At this point, it should also once again be noted that some of the challenges of effective responses to human trafficking, such as the identification of victims, have to be tackled primarily on a national level. In this regard, however, inter-state cooperation can be a very helpful tool as well. By way of exchanging knowledge and best practice examples as well as by conducting joint inspections in high risk sectors, states have the opportunity to enhance and improve their efforts to identify victims of human trafficking. The proper identification is, in turn, the prerequisite for the granting and protection of victims' rights. In this regard, inter-state cooperation can indirectly enhance victim protection as well.

Needless to say, the strategies of international prosecution presented and analyzed above cannot be seen as solutions to all the problems and obstacles in the context of the global scourge of human trafficking. Nevertheless, it has been illustrated that although the prosecution by the ICC, the application of universal jurisdiction and the potential establishment of specialized tribunals have their general limitations when it comes to investigations and prosecutions of the crime, all options would tackle some of the issues regarding national criminal proceedings.

There can be no doubt that the existence of more possibilities and instances tasked with the prosecution of trafficking in persons cases would be of significance since it would complement the already existing national mechanisms which are, in many ways, flawed. Furthermore, the symbolic nature cannot be stressed enough, as it would send a strong signal to traffickers and victims across the globe, hopefully inducing states to enhance their efforts with regard to anti-trafficking. We have also seen that other international measures, that do not concern prosecution or inter-state cooperation per se, such as international legal instruments, the jurisprudence of international tribunals as well as case law of international monitoring bodies contribute to more awareness and states being pressured to adopt more suitable and effective measures.

All things considered, it can be concluded that there is no one-size-fits-all approach to address the global 'industry' of trafficking in human beings. However, this thesis has illustrated that there are a number of possibilities still to be explored on an international level, indicating that the international community could and should intensify its efforts in the field of anti-trafficking. Preferably, a combination of several measures, such as more joint prevention projects by states, more enhanced international cooperation and the establishment of new methods to prosecute the crime on an international level, should be put in place. This would not only help tackle the shortcomings resulting from addressing human trafficking merely on a national basis, but it would also reflect the seriousness and gravity of the crime and demonstrate the international community's unequivocal will to fight it.

Bibliography

Articles, Books and Reports

A.D. Tolar, ‘Human Trafficking Analyzed as a Crime Against Humanity’, ICLR, Vol. 20, No. 1., 2020, 127–152

A. Gallagher and P. Holmes, ‘Developing an Effective Criminal Justice Response to Human Trafficking - Lessons From the Front Line’, International Criminal Justice Review, Volume 18 Number 3, 2008, 318-343

A. T. Gallagher, ‘The International Law of Human Trafficking’, Cambridge University Press, 2010

ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases, 2010, https://www.unodc.org/documents/humantrafficking/ASEAN_Handbook_on_International_Legal_Cooperation_in_TIP_Cases.pdf

Austrian Ministry of the Interior/Criminal Intelligence Service, ‘Delikte & Ermittlungen – Menschenhandel’, https://bundeskriminalamt.at/303/start.aspx

Austrian Ministry of the Interior/Criminal Intelligence Service, ‘Lagebericht Schlepperei und Menschenhandel 2020‘, Wien 2021

B. Iselin and M. Adams, ‘Distinguishing between Human Trafficking and People Smuggling’, UN Office on Drugs and Crime, Regional Centre for East Asia and the Pacific, 2003

D. Hovell, ‘The Authority of Universal Jurisdiction’, The European Journal of International Law, Vol. 29 no. 2, 2018, 427–456

Empact THB – Projekt ETUTU, ‘Operative Kooperation zur Bekämpfung von nigerianischem Menschenhandel & moderner Sklaverei, 2016

F. Yen Ne, ‘Human Trafficking: In the Shadows of the Law’, NTS Insight, no. IN18-06, 2018

G. Conway, ‘Ne Bis in Idem in International Law‘, International Criminal Law Review 3, 2003, 217–244

G. Oğuz, ‘International Cooperation in Combating Human Trafficking in the EU: Evidence from Turkey’, Irish Journal of Sociology, 2012; 20(1):39-64

GRETA, ‘Evaluation Report Austria, Third evaluation round, Access to justice and effective remedies for victims of trafficking in human beings’, 2020

H. G. van der Wilt, ‘Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts’, Chinese Journal of International Law 13(2), 2014, 297-334

