Corporate Criminal Liability for Human Trafficking in the EU
- a legal obligation for Member States?

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# Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EU</td>
<td>European Union</td>
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<td>EU Trafficking Directive</td>
<td>Directive 2011/36/EU</td>
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<td>European Trafficking Convention</td>
<td>The Council of Europe Convention on Action Against Trafficking in Human Beings</td>
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<td>EU Charter of Fundamental Rights</td>
<td>Charter on Fundamental Rights of the European Union</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>ILO Forced Labour Convention</td>
<td>ILO Convention concerning Forced or Compulsory Labour (No.29)</td>
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<td>TEU</td>
<td>Treaty of European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>Document Title</td>
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<tr>
<td>Trafficking Protocol</td>
<td>Protocol to prevent, Suppress and Punish</td>
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<td></td>
<td>Trafficking in Persons Especially Women and Children, supplementing the United Nations</td>
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<td></td>
<td>Convention against Transnational Crime</td>
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<td>UNTOC</td>
<td>United Nations Convention against Transnational Organized Crime</td>
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<td>Protocol against the Smuggling of Migrants</td>
<td>Protocol Against Smuggling of Migrants by Land, Sea, and Air, Supplementing the Untied Nations</td>
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<td>Convention Against Transnational Organized Crime</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>UN</td>
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<td>Explanatory Report</td>
<td>Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report</td>
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1 Introduction

1.1 Background

Within the EU, approximately 30 000 presumed victims of human trafficking was identified in the period 2010-2012.\(^1\) The majority of victims are trafficked for the purpose of sexual exploitation (69%), which mostly (95%) consists of women and girls. A smaller group (19%) is trafficked for the purpose of labor exploitation and the rest (12%) for purposes such as forced begging, criminal activities, removal of organs and forced marriages among others.\(^2\) The majority of trafficking victims within the EU originate from Member States, although some of them are also from countries outside the EU.\(^3\)

As human trafficking is often committed in corporate contexts, corporate accountability for trafficking offences plays a vital role in the combat against trafficking in persons. According to a report by Europol, a large part of trafficking activities take place under the cover of legal businesses in sectors such as restaurant, retail, production, trade, construction, and recruitment agencies.\(^4\) Actors involved in trafficking are not only organized criminal groups, but also corporate entities in form of employers or intermediaries that serve as loan companies or job agencies.\(^5\) Moreover, corporate entities can also take part in trafficking as owners of premises or properties such as bars, nightclubs, brothels, factories, hotels and construction sites among others, where victims of trafficking are exploited.\(^6\) For instance, victims of sex trafficking can be found in

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\(^2\) Ibid, pp. 29-30.

\(^3\) Ibid, p. 38.


\(^6\) Europol, Knowledge Product: Trafficking in Human Beings in the European Union, 1 September 2011, p. 6.
brothels and bars. Whereas trafficking victims of forced labor end up in sectors such as agriculture, construction, manufacturing and domestic service.

The importance of corporate accountability for trafficking offences is already reflected in various international legal instruments. However, while the present international legal framework prohibits human trafficking, problems such as assigned liability and complex corporate structures make it difficult to hold corporate entities accountable for trafficking offences. *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016* highlights that Member States have different approaches in addressing human trafficking, which hampers international cooperation in combatting human trafficking. It also emphasizes that the private sector plays an essential role in reducing the demand of trafficking in persons while also recognizing the need to develop supply chains that do not involve trafficking. The EU Commission has further held that ensuring liability of legal persons is an important step towards reducing the demand of trafficking.

### 1.2 Purpose and Outline

This thesis aims to examine to what extent Member States of the EU have a legal obligation under international law and EU law to impose corporate criminal liability for human trafficking offences in their domestic legal system. In order to determine the existence and the scope of such a legal obligation, this thesis will examine whether such legal obligation exist under the international legal framework on trafficking in persons and its implementation into EU law.

The first part of the thesis will determine whether Member States have obligations under international law with regards to trafficking, which extends to non-state actors

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7 Ibid, p. 7.
8 Ibid, pp. 7-8.
11 European Commission, Commission Staff Working Document: Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings, p. 9.
such as corporations. This will include an examination of international legal rules on State responsibility and how they apply in circumstances where trafficking is committed by non-state actors such as corporations. Thereafter, an overview will be made over States’ positive obligations with regards to trafficking under international law and EU law.

The second part of this thesis will focus on examining the content and scope of States’ positive obligations with regards to trafficking in persons, and to what extent these infer upon Member States a requirement to impose corporate criminal liability for human trafficking offences in their domestic legal system. As States’ positive obligations with regard to trafficking under international law are quite extensive, this thesis will focus on three key areas of State obligations that I consider relevant to the discussion of corporate criminal liability for trafficking offences. These key areas are States’ obligation to: 1) criminalizing trafficking; 2) punish traffickers; and 3) prevent trafficking. The second part of this thesis will provide an analysis over the scope and content of State’ obligation in each of these three areas and to what extent they infer a legal obligation on Member States to impose corporate criminal liability for trafficking offences.

1.3 Scope and Delimitation

The scope of analysis for this thesis will be limited to the international legal framework and EU law on trafficking in persons applicable on Member States. Since trafficking of children is subject to specific provisions, and opens up another quite extensive area of regulation, trafficking in children will be excluded from the analysis of this thesis. It is further important to note that trafficking in persons is a complex issue, which can materialize itself in many different circumstances and thereby also trigger a wide range of international legal frameworks. However, this thesis will only focus on trafficking in persons and the international legal instrument that addresses directly trafficking in persons. Hence, related matters such as smuggling of migrants will not be included in this examination. The analysis of this thesis will furthermore focus on criminal liability for corporations. Other forms of liability, such as administrative and civil liability, will only be considered when relevant to the analysis of criminal liability. Since the scope of
this legal analysis is limited to Member States of the EU, only international treaties that are ratified by those States and thereby legally binding upon them will be considered.

1.4 Methodology

The basis for the analysis of this thesis will be the legal dogmatic method. The legal analysis will be based on relevant sources of international law and EU law. With regards to international law, Article 38 of the Statute of the International Court of Justice recognizes international conventions, international customs and general principles of law as legitimate sources of international law. However, the international law of human trafficking is mainly based on treaties\textsuperscript{12}, which will therefore be the primary source for the analysis of this thesis. It is also important to note that the matter of corporate criminal liability for trafficking offences under international law has not been thoroughly discussed by scholars. As a result, the analysis of this thesis will in some parts be predominately be based on treaties. The rules on how to interpret treaties in Article 31 and 32 of the Vienna Convention on the Law of Treaties will be the basis of any interpretation of relevant treaties. These rules are considered customary international law, and thus applicable on all international treaties.\textsuperscript{13} When relevant for identifying States’ obligations with regard to human trafficking, other customary international law will also be considered. Moreover, international legal doctrine recognizes that uniform State practice accompanied by \textit{opinio juris} can be considered as customary international law.\textsuperscript{14} Thus, consideration will also be taken to current State practice on the matter of corporate criminal liability for trafficking offences.

In addition to the primary sources of international law, relevant decisions of international courts and tribunals will be considered.\textsuperscript{15} For instance, decisions by the ECtHR will be taken into account when interpreting the scope of States’ obligations under the ECHR. The case law by the ECtHR will also be considered as relevant

\textsuperscript{12} Gallagher, A. T., \textit{The International Law of Human Trafficking}, p. 132.
jurisprudence for the interpretation of States’ obligations under the European Trafficking Convention. For the purpose of this thesis, it is also important to consider relevant ‘soft law’ in the form of non-legal binding instruments as well as ‘soft obligations’ reflected in legally binding treaties. For instance, in order to determine the substance and weight of treaty based norms and obligations, it is necessary to take into account ‘soft law’ in the form of declarations, guidelines, resolutions, interpretative texts etc. Although ‘soft law’ does not constitute legally binding norms, it can help clarify the scope of treaty based norms and obligations in the current legal framework. However, it is important to note that trafficking in persons has generated a considerable amount of “soft law” instruments. Consequently, it is necessary to understand that some soft law instruments carry more weight than others. In particular, interpretative materials in the form of legislative guides and other commentaries to the major international treaties are an important source of guidance with regards to States obligations’ under international law.

When examining Member States’ obligations under EU law with regards to human trafficking, the analysis will predominantly focus on the EU Trafficking Directive. It is thus important to understand how Member States’ obligations under directives are to be interpreted under EU law and their relation to the legal framework on trafficking under international law. Article 288 TFEU provides that “a directive shall be binding, as to the result to be achieved (...) but shall leave to the national authorities the choice of forms and methods”. Moreover, the aim of directives is often to impose a legal obligation on States to adopt a minimum standard, as in the EU Trafficking Directive. With regards to the relation between the EU Trafficking Directive and international law, the ECJ has also consistently affirmed that the EU is part of the international legal order and that its competence to adopt legal acts must be exercised by observing international law, including provisions of international agreements if they reflect customary international law. Article 6 of the TEU further holds that the EU must respect the fundamental rights guaranteed under the ECHR as general principles of EU law, as they result from the constitutional traditions common to the Member States. Lastly, due to the fact that

19 See ECJ, C- 308/06 Intertanko, supra note 55, para. 51.
this thesis is centralized around the concept of corporate criminal liability, the analysis of this thesis will include some aspects of criminal law theory and doctrine.

