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## Introduction

### 1.1 Scope

With the adoption of the Trafficking Protocol to the UN Convention against Organized Crime in 2000,<sup>1</sup> support for the fight against ‘human trafficking’ has evolved rapidly and comprehensively. Abuses against migrants during journeys from their countries of origin, and once in host countries by employers, intermediaries, contractors, subcontractors, etc., have become a focal point for a political debate and an object of international law-making at global and regional levels. The campaign against ‘human trafficking’ is not simply of interest to states: it has been also embraced by human rights monitoring bodies and leading international human rights organizations, which often qualify ‘trafficking’ as a ‘modern form of slavery’ and as ‘a violation of human rights and an offence to the dignity and the integrity of the human being’.

Undoubtedly, these developments point to a problem that needs to be addressed: indebted migrants picking between 50 and 70 kg of berries per day in Sweden without being paid and left to sleep in the open; domestic workers isolated in private houses in the United Kingdom, severely underpaid and without days off; migrant women working as prostitutes in the Netherlands, deceived about the conditions and subjected to physical violence; men and women collecting potatoes in south-east Hungary for 1.5 Euro per hour under harsh conditions and living in dilapidated farm buildings in total isolation; Chinese nationals recruited by an agency after paying exorbitant recruitment fees and working for a cleaning company that refuses to pay their salaries. Much less attention, however, has been devoted to the more fundamental questions of whether the concept of human trafficking and the recently built human trafficking legal

<sup>1</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, *entered into force* 25 December 2003 (UN Trafficking Protocol); UN Convention against Transnational Organized Crime, 2225 UNTS 209, *entered into force* 29 September 2003 (UN Organized Crime Convention).

framework are actually effective tools for diminishing abuses, how the international law definition of human trafficking relates to the legal definition of slavery and what role human rights law has in this context. Why do definitions matter? Why does it matter whether factual circumstances are qualified as human trafficking, or as slavery or as forced labour? These questions are at the core of this book.

Despite the general acceptance of the international law definition of human trafficking, there seems to be insufficient understanding of the meaning of the different definitional elements therein and of how they relate to each other. Besides a ‘trafficking element’, the definition requires proving ‘exploitation’ whose meaning might be difficult to construe. Slavery, servitude and forced labour are added as examples of exploitative practices. However, the meaning of these concepts at the level of international human rights law and at national level is yet to be clarified in order for these concepts to be used effectively. In addition, the relation between the concept of human trafficking and, the concepts of slavery, servitude and forced labour under international human rights law is yet to be elucidated.

Definitional indeterminacy, however, motivates this book only in part. Definitions are important because they help us to distil a phenomenon and identify the group of individuals affected so that they can be assisted. Following this logic, the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings imposes international obligations upon its State Parties to identify, assist and protect individuals who are victims of human trafficking.<sup>2</sup> This raises the question as to how meaningful the benefits attached to the status of a victim of human trafficking are and how these are driven by the operation of the criminal law, questions that also motivate this book. At the same time, victims as migrants are subject to the national immigration laws the main goal of which is to control the entry and stay of foreigners, which might lead to difficult and sometimes conflictual relation between immigration law, criminal proceedings and protection needs.

Does human rights law and more specifically the right not to be subjected to slavery, servitude and forced labour, offer better protection by overcoming the abovementioned conflictual relation? Might the human

<sup>2</sup> CoE Convention on Action against Trafficking in Human Beings, CETS No.197, Warsaw, 16 May 2005 (the CoE Trafficking Convention). Although the personal scope of the convention is not limited to migrants, the focus of this book is on migrants in view of their particular vulnerabilities and the challenging questions provoked by their migration status.

rights law framework be a source of more protective standards? If so, in what ways might human rights law be more helpful? How are potential clashes between national immigration laws and human rights standards to be resolved? Can the nexus between immigration laws and the migrants' vulnerabilities lead to failures by the state to fulfil its obligations corresponding to the right not to be subjected to slavery, servitude and forced labour? How are these obligations affected by the legal characterization of the situation as one of slavery or human trafficking?