H. Konrad and N. Marques, ‘International Cooperation and Coordination: The European Challenge to Combating and Preventing Human Trafficking’, Program on Human Rights, Center on Democracy, Development, and the Rule of Law, Freeman Spogli Institute for International Studies

H. Sax in J. Planitzer and H. Sax, ‘A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings’, Elgar Commentaries series, 2020, 183-200

J. C. Green, ‘A Proposal Leading to an International Court to Combat Trafficking in Human Beings’, Third Annual Interdisciplinary Conference on Human Trafficking, 2011

J. N. Aston and V. N. Paranjape, ‘Human Trafficking and its Prosecution: Challenges of the ICC’, 2012

J. Planitzer, ‘The Council of Europe Convention on Action against Trafficking in Human Beings and the Human Rights-Based Approach to Trafficking in Human Beings’, 2013

K. Simonova in J. Planitzer and H. Sax, ‘A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings’, Elgar Commentaries series, 2020, 323-332

M. C. Brand, ‘International cooperation and the anti-trafficking regime’, Working Paper Series No. 7, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, 2010

M. Cohen, ‘The Analogy between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction’, Buffalo Human Rights Law Review, Volume 16, 2010, 201-235, 201

M. Hirsch, ‘Plan of Action against Traffic in Women and Forced Prostitution’, 1996, 11, cited in Wijers and Lap-Chew, ‘Trafficking in Women, Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution’

N. Alhadi, ‘Increasing Case Traffic: Expanding the International Criminal Court's Focus on Human Trafficking Cases’, Michigan Journal of International Law, Volume 41, Issue 3, 2020, 541-580

R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, An Introduction to International Criminal Law and Procedure (2007)

R. Piotrowicz in J. Planitzer and H. Sax, ‘A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings’, Elgar Commentaries series, 2020, 310-322

The Human Trafficking Legal Center, ‘Using the Optional Protocol under CEDAW to combat Human Trafficking’, 12 December 2018

United Nations Documents

UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000

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

Slavery Convention, Geneva 25 September 1926, entered into force on 9 March 1927, UN Treaty Series, Volume 212

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Geneva, 7 September 1956, entered into force on 30 April 1957, UN Treaty Series, Volume 266

UNODC, 'The Protocol – The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons is the world's primary legal instrument to combat human trafficking', https://www.unodc.org/unodc/en/human-trafficking/protocol.html

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

UNODC, Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 2004

UNGA, Interpretive notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, para. 59, UN Doc. A/55/383/Add.1 (Nov. 3, 2000)

UN General Assembly, United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25

UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6

UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267

UNODC, Regional Programme Office for South Eastern Europe, 'Trafficking in Persons & Smuggling of Migrants, Guidelines of International Cooperation', 2010

UNODC, 'Anti-human trafficking manual for criminal justice practitioners Module 6', 2009

UNODC, 'Annual Report Covering activities during 2015'

UNODC, Regional Programme Office for South Eastern Europe, 'Trafficking in Persons & Smuggling of Migrants, Guidelines of International Cooperation', 2010

Council of Europe

Council of Europe, Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings, 2005, CETS No. 197

Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197

European Court of Human Rights

European Court of Human Rights, Press Unit, 'Trafficking in human beings' – Factsheet, February 2021

L.E. v. Greece (European Court of Human Rights, 21 January 2016) 71545/12

Rantsev v. Cyprus and Russia (European Court of Human Rights, 7 January 2010) 25965/04

European Union

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025', 14.4.2021 COM(2021) 171 final

International Court of Justice

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002, ICJ Rep 3, at para. 73 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal)

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment), IT-96-23-T & IT-96-23/1-T, 22 February 2001

Online sources

Conference Report Nordic-Baltic Conference on Human Trafficking 10 & 11 November 2016 in Tallinn, Estonia, https://www.norden.ee/images/heaolu/inimkaubanduse_konverents/Conference_report_THB_Tallinn_10-11.11.2016.pdf

Eurojust, 'Human traffickers' ring busted in France and Bulgaria', 2019, https://www.eurojust.europa.eu/human-traffickers-ring-busted-france-and-bulgaria

European Commission, 'Together Against Trafficking in Human Beings – Austria', https://ec.europa.eu/anti-trafficking/member-states/austria_en

Lightup, 'Menschenhandel in Österreich', https://lightup-movement.at/blog/menschenhandel-in-oesterreich#:~:text=Wir%20sind%20Transit%2D%20und%20Zielland,Zwangsarbeit