1.5 Definitions and use of Terms

For the purpose of this thesis it is important to clarify to some extent the meaning of corporate criminal liability. Firstly, ‘corporation’ or ‘corporate entity’ should be understood as a legal person, which is an entity recognized as having legal personality under the applicable national law. Whether an entity has a legal personality is dependent upon whether such personality is conferred upon the concerned entity according to national law. It should be noted that in what way and at which moment an entity acquires legal personality differs among Member States. As of now, there is not a common definition at international level as to the term ‘criminal’ or what can be deemed as ‘criminal sanctions’. Thus, the term ‘criminal’ does not have a uniform meaning under international law or EU law. The concept of liability in this thesis refers to the legal responsibility for one’s actions or omissions. Moreover, liability can be categorized as administrative, civil or criminal depending on whether it is qualified as such under the relevant national authority or law. In general, criminal liability refers to liability arising from an act or omission that constitutes a criminal offence under relevant authority or law. However, since the application of liability differs depending on each State’s domestic legal system, any examination of the matter becomes somewhat problematic. For instance, some States recognize criminal liability of legal persons in their domestic legal systems while others do not. In Member States where

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20 This definition is found in the Second Protocol to the Convention on the protection of the European Communities’ financial interests and used in the Council of Europe Convention on Corruption, and also in several EU instruments in relation to criminal corporate liability, as explained in Vermeulen, G., De Bondt, W., Ryckman, C., Liability of Legal Persons for Offences in the EU, European Commission, IRCP-series Vol. 44, Maklu Publishers, 2012, p. 21.


criminal liability of legal persons does not exist, the State may instead apply administrative liability for criminal offenses committed by legal persons.\textsuperscript{24} For the purpose of this essay, a distinction will be made between being held liable for a criminal offence and being held ‘criminal’ liable for a criminal offence. The term \textit{criminal liability} in this thesis will refer to being held legally responsible for a criminal offence under the States’ criminal law framework. Thus, States that do not recognize corporate criminal liability in their domestic legal system and instead apply administrative and civil liability of legal persons for criminal offences, will not be considered as imposing corporate criminal liability.

The international legal definition of \textit{trafficking in persons} is stated in Article 3(a) of the Trafficking Protocol.\textsuperscript{25} The definition requires the presence of three elements in order for an act of trafficking to be at hand: (1) the action of “recruitment, transportation, transfer, harboring or receipt of persons”; (2) the means used to secure that action in form of “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 payments or benefits to achieve the consent of a person having control over another person”; and (3) the purpose of the action taken which must include “the exploitation of the prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”. This definition of trafficking as prescribed in the Trafficking protocol is also reflected in Article 2 of the EU Trafficking Directive, as well as Article 4(a) in the European Trafficking Convention. It is important to note that trafficking in persons should be distinguished from the act of smuggling of migrants as defined under Article 3 of the Protocol against the Smuggling of Migrants.

\section*{1.6 International and European Legal Instruments}

Member States are legally bound by customary international law and ratified international treaties, which give rise to State obligations to combat human trafficking. The main international treaty on trafficking in persons is the UNTOC and its

\begin{itemize}
  \item \textsuperscript{24} Ibid.
\end{itemize}
supplementary Trafficking Protocol.\textsuperscript{26} Furthermore there are several international human rights law treaties that directly or indirectly address trafficking in persons, such as CEDAW, ICCPR and ICESCR, as well as ILO Forced Labour Convention.\textsuperscript{27} At European level, regional legal instruments on trafficking in persons include relevant conventions and case law by the Council of Europe as well as EU law. The ECHR and the European Trafficking Convention are the two central human rights treaties with regards to trafficking in persons.\textsuperscript{28} The European Trafficking Convention was adopted by the Council of Europe to reinforce and realize the UNTOC together with the Trafficking Protocol.\textsuperscript{29} However, only those Member States that have ratified the European Trafficking Convention is legally bound by it, which excludes Czech Republic, Estonia and Greece. With regards to EU law, Member States are obliged to implement the EU Trafficking Directive, which includes minimum rules on measures for Member States to combat trafficking in persons.\textsuperscript{30} When implementing the EU Trafficking Directive, Member States must also comply with the EU Charter of Fundamental Rights.\textsuperscript{31}

2 State Responsibility for Trafficking under International Law

2.1 Introduction

In order to determine whether Member States have a legal obligation to impose corporate criminal liability for trafficking offences, it is necessary to first examine how the rules on State responsibility under international law apply in the context of


\textsuperscript{28} Jonsson Cornell, A., \textit{Människohandel som uttryck för globala obalanser: Vad gör EU}, p. 141.

\textsuperscript{29} Österdahl, I., \textit{International countermeasures against human trafficking}, p. 70.

\textsuperscript{30} Ibid, p. 142.

\textsuperscript{31} Jonsson Cornell, A., \textit{Människohandel som uttryck för globala obalanser: Vad gör EU}, p. 141.
trafficking. Especially in the context of trafficking committed by non-state actors, such as corporations. The following section will thus commence with a general overview of the rules on State responsibility and thereafter an analysis will follow of how States’ positive obligations under international law applies to trafficking committed by non-state actors such as corporations.

2.2 General Rules

State Responsibility for an international wrongful act under international law is a prerequisite for defining States’ obligations under international law. The rules of State responsibility determine whether a State can be held legally responsible for an international wrongful act. The principle of State responsibility for international wrongful acts is enshrined in international law doctrine and it is a critical component for the effectiveness and credibility of the international legal system.\(^\text{32}\) The responsibility of the State under international law has been discussed by international tribunals and is reflected in substantive State practice.\(^\text{33}\) As a result, the ILC was assigned to codify existing customary rules on State responsibility following a referral from the UN General Assembly.\(^\text{34}\) The work of the ILC was completed in 2001 and includes a set of Articles on State responsibility with accompanied commentaries. These Articles establish a general framework for State responsibility applicable to all areas of international law.\(^\text{35}\) Although not all Articles in the ILCs work are universally accepted as a source of international law, many of the Articles are considered as codification of relevant customary law doctrine.\(^\text{36}\)

When determining State responsibility under international law, there are two criteria that must be fulfilled: 1) the State act or omission must be attributable to the State; and 2) the State act or omission must constitute a breach of an international obligation of that State.\(^\text{37}\) The State act or omission may involve passing legislation or other State

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\(^{33}\) Ibid, p. 220.

\(^{34}\) Ibid.

\(^{35}\) Ibid.

\(^{36}\) Ibid, p. 221.

measures in a give case. It may also involve providing facilities, taking precautions or enforcing a prohibition. The general rule is that only acts by State agents, namely organs of government or others acting under the direction, instigation, or control of these organs, are attributable to the State. Furthermore, a State is in breach of an international obligation when: 1) the act is attributable to the State; and 2) the act is not in conformity with what is required by the obligation in question. Whether the State act or omission is in conformity with an international obligation depends on the nature, scope and content of the obligation. This is determined by examining the primary rule, which can reside in a treaty, customary international law or another recognized source of international law.

As noted above, the general rule is that the conduct of non-State actors is not attributable to the State under international law. However, the ILC also maintains that the rules governing attribution have a cumulative effect “such that a State may be responsible for the effects of the conduct of private parties, if it failed to take the necessary measures to prevent those effects”. Hence, there is a growing acceptance in international law that State responsibility is triggered when a State fails to adequately protect those within their jurisdiction from the actions of others, when such actions result in a violation of rights that are guaranteed under international law. For instance, international human rights law provides for many examples of positive obligations where a State is required to do more than abstain from committing violations. These positive obligations are commonly identified as to protect, respect, fulfill and promote. Arguably, other international treaties also include similar positive obligations. For

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38 Ibid, See Article 12 and accompanied commentary at para. 2.
41 ILC, Draft Articles on Responsibility of States Internationally Wrongful Acts with Commentaries, Article 12 and accompanied commentary at para. 1.
42 ILC, Draft Articles on Responsibility of States Internationally Wrongful Acts with Commentaries, Article 8 and accompanied commentary at para. 1.
43 ILC, Draft Articles on Responsibility of States Internationally Wrongful Acts with Commentaries, Part One, Chapter II at para. 4
instance, with regards to human trafficking States’ positive obligations can be found in various international treaties as well as customary international law. As will be examined in the following section, States have quite extensive positive obligations under international law with regards to human trafficking.

2.3 States’ Positive Obligations with regards to Trafficking

2.3.1 Trafficking in Transnational Criminal Law

States’ positive obligation with regards to trafficking in persons can be found in international treaties of transnational criminal law such as the UNTOC and its supplementing Trafficking Protocol. Transnational criminal law treaties aim to impose obligations on States to adopt domestic law measures to suppress “criminal activities that have actual or potential trans-boundary effects”. Thus, the aim of transnational criminal law treaties is to suppress harmful behavior by non-state actors by obligating States to criminalize certain offences and establish penalties, procedural measures and jurisdiction in their domestic legal systems. According to Nadelmann, treaties of transnational criminal law are intended to minimize or eliminate potential havens where crimes can be committed or to where criminals can flee to escape prosecution and punishment. As such, States’ obligations under international treaties of transnational criminal law directly target criminal conduct committed by state actors as well as non-state actors.

The provisions in UNOTC aim to eliminate “safe havens” where organized crime such as human trafficking can take place. States are thereby obligated to take legislative and

47 Ibid.
other measures to criminalize organized crime. States are also obligated to take “appropriate measures within their means to provide assistance and protection of victims”. Moreover, Article 31 of the UNTOC requests that States endeavor different prevention measures against transnational organized crime. In addition, the Trafficking Protocol aims to prevent and combat trafficking in persons, with special consideration to the protection of women and children, as well as to promote cooperation among States. The provisions in UNTOC apply mutatis mutandis to the Trafficking Protocol, meaning that both instruments should be interpreted together. Consequently, the trafficking offences established under the Trafficking Protocol are also considered as offences under the UNTOC, which means that States’ obligations under the UNTOC also is applicable when implementing the more detailed obligations under the Trafficking Protocol.

State obligations under the Trafficking Protocol can be categorized into: 1) prosecution; 2) protection; and 3) prevention. Firstly, the Trafficking Protocol obligates States to criminalize the conduct of trafficking as established under the Trafficking Protocol. States are further obligated to ensure that victims’ privacy and identity are protected, but only in ‘appropriate cases and to the extent possible”. States are further asked to consider implementing measures for the physical, psychological and social recovery of victims. Lastly, States’ obligations regarding prevention of trafficking are set out in Article 9 of the Trafficking Protocol in quite broad terms, which makes it difficult to establish the content and scope of these obligations. It is arguable that States’ obligations under the Trafficking Protocol with regards to protection of victims and prevention in general could be considered as quite weak.