In light of the above, this book has two interrelated objectives. The first is to counter conceptual and terminological confusion and fragmentation. The central argument that will emerge is that the human rights concepts of slavery, servitude and forced labour are operational and effective for defining abuses against migrants. Despite their potential, there has been a tendency by the human trafficking concept to sideline them, which has led to considerable negative consequences. The second objective is, on the one hand, to examine the scope of states' positive obligations under the human trafficking legal framework and to urge their better understanding in light of the precepts of treaty interpretation as set out in the Vienna Convention on the Law of Treaties.<sup>3</sup> On the other hand, I also argue for deeper engagement with states' positive obligations under Article 4 of the European Convention on Human Rights (ECHR),<sup>4</sup> which enshrines the right not to be held in slavery, servitude or required to perform forced labour. It needs to be also noted that the analysis of the interaction between these two regimes (human trafficking and human rights law) in terms of the nature of the obligations that they impose will enhance the understanding of each of them.

These objectives are addressed from the perspective of European law with focus on the CoE Trafficking Convention and Article 4 of the ECHR. The European Union (EU) law on human trafficking is also included in the analysis. The delimitation to two legal frameworks should not be accepted as a general rejection of the relevance of other legal frameworks and other human rights. Besides ensuring that the book has a clear focus, the choice of legal frameworks is justified by the need to introduce clarity within these fields of international law and to study the achievements and potential of these legal frameworks.

<sup>3</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, *entered into force* 27 January 1980 (VCLT).

<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 005, Rome, 4 November 1950 (ECHR).

The book focuses on the legal situation of low-skilled migrant workers, who once in the destination country occupy the lowest strata of the labour market (for example, construction workers or domestic workers), who enter the unregulated labour market or a labour market in which they are very vulnerable (for example, prostitution), who might have entered the country of destination illegally or who might subsequently become undocumented even though they entered legally. These are migrants who are vulnerable to abuses in the process of migration and who also are vulnerable to such abuses after arriving in the destination country. EU nationals, who within the EU space can be characterized as privileged migrants, are excluded since there is a specific legal framework that applies to them. Abuses against migrant children also trigger the application of specific legal norms. This book is pertinent to migrant children; however, it does not examine the operation of these specific norms.

Coping with the research questions also requires an understanding of the way in which they have been addressed in the existing literature. For the last decade, there has been an explosion of legislative and academic interest in the field of trafficking in human beings. Within the relevant literature, it is helpful to distinguish two broad approaches. Many scholars support and accept the anti-trafficking legal framework as a positive development. At the same time they are aware of the ineffectiveness of the responses as envisioned by the anti-trafficking legal instruments and argue for reform, or suggest certain expansive interpretation of the relevant legal norms. They defend the anti-trafficking architecture, arguing, with regard to its ineffectiveness, that states need to perform better. Nevertheless, their arguments, meant to enhance the effectiveness of the legal framework, often do not find support in the law as agreed by states. For example, Gallagher and Roth argue that states need to perform better in terms of interpreting the definition of human trafficking. Doing so would mean interpreting the definition of human trafficking more broadly, that is, making it cover not only the process that could potentially lead to abuses, but also the outcome – the actual abusive circumstances.<sup>5</sup> This group of scholars criticize the trafficking legal framework for being overly focused on criminal prosecution, for its failure to sufficiently protect victims of

<sup>5</sup> A Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010); V Roth, *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff Publishers, 2012) 73.

human trafficking and for its overemphasis on sex trafficking.<sup>6</sup> Yet they do not fundamentally question the human trafficking concept and the legal framework behind the concept.