Oxford Public International Law, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e66#:~:text=Literally%20translated%20ne%20bis%20in,eadem%20re%20ne%20sit%20actio

Task Force gegen Menschenhandel, 'Was unternimmt Österreich gegen Menschenhandel?', https://www.gegen-menschenhandel.at/08-index.php

The New Humanitarian, IRIN, 'Southeast Asia's human trafficking conundrum', https://www.thenewhumanitarian.org/analysis/2013/05/06/southeast-asia-s-human-trafficking-conundrum (accessed on 3 July 2021)

Austrian law

Austrian Aliens' Police Act, Federal Law Gazette No. 100/2005

Austrian Asylum Act, Federal Law Gazette No. 100/2005

Austrian Corporate Criminal Liability Act, Federal Law Gazette No. 151/2005

Austrian Criminal Code, Federal Law Gazette No. 60/1974

Abstract

English

The ever-growing phenomenon of human trafficking has long since become a fixed component of 'the new global economy'. With exceedingly high dark figures, perpetrators acting 'in the shadows of the law' and victims often being wrongfully criminalized, many refer to human trafficking as a 'hidden crime'. While trafficked women, children and men often end up being arrested, detained as illegal migrants or convicted for offences such as prostitution or document fraud, their traffickers almost always go unpunished. The generic failure of states to identify victims as well as to prosecute perpetrators of human trafficking leads to the view that many states are unwilling or unable to effectively address the issue. It is often argued that domestic anti-trafficking regimes are not suited to effectively counter human trafficking with regard to both the prosecution of perpetrators and the protection of victims. This raises the question whether it would be beneficial to address human trafficking on an international level, what the options are and whether increased inter-state cooperation and ways of international prosecution can help overcome obstacles and challenges of national law enforcement.

The aim of this thesis is to analyze the most significant legal, procedural and factual obstacles and challenges to national prosecution of human trafficking cases as well as the difficulties with regard to the protection of victims' rights on a national level before thoroughly analyzing these challenges based on the example of the legal situation in Austria. This will be followed by an examination of possible ways of addressing human trafficking on an international level before concluding with an assessment of added value of such an international approach.

German

Menschenhandel ist längst zu einem festen Bestandteil der „neuen globalen Wirtschaft" geworden. Nicht zuletzt aufgrund der außerordentlich hohen Dunkelziffern wird er häufig als „verstecktes Verbrechen“ bezeichnet. Während Opfer oftmals verhaftet, als illegale MigrantInnen inhaftiert oder wegen Straftaten wie Prostitution oder Dokumentenbetrug verurteilt werden, bleiben MenschenhändlerInnen selbst fast immer straffrei. Das allgemeine Versagen der Staaten sowohl bei der Identifizierung von Opfern als auch der strafrechtlichen Verfolgung von TäterInnen von Menschenhandel führt zu der Auffassung, dass die meisten Staaten nicht willens oder in der Lage sind, dem Phänomen Menschenhandel auf nationaler Ebene wirksam entgegenzutreten. Nicht selten wird argumentiert, nationale Regelungen zur Bekämpfung von Menschenhandel seien nicht geeignet, das komplexe Verbrechen sowohl im Hinblick auf die Strafverfolgung als auch auf den Opferschutz effektiv zu bekämpfen. Dies wirft die Frage auf, welche Möglichkeiten zur Bekämpfung von Menschenhandel sich auf internationaler Ebene bieten und ob eine verstärkte zwischenstaatliche Zusammenarbeit sowie Wege der internationalen Strafverfolgung dazu beitragen können, die Hindernisse und Herausforderungen nationaler Systeme zu überwinden.

Ziel dieser Arbeit ist es, die wichtigsten rechtlichen, verfahrensrechtlichen und faktischen Hindernisse und Herausforderungen bei der nationalen Strafverfolgung von Menschenhandelsfällen sowie die Schwierigkeiten im Hinblick auf den Schutz von Opferrechten auf nationaler Ebene zu analysieren. Diese werden nachfolgend am Beispiel der Rechtslage in Österreich eingehend untersucht. Im Anschluss daran werden mögliche Wege zur Bekämpfung von Menschenhandel auf internationaler Ebene behandelt, bevor abschließend der Mehrwert eines solchen internationalen Ansatzes bewertet wird.