50 See UNTOC, Article 5.
52 Ibid, Article 31 (7).
53 See Trafficking Protocol, Article 2.
54 See UNTOC, Article 37(4); Trafficking Protocol, Article 1(1)-(2); Legislative Guide, at pp. 253-255.
56 Trafficking Protocol, Article 5.
57 Trafficking Protocol, Article 6 (1).
58 Trafficking Protocol, Article 6 (3).
2.3.2 International Human Rights Law

2.3.2.1 States’ obligation to protect, respect and ensure human rights

International human rights law impose positive obligations on States to protect, respect and ensure the enjoyment of human rights within their jurisdiction. States are thereby required to also provide protection from the actual and potential interference of these rights by individuals or other private entities. International tribunals have recognized that the State has a responsibility under international human rights law to regulate and prevent the actions of other individuals and private entities, and that a failure to do so will lead to the State being in breach of its human rights obligations.\(^6^0\)

International tribunals and treaty bodies have further elaborated on States’ positive obligations under international human rights. In the case Velasquez Rodriguez v. Honduras by the Inter-American Court of Human Rights, it was held that States have a duty to “organize the governmental apparatus and structures of the state through which the public power is exercised in order to ensure the full enjoyment of all persons within the territory of the State, their fundamental rights and freedoms under the Convention”.\(^6^1\) The Court further held that State responsibility is invoked when a violation of rights has occurred and the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.\(^6^2\) Hence, the State must exercise due diligence to prevent violation of human rights committed by individuals and other private entities.\(^6^3\) These statements by the Inter-American Court of Human Rights were later endorsed by the UN Special Rapporteur on Violence against Women as an important assertion of State responsibility for acts of private individuals and an interpretation of an international standard on State duty.\(^6^4\) The decision by the Inter-American Court of Human Rights has also been supported by other international human rights instruments as well. For instance, the Committee of CEDAW has stated that

\(^6^2\) Ibid. at para. 173.
\(^6^3\) Ibid.
“States may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence”.65

European human rights law also recognizes the Inter-American Court of Human Rights’ legal stand on States’ positive obligations with regards to human rights. Article 1 of the ECHR requires States to secure the rights and freedoms included in the Convention, which has been interpreted as imposing both negative and positive obligations upon States. The negative obligation refers to the State abstaining from interfering with individuals’ human rights. Whereas positive obligations require the State to take action to secure individuals’ human rights, which includes State protection from the acts of other persons, which includes state agents as well as private individuals and other entities.66 Thus, where positive obligations have been recognized in the convention, State responsibility is invoked when the State has failed to act to secure within its jurisdiction the rights guaranteed by the ECHR. This has further been supported by the ECtHR, which also recognizes that States are obligated to protect individuals’ rights from the infringement by other individuals or private entities under the ECHR.67

States have a duty to protect individuals’ human rights within their territory or jurisdiction, from the interference by third parties such as corporations.68 In 2005, a Special Representative was mandated by the UN to submit a report on the role of States in effectively regulating and adjudicating businesses with regard to human rights.69 The Special representative confirmed in his report that States’ duty to protect is well recognized under international human rights law and applies to private entities in form

67 Ibid.
of businesses and corporations.\textsuperscript{70} As a result, the UN ‘Protect, Respect and Remedy’ Framework on Human Rights and Business was adopted in 2008 by the UN Human Rights Council. Although the resolution is not legally binding upon States, it was unanimously adopted by all States and is widely considered as the common position of the international community with regards to corporations and human rights.\textsuperscript{71}

\textbf{2.3.2.2 Trafficking as a Violation of Human Rights}

International human rights law recognizes trafficking as a violation of human rights. Several international human rights instruments include provisions that explicitly prohibit human trafficking while also requiring States to take necessary measures to combat human trafficking. For instance, Article 6 in CEDAW requires States to take “all necessary measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”. International human rights law also includes a prohibition against discrimination on the basis of race and sex and has outlawed arbitrary detention, forced labor, debt bondage, forced marriage and the sexual exploitation of women and children.\textsuperscript{72} International criminal law has further recognized human trafficking as a contemporary form of slavery that violates human rights. ICTY noted in \textit{Kunarac} that “trans border trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights.\textsuperscript{73} The ICTY further stated that indications of enslavement include exploitation such as “forced or compulsory labour or service, often without remuneration and often, though not necessarily involving physical hardship, sex, prostitution and human trafficking”.\textsuperscript{74} Furthermore, slavery, servitude and forced labor are prohibited in several major human rights instruments. For instance, the ICCPR states that slavery and the slave trade in all their forms shall be prohibited.\textsuperscript{75}


\textsuperscript{71} Ibid

\textsuperscript{72} UN Human Rights Office of the High Commissioner, \textit{Fact Sheet No. 36 on Human Rights and Human Trafficking}, 2014, p. 4.

\textsuperscript{73} Prosecutor v Kunarac, Kovac and Vukovic, Judgement of 22 February 2001, Case No IT 96-23-T and 23/1, at para. 536.

\textsuperscript{74} Ibid, at para. 542.

\textsuperscript{75} ICCPR, Article 8.
Similar prohibition of human trafficking exists in European human rights law. The EU Charter of Fundamental Rights, Article 5(3), prohibits trafficking in human beings. Human trafficking has also been recognized to violate several human rights protected by the ECHR. The ECtHR has concluded that human trafficking as defined in Article 3(a) of the Trafficking Protocol falls within the scope of Article 4 of the ECHR. Article 4 of ECHR provides that “no one shall be held in slavery or servitude and that no one shall be required to perform forced or compulsory labour”. The ECtHR acknowledged in Rantsev, the clear links between slavery and human trafficking by for instance referring to the ILO Forced Labour Convention in which Article 2(1) states that forced labour includes “all work or service which is exacted from any person under the menace of any penalty and for which the sad person has not offered himself voluntarily”. The ECtHR has further recognized that human trafficking due to its nature and exploitative aim, can be associated to ownership and referred to the ICTY’s analysis on similar practices to slavery.

States’ positive obligations under the ECHR with regard to trafficking are elaborated on in Rantsev. The case involved a Russian national, named Oxana Rantseva who had arrived in Cyprus with a visa to work as an “artiste” in a cabaret. She was later found dead. In the days leading up to her death, Rantseva had tried to leave her work place. When her employer had found out that Rantseva was trying to leave, he had reported her to the police and requested that she would be arrested and deported as she was residing in the country illegally. However, the police and migration department refused to take Rantseva and instead left her in the custody of her employer. A short time after, Rantseva was found dead outside the residence of one of the other employees. There were strong suspicions that Rantseva had been brought to Cyprus to force her into prostitution and that this had been the reason why she had been trying to leave her work. Despite these suspicions the police never investigated the matter. The ECtHR held in Rantsev that Cyprus had violated Article 4 of the ECHR by establishing a visa system that facilitated prostitution and trafficking across national borders. Furthermore, its was

77 ECtHR, Rantsev v. Cyprus and Russia, at para. 282.
80 See ECtHR, Rantsev v. Cyprus and Russia
also concluded that the police had failed to provide adequate protection to Rantseva, by leaving her in the custody of her employer. The ECtHR also held that Russia had violated Article 4, due to its failure to investigate the circumstances regarding why Rantseva had travelled to Cyprus.

The ECtHR’s decision established a more detailed overview of States’ positive obligations under the ECHR with regards to trafficking in persons. Firstly, the ECtHR held that the safeguards set out in national legislation must be adequate enough to ensure practical and effective protection of actual and potential victims of trafficking. Thus, in addition to criminal law measures to punish traffickers, States also have an obligation to put in place adequate measures to regulate businesses often used as a cover for human trafficking.⁸¹ Although the State has a duty to penalize and prosecute trafficking, these obligations must also be seen in the broader context of preventing trafficking and protecting victims.⁸² For instance, States’ obligation to protect actual and potential victims of trafficking may require States to take operational measures due to the circumstances in a particular case.⁸³ Moreover, Article 4 of the ECHR also imposes a procedural obligation on States to investigate situations of potential trafficking.⁸⁴

In Rantsev, the ECtHR confirmed that Article 4 of the ECHR imposes obligations on States to prosecute and penalize anyone who engages in an act of trafficking, which include enacting effective national legislation to that aim. However, the ECtHR also recognized that State obligations under Article 4 extends beyond criminal law measures and must include significant measures to protect actual victims of trafficking and those at risk of being trafficking in the future.⁸⁵ The ECtHR emphasize that this include adopting measures to regulate the operation of businesses that function as a cover for trafficking in persons.⁸⁶ Moreover, States are also obligate under some circumstances to

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⁸¹ ECtHR, Rantsev v. Cyprus and Russia, at para. 284.
take protective and preventive measures directly aimed at an individual situation where a person is trafficked or at risk of being trafficked in the future.  

2.3.3 Conclusion

As established above, international law imposes quite extensive positive obligations on States with regards to trafficking in persons. UNTOC together with the Trafficking protocol impose positive obligations on States to criminalize and punish trafficking, as well as to provide protection for trafficking victims and take measures to prevent trafficking. International human rights law further recognizes that human trafficking violates human rights, which triggers States’ obligations to protect, respect, and ensure human rights. This includes providing protection of individuals’ human rights from the interference by third parties such as other private individuals or entities. It has also been recognized that States’ duty to protect human rights from the interference by third parties also includes businesses and other private enterprises. It is thus clear that States’ positive obligations under international law with regards to trafficking also include taking actions against corporations. The question remains though whether such actions should include imposing corporate criminal liability for trafficking offences. In order to determine this, a closer examination of States’ positive obligations regarding trafficking in persons is needed.

3 Criminalizing Trafficking

3.1 Introduction

International law recognizes that States’ positive obligations with regard to trafficking include criminalizing trafficking at domestic level.  