There is an acknowledgement that human rights law is very important to any responses against human trafficking, but the consideration of human rights law suffers from major deficiencies. First, the acknowledgement that the approach to trafficking should be human rights based is so general as to be virtually meaningless. Second, the focus has remained on the significance of the human trafficking framework and human rights law is considered as having a complementary value. The argument for a human rights-based approach to human trafficking has remained a vague statement, which has been continuously repeated without any serious consideration how exactly, from a formal legal perspective, human rights law is triggered in situations of abuses against migrants by private parties.<sup>7</sup> Faced with this inadequacy, Piotrowicz has rightly asked how exactly human rights law is relevant in cases of human trafficking, which he points out is first and foremost a crime. Piotrowicz has correctly noted that scholars supporting the human trafficking legal framework have not adequately met the challenge of demonstrating how human rights law is pertinent where migrants are abused by private parties.<sup>8</sup>

A second group of scholars challenge the human trafficking concept and the human trafficking legal framework. Hathaway, for example, argues that ‘there has really been no fundamental, overarching criticism of the effort to stamp out human trafficking as a worthy objective and, more specifically, as an appropriate focus of international law’.<sup>9</sup> He points out that instead of focusing on ‘slavery in all its contemporary forms’, the focus has been placed on human trafficking. Noll also challenges the human trafficking legal framework and criticizes the counter-trafficking norms, questioning

<sup>6</sup> A Gallagher, ‘Human Rights and the New UN Protocol on Trafficking and Migrant Smuggling: A Preliminary Analysis’ 23 *Human Rights Quarterly* (2001) 975, 990.

<sup>7</sup> J Fitzpatrick, ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking’ 24 *Michigan Journal of International Law* (2003) 1143; T Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff Publishers, 2006); see the preamble of the CoE Trafficking Convention, which states that ‘trafficking in human beings constitutes a violation of human rights’.

<sup>8</sup> R Piotrowicz, ‘The Legal Nature of Trafficking in Human Beings’ 4 *Intercultural Human Rights Law Review* (2009) 175.

<sup>9</sup> J Hathaway, ‘The Human Rights Quagmire of “Human Trafficking”’ 49(1) *Virginia Journal of International Law* (2008) 1.

whether these norms are suitable tools for diminishing abuses.<sup>10</sup> Similarly, Vernier finds the concept of human trafficking of doubtful value.<sup>11</sup> In her arguments, she asks why the acts of complicity – trafficking – were criminalized instead of the primary result – reduction to slavery.

While this book acknowledges the achievements of the human trafficking legal framework at regional level, it also questions the usefulness of the human trafficking concept and framework. In this way, it develops the arguments made by the second group of authors. The value of this book lies *inter alia* in demonstrating in concrete terms the problems ensuing from the definition of human trafficking. At the same time, the contribution of the book also lies in the clear elaboration of the human rights law concepts of slavery, servitude and forced labour, and in how and why these concepts should be rather used to address abuses against migrants. It proposes how the definitional limits of slavery, servitude and forced labour can be drawn and how the respective definitions can be used. Thus the present book develops an alternative to the human trafficking concept, which it shows to be problematic.

No discussion of the meaning of slavery, servitude and forced labour in international law can neglect the contribution of Allain.<sup>12</sup> Allain has convincingly argued that the definition of slavery under international law covers *de facto* conditions in which individuals are subjected to powers attaching to the right of ownership. In part this book draws upon Allain's work. In many ways, however, it is critically distanced from his approach. First, it questions the definition of slavery as outlined in the *Bellagio–Harvard Guidelines on the Legal Parameters of Slavery*. It points out that Allain defines slavery with reference to the definition of human trafficking, which exacerbates the already existing conceptual confusion. Second,

<sup>10</sup> G Noll, 'The Insecurity of Trafficking in International Law' in V Chetail (ed), *Mondialisation, Migration et Droits de L'homme: le Droit International en Question* (Bruylant, 2007) 356.

<sup>11</sup> J Vernier, 'French Criminal and Administrative Law Concerning Smuggling of Migrants and Trafficking in Human Beings: Punishing Trafficked Persons for Their Protection?' in E Guild and P Minderhoud (eds), *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings* (Martinus Nijhoff Publishers, 2006) 7.

<sup>12</sup> J Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers, 2013); J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford University Press, 2012); J Allain and R Hickey, 'Property and the Definition of Slavery' 61 *International and Comparative Law Quarterly* (2012) 915; J Allain, 'The Definition of Slavery in International Law' 52 *Howard Law Journal* (2009) 239. See also the *Bellagio–Harvard Guidelines on the Legal Parameters of Slavery*.