88 See Trafficking Protocol, Article 5; The European Trafficking Convention Article 18; and CEDAW Articles 2 and 6.
criminalization of trafficking is thus seen as a necessary component in any national or international response to end impunity for traffickers.\textsuperscript{89} It is also seen as a prerequisite in order for States to provide the necessary structures to investigate, prosecute and adjudicate cases of trafficking to the required standard of due diligence under international law.\textsuperscript{90} Hence, international law makes is clear that a State’s failure to criminalize trafficking is also a failure to provide adequate protection for victims and preventing future occurrences of trafficking and thus is considered a breach of its international obligations. This section will examine the scope and nature of States’ obligation to criminalize trafficking and whether it infers an obligation on States to ensure corporate accountability for trafficking in the form of corporate criminal liability for trafficking offences.

3.2 The ‘Criminalization Requirement’

The Trafficking Protocol imposes an explicit obligation on States to criminalize trafficking in persons. Article 5 (1) of the Trafficking Protocol requires States to adopt legislation and other necessary measures in order to criminalize the conduct of trafficking as defined under Article 3 in the Trafficking Protocol. States are also required to criminalize attempt and complicity to such conduct.\textsuperscript{91} Complicity in trafficking includes participating as an accomplice, as well as organizing or directing another person to commit a trafficking offense.\textsuperscript{92} The criminalization of trafficking must be established through legislation, but may in addition also include other State measures.\textsuperscript{93} Although the criminalization requirement under the Trafficking Protocol does not imply an obligation to reproduce the exact text of the trafficking definition, its core features must be included. Moreover, the language used in national criminal law provisions on trafficking in persons must be interpreted in a manner that is consistent with the meaning and intention of the Protocol.\textsuperscript{94} The criminalization of trafficking in States’ domestic legal systems must also be independent of a transnational element or

\textsuperscript{89} UN Human Rights Office of the High Commissioner, \textit{Commentary on UN Recommended Principles and Guidelines on Human Rights and Human Trafficking}, 2010, p.185

\textsuperscript{90} Ibid.

\textsuperscript{91} Trafficking Protocol, Article 5(2) (a)- (c).

\textsuperscript{92} Trafficking Protocol Article 5(2) (b)-(c).

\textsuperscript{93} Legislative Guide, Part II, at para. 45(c).

\textsuperscript{94} Ibid, Part II, at para. 45(e) - (f) and 46.
the perpetrator being an organized criminal group.\textsuperscript{95} Since trafficking in persons can occur within the borders of a country as well as transnational, a mandatory transnational element would only limit the scope of the trafficking offense. Criminal law provisions on trafficking in persons should also not be limited to acts of organized criminal groups but apply to other perpetrators as well. The requirement to criminalize trafficking in persons can also be found in the European Trafficking Convention and the EU Trafficking Directive.\textsuperscript{96}

International human rights law also requires States to criminalize trafficking in persons. As already noted, international human rights law impose obligation on States to protect, respect and ensure human rights. Thus, a failure to criminalize trafficking would not provide the structures needed for State agencies to investigate, prosecute and adjudicate cases of trafficking as required by the State’s duty to protect human rights under international law.\textsuperscript{97} Several international human rights law treaty bodies have further recognized the requirement for States to criminalize trafficking. For instance, CEDAW is considered to infer an obligation on States to criminalize trafficking in women.\textsuperscript{98} The UN General Assembly has further called upon States to criminalize all forms of trafficking.\textsuperscript{99} It has further been recognized that States that fail to criminalize trafficking do not comply with their obligation to protect actual and potential victims from trafficking.\textsuperscript{100} In conclusion, the criminalization of trafficking should be considered as a prerequisite in order for States to fulfill their positive obligations under international human rights law.

The argument can be made that the criminalization requirement arising from States’ positive obligations under international human rights law extends to other conducts and practices that are commonly associated with trafficking as well. It should be noted that

\textsuperscript{95} Legislative Guide, Part II, at para 45(a)-(b).

\textsuperscript{96} European Trafficking Convention, Article 18; and EU Trafficking Directive, Article 2 and 3.

\textsuperscript{97} UN Human Rights Office of the High Commissioner, \textit{Fact Sheet No. 36 on Human Rights and Human Trafficking}, p. 34.

\textsuperscript{98} CEDAW, Articles 2 and 6; see also Human Rights Office of the High Commissioner, \textit{Commentary on UN Recommended Principles and Guidelines on Human Rights and Human Trafficking}, 2010, p. 186.


\textsuperscript{100} UN Human Rights Office of the High Commissioner, \textit{Fact Sheet No. 36 on Human Rights and Human Trafficking}, p. 34.
human trafficking may implicate a wide range of prohibited acts under international human rights law such as slavery, servitude, debt bondage, forced labor and forced marriages among others.\textsuperscript{101} Some of these acts are prohibited by customary international law and are therefore applicable to all States. In other cases, a State might have other international treaty obligations that require the prohibition of trafficking related practices.\textsuperscript{102} For instance, trafficking in persons has been recognized as a form of violence against women, which violates a wide range of women’s rights protected under international law.\textsuperscript{103} The Committee of Ministers of the European Council has stated that violence against women includes trafficking, which violates and infringes on women’s enjoyment of their human rights.\textsuperscript{104} Consequently, it is arguable that States’ failure to criminalize related practices to trafficking may amount in a breach of States’ human rights obligations. This view is also reflected in relevant ‘soft law’ instruments, stating that the criminalization requirement also should apply to the component acts of trafficking and other related conduct.\textsuperscript{105} Related conduct to trafficking is identified as practices covered by the definition of trafficking such as debt bondage, forced labour and enforced prostitution.\textsuperscript{106} Moreover, it is also arguable that related offences that are a common feature of trafficking situations such as rape, physical and sexual assault, unlawful detention and other similar acts should be criminalized.\textsuperscript{107} Thus, it is fair to conclude that States’ obligations under international human rights law may require the criminalizing of related conducts to trafficking as well and therefore goes beyond the explicit requirement to criminalize the act of trafficking.

The requirement to criminalize trafficking is also recognized in European human rights law. Article 18 in the European Trafficking Convention holds that States shall adopt the necessary legislative measures to criminalize the conduct of trafficking as defined under

\textsuperscript{102} Ibid.
\textsuperscript{103} UN General Assembly, \textit{Declaration on the Elimination of Violence against Women}, 20 December 1993, (A/RES/48/104), Article 2(b) ; UN General Assembly, \textit{In-depth study on all forms of violence against women: report of the Secretary-General}, 6 July 2006, (A/61/122/Add.1) at para. 119.
\textsuperscript{104} See Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence.
\textsuperscript{106} Ibid, Guideline 4.1.
\textsuperscript{107} Ibid.
Article 4 of the convention. Moreover, Article 21 extends the criminalization requirement to include attempt, aiding or abetting the commission of trafficking. The obligation to criminalize trafficking has also been recognized by the ECtHR. Article 4 of the ECHR was interpreted by the ECtHR in Siliadan, where it held that States have positive obligations under the convention to adopt criminal law provisions, to penalize practices referred to in Article 4 of the ECHR and to apply them in practice.\textsuperscript{108} In Rantsev, the Court confirmed that States’ obligations under Article 4 of the ECHR include adopting criminal law measures to punish traffickers. Moreover, it held that States’ obligations goes beyond criminal measures and must also ensure practical and effective protection of victim’s rights or potential victims of trafficking.\textsuperscript{109}

In conclusion, international law imposes an explicit criminalization requirement as set out in the UNTOC together with the Trafficking Protocol as well as the European Trafficking Convention. This explicit criminalization requirement is further reflected in the EU Trafficking Directive. However, States’ obligations under international human rights law also imply a requirement to criminalize trafficking in persons but also other related conducts and practices associated with trafficking as well. The question remains as to whether the criminalization requirement of trafficking offences should result in criminal liability for legal persons such as corporations.

### 3.3 Corporate Accountability for Trafficking

The Trafficking Protocol recognizes that the criminalization of trafficking must result in liability for both natural and legal persons.\textsuperscript{110} The UNTOC provides that States who are or will become parties to one of its protocols must adopt measures to ensure liability of legal persons for offenses in the additional protocols.\textsuperscript{111} Hence, UNTOC with reference to the Trafficking Protocol requires States to ensure liability of legal persons for the trafficking offences under Article 5 and Article 3 of the Trafficking Protocol. Moreover, the UNTOC holds that Member States do not exclude criminal proceedings against

\textsuperscript{108} ECtHR, Siliadan v. France, Application No. 73316/01, Judgment of 26 October 2005, at para. 89.
\textsuperscript{109} ECtHR, Rantsev v. Cyprus and Russia, at para. 284.
\textsuperscript{110} Legislative Guide, Part II, at para. 36.
\textsuperscript{111} See UNTOC, Article 10; and Trafficking Protocol, Article 1 (3).
natural persons as well when holding legal persons liable for trafficking offences. Although the UNTOC requires States to ensure liability of legal persons for trafficking, it does not require the liability of legal persons to be ‘criminal’. States are allowed the discretion to decide whether liability of legal persons should be criminal, civil or administrative. It is thus arguable that the UNTOC does not enforce a requirement for legal persons to be held ‘criminal’ liable under the State’s criminal law authority for trafficking offences. The reason for allowing such discretion stems from the fact that States have different views on whether criminal liability can be applied to legal persons at all. In some States only natural persons are considered to liable for committing criminal offences since legal persons do not have the proper mind to have a criminal intent, which is a requirement for criminal liability. However, corporations predominant and influential role in society, has led to it becoming more accepted that legal persons can be held criminal liable for offences as well. Despite this, the legal stand on criminal liability for legal persons still differs among Member States. In States where corporate criminal liability is not recognized, alternative forms of liability such as administrative and civil liability are often used to enforce corporate accountability. Whereas in States that do recognize criminal liability of legal person, the crimes that can give rise to such liability are often limited. While some Member States have extended all criminal offences to legal persons, others only allow certain specific offences.

The analysis above makes it clear that the UNTOC with reference to the Trafficking Protocol requires States to ensure liability of legal persons for trafficking offences established under the Trafficking Protocol. However, this requirement does not need to result in criminal liability of legal persons in the sense that legal persons are held liable under the State’s criminal law framework. Instead, the UNTOC allows States to ensure liability in other forms as long as they ensure some sort of liability for the criminal offences of trafficking. The UNTOC does not indicate any preference for imposing criminal liability of legal persons in order for States to fulfill their obligation under

113 See UNTOC, Article 10.
117 Ibid, p. 79.
Article 10. Instead it acknowledges that there are various different ways in which States can ensure liability of legal persons in their domestic legal systems.\textsuperscript{118} It is also important to note that the obligation under the UNTOC for States to ensure corporate liability is open to modifications by States. The Trafficking Protocol includes a \textit{saving clause} recognizing that nothing in the protocol should affect States’ rights, obligations, and responsibilities under international law, including international human rights law.\textsuperscript{119} The aim of the savings clause is to ensure that the provisions in the Trafficking Protocol do not diminish or hamper other State obligations under international law but should only have a complementary function.\textsuperscript{120} Thus, the provisions obligating States to criminalize trafficking and ensure liability of legal persons under the UNTOC and the Trafficking Protocol are subject to modification with regards to State obligations under other international law instruments. Accordingly, in order to determine the exact scope of Member States’ obligations under international law to criminalizing trafficking and ensure liability of legal persons for trafficking, it is necessary to examine other international instruments on the matter as well.

As already noted, States have a duty to protect the enjoyment of human rights under international human rights law from the interference of third parties, which includes private entities such as businesses and corporations.\textsuperscript{121} Moreover, several international human rights treaty bodies have addressed the obligation to ensure corporate accountability for human rights violations. The UN Committee on Economic, Social and Cultural Rights held that States have a primary obligation to respect, protect and fulfill the Covenant rights of all persons under their jurisdiction in the context of corporate activities.\textsuperscript{122} This principle was further supported by the UN Guiding Principles on Business and Human Rights in 2011, where it held that States must protect and prevent human rights abuses within their territory by business enterprises, which requires taking appropriate steps to prevent investigate, punish and redress abuse.

\begin{footnotes}
\item[118] Legislative Guide, Part I, at para 247.
\item[119] Trafficking Protocol, Article 14.
\item[120] Legislative Guide, Part II, at para. 19.
\item[121] See section 2.3.2.1
\item[122] UN Committee on Economic, Social and Cultural Rights, \textit{Statement on the obligations of State Parties regarding the corporate sector and economic, social and cultural rights}, 12 July 2011, (E/C.12/2011/1), at para. 3.
\end{footnotes}
thought effective policies, legislation, regulations and adjudication.\textsuperscript{123} Although States have the discretion to choose what measures to take in order to fulfill this duty, both regulation and adjudication of corporate activities are considered as appropriate measures.\textsuperscript{124} Moreover, the UN Human Rights Council has stressed that States have a responsibility to promote and protect human rights, and the fact that corporations can contribute to the enjoyment of established human rights.\textsuperscript{125} The UN Human Rights Council has also urged States to impose sanctions against legal entities involved in trafficking, as a necessary step to condemn and penalize all traffickers, including facilitators and intermediaries of trafficking.\textsuperscript{126}

States’ obligation to ensure corporate accountability with regards to trafficking, are further addressed in European human rights law. Article 22 of the European Trafficking Convention requires States to establish liability of legal persons for trafficking in the form of criminal, civil and administrative liability. The legal stand of the European Trafficking Convention regarding corporate liability for trafficking is to a greater extent consistent with the UNTOC and the Trafficking Protocol. However, the Explanatory Report to the European Trafficking Convention suggests that the discretion afforded to States to choose between administrative, civil or criminal liability of legal persons is not absolute. Any form of corporate liability must comply with the requirements in Article 23(2), namely that liability of legal persons must be subject to effective, proportionate and dissuasive sanctions.\textsuperscript{127} Accordingly, it could be argued that the European Trafficking Convention clarifies that the form of liability imposed on corporations is not important, as long as it ensures that sanctions following when a legal persons is held liable for trafficking fulfill the standard of being effective proportionate and dissuasive.


\textsuperscript{125} See UN Human Rights Council, Mandate of the Special representative of the Secretary –General on the issue of human rights and transnational corporations and other business enterprises, 18 June 2008, (A/HRC/RES/8/7)

\textsuperscript{126} UN Human Rights Council, Trafficking in persons, especially women and children, 17 June 2009, (A/HRC/RES/11/3), at para. 3(b).

This interpretation is further consistent with the ECtHR statement in *Rantsev* regarding States’ positive obligation under Article 4 of the ECHR. In *Rantsev*, the ECtHR held that Article 4 of the ECHR requires Member States to put in place adequate measures to regulate businesses that cover operations of trafficking in persons. However, the ECtHR did not elaborate further on whether criminal measures must amount in criminal liability of legal persons or if adequate measures to regulate businesses must be of criminal nature. Even so, it is fair to conclude that States are obligated under international law to take measures against corporations and that such measures must amount in an adequate standard of protection for actual and potential victims of trafficking. When considering the provisions on corporate liability in the UNTOC and the European Trafficking Convention, it could further be argued that liability of legal persons resulting in sanctions that are effective, proportionate and dissuasive is necessary in order to States to be considered as to provide adequate protection.

The EU Trafficking Directive also includes provisions regarding liability of legal persons for trafficking offences. As stated in Article 1, the EU Trafficking Directive establishes minimum rules for the criminalization of trafficking. The criminalization requirement, set out in Article 2 of the EU Trafficking Directive, complies with that of the Trafficking Protocol, and also extends the scope of criminalization in Article 3, to include the act of inciting, aiding, abetting and attempt to trafficking. Moreover, Article 5 of the EU Trafficking Directive requires States to take all necessary measures to ensure that legal persons can be held liable for trafficking offences in Article 2 and 3. Article 6 provides that necessary measures to ensure liability of legal persons pursuant to Article 5 can include criminal or other non-criminal sanctions, but must be effective, proportionate and dissuasive. Thus, the EU Trafficking Directive takes an identical stand as to the European Trafficking Convention, and does not require the liability of legal persons to be criminal, but allow Member States to decide the form of corporate liability. Moreover, similar to the European Trafficking Convention, Article 6 of the EU Trafficking Directive also provides that liability of legal person must be subject to sanctions that are effective, proportionate and dissuasive.

It is important to note that the EU Trafficking Directive imposes minimum rules for Member States regarding the criminalization of trafficking. Consequently, if

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international law would impose obligations on Member States to criminalize trafficking beyond the criminalization requirement provided under the EU Trafficking Directive, such actions would be consistent with Member States’ obligations under the EU Trafficking Directive. Article 1 of the EU Trafficking Directive recognizes that human trafficking is a violation of fundamental rights protected under the Charter and that the directive aims to adopt a human rights approach to combat trafficking in persons. It is further stated that the EU Trafficking Directive respects the rights in the EU Charter of Fundamental Rights with reference to Article 5(3), which explicitly prohibit trafficking in human beings. Thus, it is fair to argue that the EU Trafficking Directive aims to reflect the already existing legal framework of international law with regards to corporate liability for trafficking offences.

3.4 Liability of Legal Persons for Trafficking Offences

3.4.1 Introduction

The analysis above establishes that Member States have a legal obligation under international law to criminalize trafficking in persons, which is also reflected in the EU Trafficking Directive. Moreover, Member States are also obligated to ensure corporate liability for trafficking. However, this obligation does not require Member States to ensure that the liability of legal persons is ‘criminal’, instead Member States are allowed to choose between administrative, civil or criminal liability. The remaining question is how Member States are to fulfill their obligation to ensure liability of legal persons for trafficking. For instance, factors such as what is defined as a ‘legal person’, how a trafficking offence is attributed to a legal person, as well as which trafficking offences that can be attributable to a legal person, will all have a fundamental impact on the extent to which corporate liability for trafficking is made possible in Member States’ domestic legal system. Thus, in order to determine the exact scope of States’ obligation to ensure corporate liability for trafficking it is necessary to examine these aspects further.
3.4.2 Defining ‘legal person’

How a ‘legal person’ is defined in Member States’ domestic legal systems will have a great impact on the scope for which corporations can be held liable for trafficking. Currently, diversity exists among Member States’ domestic legal systems with regards to this matter. For instance, some Member States do not consider public entities to be legal persons. There are also differences as to whether legal persons encompass both multiple and single ownership, and how parent-daughter constructions are addressed. International legal instruments on trafficking do not elaborate on how to define ‘legal person’. However, the EU Trafficking Directive defines ‘legal person’ in Article 5 (4) as “any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organizations”. This definition is consistent with other EU approximation instruments. The same definition of legal persons has also been adopted in Conventions by the European Council. However, it should be noted that no definition of ‘legal person’ is included in the European Trafficking Convention. Thus, it is questionable whether the definition of ‘legal person’ as stated in the EU Trafficking Directive reflects international law.

When considering States’ obligation to ensure corporate accountability for trafficking under international human rights law, there is nothing that indicates that public corporations should be excluded. Instead, it is arguable that States even have an obligation to take actions against public legal persons in order to respond adequately to public sector corruption and complicity to trafficking, which is considered as a mandatory part of States broader duty to prevent trafficking. The European Convention on trafficking further recognizes public sector complicity in trafficking as aggravated circumstances. It could thus be argued that international law require a wider definition of ‘legal person’ with regards to liability of legal persons for trafficking offences than provided for in the EU Trafficking Directive. The wider definition of

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131 Ibid, p. 20.
133 UN Human Rights Office of the High Commissioner, Fact Sheet No. 36 on Human Rights and Human Trafficking, p. 47.
134 European Trafficking Convention, Article 24.
‘legal person’ would further be consistent with State practice, which shows that many Member States apply liability to public legal persons.\textsuperscript{135}

From a legal standpoint, the fact that the EU Trafficking Directive applies a definition that excludes public legal persons from States’ obligations under the directive does not conflict with a wider obligation under international law. As already noted, the EU Trafficking Directive provides minimum rules, which allow Member States to take measures to ensure a wider scope of liability of legal persons if international law would require it. The EU Trafficking Directive’s limited definition of legal persons can further be explained by the EU’s tendency to adopt similar definitions of general concepts in all of their approximation instruments. It is nevertheless arguable that the exclusion of public legal person in the EU Trafficking Directive’s definition of ‘legal person’ could lead to some confusion and thus undermine Member States’ obligation under international law to ensure liability of legal persons for trafficking to an adequate standard.