I disagree with his response to the definitional challenges raised by the concept of servitude in international law. Allain neglects the concept of servitude by submitting that it has no independent meaning in international law. This is an important omission on his part, which I address by offering a detailed analysis of the meaning of servitude in international law. Third, I maintain that simplistic references to the International Labour Organization (ILO) definition of forced labour are unhelpful. Thus I propose a different analytical framework for defining abuses as forced labour. Fourth, though Allain is right that the relation between slavery, servitude and forced labour is based on a gravity model, and that the criterion that denotes escalation of the abuses is the pervasiveness of the control over the victim, at the same time, I show that slavery, defined as exercise of powers attaching to the right of ownership, has the potential to cover abuses that neither forced labour nor servitude can encompass. The gravity model can therefore be seen as incomplete. Fifth, Allain ignores the different interpretation techniques applicable in the context of criminal law versus the context of human rights law. These differences are essential to explain because of the inherent tension in the interpretative standpoints in the context of criminal law versus that of human rights law. While Allain's focus appears to be on holding individuals criminally responsible, mine is on holding states internationally responsible. This implies a whole new vista of research, which this book offers. One focus of the book is on the definitional issues emerging in relation to the application of Article 4 of the ECHR, an area hitherto largely neglected.

One of the pivotal points in the book is the examination of the relationship between the concept of human trafficking and those of slavery, servitude and forced labour by applying a case study approach. To this end, I examine concrete cases and how they have been defined, enquiring into the ability of the legal definitions of human trafficking, slavery, servitude and forced labour to produce a close match with the actual factual circumstances in the cases. This enquiry also adds unique features to this book.

The positive human rights obligations under Article 4 of the ECHR have not been explored hitherto. This book addresses this blind spot by systematizing the positive human rights obligations under Article 4 of the ECHR, demonstrating their relevance in the context of abuses against migrants by private parties and specifically showing how the application of human rights law can be triggered. I point out how the responsibility of host states under human rights law can be engaged. In this way, I address the question how human rights law is of relevance when migrants are subjected to abuses falling within the material scope of the right not to be subjected

to slavery, servitude and forced labour. This is an important enquiry not only for addressing the abovementioned concern by Piotrowicz, but also in light of the existing misunderstanding concerning the role of slavery in terms of necessary interventions.<sup>13</sup>

The case law of the European Court of Human Rights (ECtHR) on Article 4 has just started to emerge. The budding jurisprudence under Article 4 has positive aspects. Yet at the same time, there are some flaws in the existing case law. This book is thus timely and has the potential to influence future developments by suggesting opportunities for correction and different lines of argumentation in relation to states' obligations under Article 4 of the ECHR.

The ECtHR case law on positive obligations under other substantive provisions from the ECHR is extensive and scholars have addressed this development. Yet the works of Mowbray and Akandji-Kombe, which are still regarded as the key sources in this field, are descriptive and not recent.<sup>14</sup> Given that Dröge, Xenos and Lavrysen have been more analytical,<sup>15</sup> I draw upon their work. At the same time, I clarify my own position as to the types of positive obligations and their scope, thus contributing to the discussion on positive obligations in light of the recent judgments by the ECtHR. Perhaps most importantly, I examine positive obligations within the specific context of abuses against migrants, looking at the involvement of immigration control concerns, which adds a layer of sophistication in relation to the scope of these positive obligations. This distinguishes the present book from the work of the scholars mentioned above.

<sup>13</sup> J Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' 108(4) *The American Journal of International Law* (2014) 609, 629 & 636, where it is argued that the move towards slavery presupposes that interventions should be limited to *ex post* criminal responsibility of evil individuals. This book offers a different perspective.

<sup>14</sup> A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004); J Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Council of Europe Publishing, 2007).

<sup>15</sup> C Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (Springer, 2003); D Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge, 2012); L Lavrysen, 'The Scope of Rights and the Scope of Obligations: Positive Obligations' in E Brems and J Gerards (eds), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2014); L Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect the ECHR Rights' in E Brems and Y Haeck (eds), *Human Rights and Civil Rights in the 21st Century* (Springer, 2014) 69.