3.4.3 Attribution Models

Although UNTOC, with reference to the Trafficking Protocol, requires States to establish liability of legal persons for trafficking, it fails to specify how an act of trafficking can be attributable to a legal person. However, regional human rights instruments include some details as to how States could attribute an act of trafficking to a legal person. For instance, Article 22 (1) of the European Trafficking Convention specifies that States must ensure liability of legal persons for a trafficking offence “committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person”. Moreover, Article 22 (2) of the European Trafficking Convention holds that States should ensure that a legal person also can be held liable where the lack of supervision or control by a natural person referred to in subsection (1), has led to the commission of a trafficking offence, for the benefit of the legal person, by a natural person acting under its authority. Hence, liability under Article 22(2) require the following elements: 1) the trafficking offence was committed by an employee or an agent of the legal entity; 2) the offence was committed for the legal entity’s benefit; and 3) the commission of the

\textsuperscript{135} Vermeulen, G., De Bondt, W., Ryckman, C., \textit{Liability of legal Persons for Offences in the EU}, p. 22.
offence was made possible by the leading person’s failure to supervise the employee or agent. The “failure to supervise” element could include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity’s behalf. Whether the leading person had taken appropriate and reasonable steps should further be determined by factors such as the type of business in question, its size, and relevant regulations on good practice in force. The same can be found in Article 5(1) and (2) of the EU Trafficking Directive.

In conclusion, both the European Trafficking Convention and the EU Trafficking Directive require Member States to at a minimum adopt an attribution model where the liability of a legal person is based on the trafficking offence committed by a natural person. Hence, the prescribed attribution model allows for the act of trafficking and guilt of a natural person to be attributed to a legal person. However, the attribution model prescribed in the European Trafficking Convention and the EU Trafficking Directive also allows Member States to include elements that can restrict the scope of liability of legal persons. For instance, Member States could exclude acts by employees from being attributed to the legal person by requiring the employee to act within the activities of the company or acting for the benefit of the company, in order for liability to be attributed. Another restriction could be to limit liability to acts of natural persons in ‘leading positions’. Such restriction is only partly allowed in both the European Trafficking Convention and the EU Trafficking Directive. However, both frameworks require Member States to ensure liability of legal persons for trafficking offences committed by all employees if such acts were enabled by a lack of control or supervision by a person in a leading position within the company.

The attribution model prescribed in both the European Trafficking Convention and the EU Trafficking Directive reflects an open approach concerning Member States’ obligations to ensure liability of legal persons for trafficking. This approach is further reflected in current State practice as Member States apply various attribution models.

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138 See European Trafficking Convention, Article 22 (1); and EU Trafficking Directive, Article 5(1).
139 See European Trafficking Convention, Article 22 (2); and EU Trafficking Directive, Article 5(2).
regarding liability of legal persons in their domestic legal systems. In general, there are four types of attribution models that can be identified among Member States: 1) vicarious liability model; 2) identification model; 3) aggregation model; 4) organizational model.\textsuperscript{140} Some Member States do not apply one model fully when establishing liability of legal persons, but apply different elements from several attribution models.\textsuperscript{141} The attribution model reflected in the European Trafficking Convention and the EU Trafficking Directive could be identified as a version of the \textit{identification model}. This attribution model provides that only managers and employees with certain responsibilities can result in liability for the legal person. Hence, only members of the personnel, who due to their position have the proper mind, can lead to liability for the legal person.\textsuperscript{142} However, the vicarious liability model goes a step further. Although varieties exist, the \textit{vicarious liability model} is based on the idea that any misconduct by the legal persons’ employees will lead to legal responsibility if the act was taken for the benefit of the company and/or within its operations.\textsuperscript{143} In both the vicarious liability model and the identification model, the natural person committing a trafficking offence must be identified.\textsuperscript{144} Although the application of these attribution models indeed would ensure liability of legal persons for trafficking offences to some extent, the question remains whether there are other attribution models that would widen the scope of corporate liability even further.

It is arguable that other forms of attribution models could be better suitable to ensure corporate liability for trafficking offences. For instance, it is arguable that States should consider establish liability not only for persons who have acted on behalf of an corporation, or who is acting in an executive capacity, but for actions by the corporation itself. This could be achieved by applying the aggregation model or the organizational model. In contrast to the attribution models above, the \textit{aggregation model} takes into consideration the combined behavior of several persons that lead to the offence.\textsuperscript{145} Hence, the thoughts of different agents/employees of the legal person are linked and creates the necessary element to establish corporate liability for an offence. Some would interpret that the aggregation model depends on the identification of a certain corporate

\textsuperscript{140} Vermeulen, G., De Bondt, W., Ryckman, C., \textit{Liability of legal Persons for Offences in the EU}, p. 50.

\textsuperscript{141} Ibid.

\textsuperscript{142} Ibid, p. 59.

\textsuperscript{143} Ibid, p. 58

\textsuperscript{144} Ibid, p. 59.

\textsuperscript{145} Ibid, p. 60.
culture that resulted in the act or omission of the offence in question.\footnote{Ibid.} Factors such as whether the company took sufficient organizational measures to avoid the offence could then be taken into account.\footnote{Ibid.} This model is to some extent similar to the \textit{organizational model}, which is based on the notion that a legal person has a self-identity independent from the behavior of individuals and can therefore be held directly liable for crimes.\footnote{Ibid, p. 61.} The organizational model relies on the idea that a legal entity exists on itself and can commit crimes without the involvement of the acts of natural persons.\footnote{Vermeulen, G., De Bondt, W., Ryckman, C., \textit{Liability of legal Persons for Offences in the EU}, p. 61.} For instance in Austria, a form of the organizational model has been established within its criminal law framework to ensure liability for legal persons. Thus criminal liability of legal persons is established when the offence is a result of deficits in the organizational structure of the legal person or its business ethics.\footnote{Lehner, A., “The Austrian Model of attributing criminal responsibility to legal entities”, pp. 79-86 in Brodowski, D., Espinoza De Los Monteros De La Parra, M., Tiedemann, K., Vogel, J., (ed): \textit{Regulating Corporate Criminal Liability}, Springer, 2014, p. 80.}

Although, the organizational model in theory might seem to be preferable in order to ensure liability of legal persons for criminal offences, it is questionable whether this is also the case in practice. Some argue that the organizational model is preferable since it ensures a wide scope of liability for legal persons while also accurately reflecting corporations’ responsibility for criminal conduct within their operations. However, others argue that the model ensures liability of legal persons that is too wide and is characterized with uncertainty.\footnote{Vermeulen, G., De Bondt, W., Ryckman, C., \textit{Liability of legal Persons for Offences in the EU}, p. 61.} Nevertheless, it is clear that the organizational model would ensure corporate liability for trafficking offences to a wider extent than the identification model. It is thus arguable, that the organizational model as a minimum standard for States to ensure corporate liability for trafficking offences might better deter corporations’ involvement in trafficking. Studies further indicate that States applying the identification model have not been particular successful in preventing corporations involvement in criminal conduct. The reason for this seems to stem from the fact that the identification model tend to focus on the actions of employees and does not take into account the corporate culture that might influence the employees.
Thus it is questionable whether the identification model prescribed by the European Trafficking Convention and the EU trafficking Directive is suitable as a minimum standard to ensure liability of legal persons and thereby effectively deter corporations from engaging in criminal conduct such as trafficking.

The analysis above shows that the choice of attribution model has a great impact on to what extent Member States will ensure liability of legal persons for trafficking offences. As already established, the identification model limits corporate liability to acts of certain individuals within the corporation. It is therefore important to determine whether the identification model as prescribed by the European Trafficking Convention and the EU Trafficking Directive should be seen as a mandatory requirement or only a minimum standard. Unfortunately, neither the European Trafficking Convention nor the EU Trafficking Directive offers any clarification on this matter. However, when considering the fact that Member States currently apply other attribution models to ensure liability of legal person in their domestic legal systems as well, it is arguable that the identification model should be considered as a minimum standard.

3.4.4 ‘Participation’ of Trafficking

The scope of States’ obligation to ensure corporate liability for trafficking is dependable on which trafficking offences that could be attributed to a legal person. As already noted, States are obligated by international law to criminalize trafficking in their domestic legal systems. This includes criminalizing the act of trafficking in accordance with the international definition as well as some forms of participation of trafficking. In order to fully determine the scope of States’ obligation to ensure corporate liability for trafficking it is thus essential to examine to what extent this obligation extends to forms of participation in trafficking. Whether legal persons can be held liable for ‘participation’ of trafficking is also of interest since this may extend corporate liability to encompass trafficking in corporations’ supply chains. The following analysis will focus on acts of aiding, abetting and incitement of a trafficking offence as modes of ‘participation’. However, States’ ‘participation’ in terms of using the services and goods provided by trafficking victims will be examined in the next chapter.

152 Engelhart, M., Corporate Criminal Liability from a Comparative Perspective, p. 61.
Article 10 of the UNTOC requires States to ensure liability for legal persons for offences established under the Trafficking Protocol.\textsuperscript{153} Article 5 (2) of the Trafficking Protocol further requires States to criminalize participation in trafficking. Accordingly, States are obligated to criminalize participation as an accomplice, as well as the act of organizing or directing other persons to commit a trafficking offence.\textsuperscript{154} However, neither UNTOC nor the Trafficking Protocol elaborates further on to what extent these forms of participation need to be criminalized. The requirement to criminalize forms of participation in trafficking and to ensure corporate liability for such offences is also recognized in the European Trafficking Convention. Article 21 (1) requires States to criminalize the act of aiding or abetting the commission of trafficking, when such act has been committed intentional. The Explanatory Report further provides that liability for aiding or abetting arises when a person, who commits a trafficking offence under the Convention, is aided by another person who also intends the crime to be committed.\textsuperscript{155} However, the European Trafficking Convention does not further elaborate on what is meant by ‘aiding’ another person or how to determine if the person aiding ‘intended’ for the trafficking offence to be committed. Some guidance might be found in international criminal law jurisprudence which indicates that the relevant standard for aiding and abetting is “knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime”.\textsuperscript{156} Accordingly, it could be argued that States have an obligation to at a minimum criminalize aiding and abetting if such act was committed with the intent that another person would commit a trafficking offence. Article 22 (1) of the European Trafficking Convention further provides that States “shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention”. However, it is important to stress that the provisions providing for the identification model as the minimum standard to ensure corporate liability for trafficking offences, as seen in both the EU Trafficking Directive and the European Trafficking Convention, apply for the participatory trafficking offences as well. Thus, Member States’ legal obligation under international law to ensure liability of legal persons for participation of trafficking is quite limited. However, it is important to keep

\textsuperscript{154} Trafficking Protocol, Article 5 (2) (b) and (c).
\textsuperscript{155} Explanatory Report, at para. 244.
in mind that States’ obligations under the European Trafficking Convention to
criminalize participation of trafficking as well as to ensure corporate liability for such
participatory trafficking offences are also to be considered as a minimum standard.
Thus, States are allowed to provide for a more extensive criminalization of participation
in trafficking and corporate liability in their domestic legal system if desired.

The EU Trafficking Directive also includes provisions similar to the European
Trafficking Convention, obligating Member States to ensure corporate liability for
participation of trafficking. However, there are some differences that could be
considered noteworthy as to the scope of corporate liability for participatory trafficking
offences. Article 3 of the EU Trafficking Directive requires Member States to take
measures to ensure that incitement, aiding, abetting of a trafficking offence, as
established under the directive, is punishable. The participation form of ‘inciting’ is
additional to the forms of aiding and abetting included in the European Trafficking
Convention. However, the EU Trafficking Directive does not either elaborate as to the
substantial content of the prescribed forms of participation such as inciting, aiding and
abetting, leaving it to the discretion of the Member States to decide such matter.
Another important distinction between the European Trafficking Convention and the
EU Trafficking Directive, with regards to liability of legal person for ‘participation’ of
trafficking, is the requirement of such act to be ‘intentional’. According to the European
Trafficking Convention, States only need to criminalize aiding and abetting of a
trafficking if such act was committed intentional. In contrast, Article 3 of the EU
Trafficking Directive does not mention ‘intentional’ as a requirement at all. It is
arguable that the European Trafficking Convention and the EU Trafficking Directive
leave it to the Member States to decide the substance of intent, or whether such element
even should be included in the legal construction for ‘participation’ of trafficking.
Article 5 of the EU Trafficking Directive further provides that Member States must
ensure that legal persons can be held liable for offences referred to in Article 3.
However, the EU Trafficking Directive does also prescribe the identification model as a
minimum standard for Member States to ensure corporate liability for trafficking.
Accordingly, this minimum standard applies to participatory trafficking offences
established under the directive as well. When comparing the provision in the European
Trafficking Convention with the EU Trafficking directive with regards to the
criminalization requirement of participatory trafficking offences and to ensure corporate
liability for such offences, it is fair to conclude that international law provides to some extent a more narrow scope that the EU Trafficking Directive. This is largely due to the fact that the EU Trafficking Directive also requires the criminalization of an additional form of participation, namely incitement, which is not reflected in the European Trafficking Convention. The EU Trafficking Directive also does not include a requirement of ‘intentional’ when requiring States to criminalize aiding and abetting.

From the conducted analysis, it is arguable that international law imposes a minimum standard on Member States to criminalize certain forms of participation in trafficking, and to some extent also ensure corporate liability for such offences. Moreover, international law allows States a wide discretion as to the scope and nature of the ‘intent’ element or whether such element should exist at all when establishing corporate liability for participation of trafficking. However, it is important to note that the inclusion and construction of the ‘intent’ element has a significant impact on the scope of corporate liability. As a general rule of criminal law, liability for a criminal act requires an element of ‘mens rea’, thus the act must have committed intentional or by negligence. In exceptional cases strict liability may be justified which do not require any element of ‘mens rea’. However, the application of strict liability in relation to corporations remains controversial.\textsuperscript{157} It is clear though the construction of the ‘mens rea’ element in which a States’ domestic law determines whether a legal person is culpable for participation in trafficking can make a significant difference as to the scope of corporate liability for trafficking. For instance, the ‘intent’ element could require that a corporation knew, should or could have known that it was doing business with subcontractors involved in trafficking.\textsuperscript{158} Especially in regards to whether legal persons can be held liable for participation of trafficking when trafficking occurs in corporations’ supply chains, which will soon be illustrated.

The importance of how the ‘intent’ element is applied with regards to liability of legal persons for participatory trafficking offences can be illustrated in the Belgium case


Carestel. In this case a restaurant-chain called Carestel had a contract with a German cleaning company while knowing that they exploited its personnel who were cleaning the restaurant’s restrooms. Consequently, the restaurant chain was convicted for complicity to trafficking in human beings. In the Carestel case, the corporation had been informed previously of an investigation against the subcontractor for violations of labor standards. This together with other factual circumstances such as unusual low contract cost and e-mail correspondence about concerns, were enough for the Court to conclude that the corporation was aware of the risk that the personnel were victims of trafficking but still chose to uphold business relations with the subcontractor. Another example can be found in Sweden, Switzerland and Italy, where the corporations’ guilt is presupposed, requiring corporations to show that they have taken all necessary and reasonable measures to prevent the commission of crimes by their employees. Such necessary measures include effective compliance programs or corporate codes of conduct or ethics. Hence, in this case the ‘intent’ element is one of neglect. Moreover, England, Spain and Czech Republic adopt a model where culpable acts by natural persons in legal positions within the company are attributed directly to the corporation. Thus, if a natural persons culpability can be established, this becomes attributed directly to the legal person. In conclusion, State practice show that Member States adopt varies elements of ‘intent’ for establishing corporate liability for participatory offences.

3.3 Conclusion

International law imposes an obligation on States to criminalize trafficking. This includes a specific requirement to criminalize the act of trafficking as reflected in the international definition as well as certain forms of participation in trafficking. It is also arguable that international human rights laws impose a wider requirement for States to criminalize related conducts of trafficking as well. The Trafficking Protocol recognizes

160 Ibid.
161 Ibid.
163 Ibid.
that the criminalization of trafficking should be followed by liability for both natural and legal persons. This is further confirmed by the UNTOC with reference to the Trafficking Protocol, providing that States are to ensure liability of legal persons for trafficking offences established under the Trafficking Protocol. This legal stand can further be seen as consistent with international human rights law’s stand on corporate accountability for human rights violations as also reflected in Rantsev by the ECtHR. However, the UNTOC does not require liability of legal persons to be criminal, but allows States the discretion to choose between administrative, civil and criminal liability. The main reason for this discretion was to facilitate that States’ obligation to ensure liability for legal persons would comply with those domestic legal systems that do not recognize ‘criminal’ liability of legal persons. In conclusion, although Member States are obligated by international law to ensure corporate liability for trafficking, they are not required to ensure that legal persons are held ‘criminal liable that such under the State’s criminal law system.

However, the UNTOC and its trafficking Protocol, as well as the ECtHR in Rantsev, fail to further elaborate on the required standard regarding corporate liability for trafficking. Some guidance on the matter could be found in the provisions of the European Trafficking Convention, which is also reflected in the EU Trafficking Directive. According to the European Trafficking Convention Member States’ obligation to ensure corporate liability for trafficking is not as extensive as for natural persons. Instead, Member States’ obligation to ensure corporate liability for trafficking is limited to a certain type of attribution model. This attribution model set out in the European Trafficking Convention and the EU Trafficking Directive could be considered as a minimum standard regarding Member States’ obligation under international law to ensure corporate liability for trafficking. However, due to nature of this minimum standard, Member States have a wide discretion in what form and to what extent corporate liability for trafficking is ensured in their domestic legal system. This conclusion is also consistent with the current State practice, which indicates that there are considerable differences in the manner Member States ensure corporate liability for trafficking.\textsuperscript{164}

4 Punishing Traffickers

4.1 Introduction

International law recognizes that States have an obligation to investigate, prosecute and adjudicate cases of trafficking. This includes an obligation to take legislative measures to ensure effective and proportionate criminal penalties for trafficking. The following section will examine the content and nature of States’ obligation under international law to punish traffickers and how it applies to legal persons such as corporations. Moreover, an analysis will be made as to whether States’ obligation under international law imply that criminal sanctions should be imposed against legal persons.