The examination of the positive human rights obligations in the context of abuses against migrants inevitably leads to the much broader issue of how human rights law can be helpful for migrants. While some studies do engage with this issue,<sup>16</sup> they do so at a very general level. This book contributes to the discussion by specifically demonstrating how the human rights obligations under Article 4 of the ECHR clash with the immigration control powers of the state. One of the challenges faced in the present work is establishing the link between the immigration control objectives as performed in the national regulatory frameworks and the human right not to be held in slavery, servitude and forced labour.

Finally, I examine the interaction between the positive obligations originating from the human trafficking legal framework and from the human rights law framework, a task that has never been pursued before. This interaction is of importance for those states bound by both legal frameworks. The monitoring body of the CoE Trafficking Convention, the Group of Experts on Action against Trafficking in Human Beings (abbreviated as GRETA), publishes reports evaluating the implementation of the convention by the State Parties. These reports show both how states interpret and apply their obligations, and also deficiencies and problematic aspects. The latter raise the crucial question whether states are ultimately in compliance with their obligations under the CoE Trafficking Convention. What demands in terms of international law obligations does this convention raise? To respond to these questions, it is necessary to examine the scope of the legally binding obligations imposed by the latter convention in accordance with the applicable precepts of treaty interpretation, a task that has not been undertaken so far. Rather, the boundaries between, on the one hand, legally binding obligations, and on the other, recommendations and moral aspirations, are often blurred. The investigation of these issues is intimately related to the disruptive effects of EU law on human trafficking. The unique value of the present book also lies in addressing the question of how EU law on human trafficking diverges from, enhances or undermines the standards introduced by the CoE Trafficking Convention.

<sup>16</sup> G Noll, 'Why Human Rights Fail Undocumented Migrants?' 12 *European Journal of Migration and Law* (2010) 241; S Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004); A Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford University Press, 2012); J Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' 34 *Comparative Labor Law and Policy Journal* (2012) 95; C Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008); B Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press, 2013).

## 1.2 Structure

Brief clarifications must be offered as to the order of the book. After the introductory chapter, the book is divided into two parts. Part I ‘The Human Trafficking Legal Framework’ contains Chapters 2 to 4. Part II ‘The Human Rights Law Framework’ contains Chapters 5 to 8.

Chapter 2 introduces the historical origins and the legislative context from which the definition of human trafficking emerged in international law. These feed into the examination of the elements of the international law definition of human trafficking in Chapter 3. Chapter 4 focuses on the obligations imposed upon states by the CoE Trafficking Convention and the EU law on human trafficking. Against the backdrop of the outlined deficiencies of the human trafficking legal framework, Part II addresses the question as to what human rights law can offer. Given the complexities involved, Part II is divided into the following chapters. As with the historical roots of the concept of human trafficking in international law, Chapter 5 contains historical legal analysis, which seeks to shed light on the historical origins of the concepts of slavery, servitude and forced labour in international law. This is essential for understanding their present meaning and will contribute to the analysis developed in Chapter 6, where I clarify the definitional limits of the terms from a contemporary perspective. My motivations stem from the assumption that for Article 4 of the ECHR to be effectively applied, there needs to be better understanding of the material scope of the terms included therein. By examining these limits, I prepare the ground for comparison in Chapter 7 between, on the one hand, the concepts of slavery, servitude and forced labour, and the concept of human trafficking, on the other.

If there is no clarity as to the obligations undertaken by states under Article 4 of the ECHR, the examination of the definitional thresholds under this provision will be almost inconsequential. Thus similarly to Chapter 4, where I examine the positive obligations flowing from the human trafficking legal framework, in Chapter 8 I explain the types and the scope of positive obligations upon states corresponding to the rights not to be held in slavery, servitude and forced labour. Article 4 of the ECHR being a skeletal norm needs to be fleshed out through judicial elaboration not only in relation to the definitions of slavery, servitude and forced labour, but also in relation to the scope of the corresponding obligations.<sup>17</sup> In this way, it can be transformed

<sup>17</sup> For the role of the ECtHR, see S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006).