4.2 The ‘Sanction Requirement’

As already established, States are only obligated “to adopt such measures as may be necessary” to ensure liability of legal persons.\textsuperscript{165} Thus with regards to legal persons, the UNTOC allows States to choose whether such liability is criminal, civil or administrative”.\textsuperscript{166} However, States’ obligation to ensure corporate liability for trafficking offence also includes a sanction requirement, which obligates States to ensure that legal persons held liable for trafficking offences are subject to effective, proportionate and dissuasive sanctions.\textsuperscript{167}

International human rights law also recognizes that States have an obligation to sanction violations of established rights with regards to legal and natural persons. As already established, trafficking in persons is considered as a violation of protected human rights under international law. International law also recognizes that sanctions are an essential component of the national response to sanctions that are effective and proportionate.\textsuperscript{168} Several international treaty bodies have further reflected this view. For instance, the UN

\begin{footnotesize}
\textsuperscript{165} UNTOC, Article 10 (1).
\textsuperscript{166} UNTOC, Article 10 (2).
\textsuperscript{167} UNTOC, Article 10 (4).
\textsuperscript{168} UN Human Rights Office of the High Commissioner, \textit{Fact Sheet No. 36 on Human Rights and Human Trafficking}, p. 38
\end{footnotesize}
General Assembly and the UN Human Rights Council have both held that all States have an obligation to punish the offenders and intermediaries involved in trafficking.\textsuperscript{169} The UN Human Rights Council has also urged States to punish traffickers, facilitators and intermediaries, by imposing sanctions against legal entities that are involved in the process of trafficking.\textsuperscript{170} The UN General Assembly has further concluded that States have an obligation under international law to prevent and combat trafficking in persons by imposing proportionate punishments on perpetrators.\textsuperscript{171} CEDAW also provides that States have an obligation to impose sanctions.\textsuperscript{172} Moreover, the sanction requirement has also been recognized in the Recommended Principles and Guidelines on Human Rights and Human Trafficking, which state that effective and proportionate sanction must apply to legal persons found guilty of trafficking or related offences. This also includes, where appropriate, freezing and confiscation of the asset of individuals and legal persons involved in trafficking.\textsuperscript{173}

The sanction requirement is further reflected in the European Trafficking Convention. Article 23(2) of the European Trafficking Convention holds that liability of legal persons must be subject to effective, proportionate and dissuasive sanctions. The sanctions can be of criminal or non-criminal nature, but must include monetary sanctions. Article 23(3) also imposes a general obligation on States to adopt appropriate legal instruments to confiscate or deprive offenders of the instrumentalities and proceeds of trafficking offences under the Convention. As trafficking in persons nearly always occurs due to financial profit, this measure is believed to have a deterring effect on such initiatives.\textsuperscript{174} Moreover, Article 23(4) directly targets corporate entities involved in trafficking, by suggesting that States take measures to close establishment

\textsuperscript{169} UN General Assembly, Resolution, \textit{Trafficking in women and girls: resolution / adopted by the General Assembly}, at preambler para. 3; and UN Human Rights Council, \textit{Trafficking in persons, especially women and children}, at preamble.

\textsuperscript{170} UN Human Rights Council Resolution \textit{Trafficking in persons, especially women and children}, at para. 3(b).


\textsuperscript{172} CEDAW Article 2(b); see also UN General Assembly, \textit{Declaration on the Elimination of Violence against Women}, Article 4(d); and Committee on the Elimination of Discrimination against Women, \textit{General Recommendations Nos. 19 and 20, adopted at the Eleventh Session}, at para. 24(g) and 24(f)-(i).

\textsuperscript{173} \textit{Recommended Principles and Guidelines on Human Rights and Human Trafficking}, Principle 15 and 16.

\textsuperscript{174} Explanatory Report, at para. 254.
used to carry out trafficking in persons. This provision also proposes sanctions to ban the perpetrator temporarily or permanently from carrying out the activity in the course of which the offence was committed.

The requirement under international law to impose sanctions on legal persons held liable for trafficking offences is reflected in the EU Trafficking Directive as well. Accordingly, Article 6 provides that legal persons held liable for trafficking shall be subject to effective, proportionate and dissuasive sanctions and includes a list of suggested forms of sanctions. The EU Trafficking Directive also makes reference to the approximation of penalties and that States should make full use of the seizure and confiscation of the proceeds of crime. The EU Trafficking Directive makes further reference to Directive 2009/52/EC, which establishes minimum rules for sanctions against employers that exploit third-country nationals that are residing illegally within the EU. Accordingly, States are obligated to take measures against abusive and fraudulent practices of private employment agencies and employers of illegally staying migrant workers, including criminal sanctions in the case of exploitative conditions and trafficking.

In conclusion, it is clear that Member States have an obligation under international law to impose sanctions on legal persons held liable for trafficking. This international obligation is also reflected in the EU Trafficking Directive. International law also requires the sanctions imposed on legal persons for trafficking to be effective, proportionate and dissuasive. Thus, the remaining question is how to determine if the sanctions imposed by States against legal persons satisfy the required standard of being effective, proportionate and dissuasive under international law. In order to establish the exact scope of States’ obligation to impose sanctions on legal persons held liable for trafficking, it is necessary to further examine what is actually meant by effective, proportionate and dissuasive sanctions.

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175 EU Trafficking Directive, Article 6.
178 See Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.
4.3 Standard of ‘effective, proportionate and dissuasive’

International law requires States to impose sanctions against legal persons that are proportionate to the gravity of the offence. Article 11(1) of the UNTOC provides that States should consider to ensure that liability for offences established under the Convention and its protocols takes into account the gravity of such offences.\(^{179}\) The Legislative Guide further highlights that Article 11 applies to both natural and legal persons.\(^{180}\) It also emphasizes the necessity to ensure that sanctioning of offenders is symmetric and consistent with the harm caused and with the benefits derived from their criminal activities.\(^{181}\) It is further arguable that too weak sanctions would undermine criminal justice efforts and fail to provide adequate protection for victims. Whereas too severe sanctions might not comply with human rights and other criminal justice standards under international law.\(^{182}\) Although Article 11 of the UNTOC makes it clear that the gravity of the offence should have an impact on whether sanctions are considered proportionate or not, the UNTOC fails to elaborate on the factors that need to be considered when determining the gravity of a trafficking offence. It is important to note that Article 11 refers to criminal offences established under the UNTOC in general and not trafficking offences specifically. The Trafficking Protocol further remains silent on the matter. Thus, further examination of other international legal instruments is needed.

The European Trafficking Convention prescribes that States should consider aggravated circumstances when deciding on sanctions for trafficking offences. Article 24 of the European Trafficking Convention provides that States should ensure that circumstances such as intention, the victim being a child, the offence being committed by a public official or in the framework of a criminal organization, should be regarded as aggravating circumstances when establishing the penalty. Also, Article 25 requires States to provide for the possibility to take into account previous convictions when establishing penalty for trafficking offences. This standpoint is also confirmed in the Recommended Principles and Guidelines on Human Rights and Human Trafficking,

\(^{179}\) Legislative Guide, Part I at para. 264.

\(^{180}\) Ibid, Part I, at para. 256.


\(^{182}\) UN Human Rights Office of the High Commissioner, \textit{Fact Sheet No. 36 on Human Rights and Human Trafficking}, p. 38.
which state that additional penalties should be applied for those convicted of trafficking and related crimes in aggravating circumstances.\textsuperscript{183} Moreover, several other international and regional legal and policy instruments recognize the concept of aggravated offences.\textsuperscript{184} Thus, it is fair to conclude that for sanctions to be considered proportionate, the gravity of the offence must be considered which requires taking into account factors such as aggravated circumstances.

International law also requires sanctions against legal persons held liable for trafficking to have a deterrent effect. Article 11(2) of the UNTOC emphasizes that States should endeavor that the discretionary power on domestic level regarding sanctioning of offences established under the Convention are exercised to maximize the effectiveness of law enforcement measures and deter the commission of such offences.\textsuperscript{185} Hence, the penalties chosen must result in a minimum level of deterrence to avoid the perception of organized crime being beneficial.\textsuperscript{186} Consequently, particularly light sanctions may not reflect the harm caused or the benefits derived from the crime, and would thereby not measure up to the required standard of deterrence set out under international law.\textsuperscript{187} The necessary link between punishing traffickers and deterrence was also highlighted by the ECtHR in \textit{Rantsev}.\textsuperscript{188} The Legislative Guide to the UNTOC also provides that the requirements for sanctions to be effective, proportionate and dissuasive are all necessary in order to achieve the overall objective of the UNTOC, namely that of deterrence.\textsuperscript{189} In conclusion, in order for States’ obligation to fulfill the international requirement of imposing dissuasive sanctions on legal persons held liable for trafficking, it is clear that such sanctions must aim to have a deterrent effect.

\textsuperscript{183} \textit{Recommended Principles and Guidelines on Human Rights and Human Trafficking}, Guideline 4.3
\textsuperscript{185} Legislative Guide, Part I, at para. 264.
\textsuperscript{186} Ibid, Part I, at para. 247.
\textsuperscript{188} ECtHR, \textit{Rantsev v. Cyprus and Russia}, at para. 218.
As the nature of legal persons differs from natural persons, it is arguable that the form of sanctions is relevant for determining whether sanctions are effective, proportionate and dissuasive. The UNTOC recognizes that sanctions against legal persons may be criminal, non-criminal or a hybrid of both. It also acknowledges that States may have different approaches as to what form of sanctions that are most suitable in their domestic legal system.\textsuperscript{190} Hence, the UNTOC allows States the discretion to choose the form of sanctions applicable against legal persons for trafficking offences. However, such discretion is not absolute and is limited by the requirement that “whatever sanctions that are introduced must be effective, proportionate and dissuasive”.\textsuperscript{191} It is further arguable that a too wide discretion as to the form of sanctions might compromise the aim to harmonize relevant laws and measures to ensure that the combat against trafficking is uniform and effective. As stated in the explanatory report of the European Trafficking Convention, an effective strategy to combat trafficking must adopt a multidisciplinary approach on prevention, protection and prosecution while also seek to harmonize relevant national laws and measures.\textsuperscript{192} It is thus arguable that States should consider whether the form of sanctions taken against legal persons held liable for trafficking offences sufficiently fulfill the requirement of effective, proportionate and dissuasive. Although the term ‘sufficient’ is a relevant term, it is arguable that some forms of sanctions would better fulfill these criteria than others.

When considering which forms of sanction that is better suitable with regards to the criteria of effective, proportionate and dissuasive, there are some quite convincing arguments for why criminal sanctions are more suitable than other forms of sanctions. Some argue that criminal sanctions against legal persons have a more deterrent effect.\textsuperscript{193} This is partly due to the stigmatization that follows criminal sanctions, which might influence corporations’ actions and thus deter them from involvement in criminal activities.\textsuperscript{194} Research also indicates that criminal sanctions against legal persons tend to be more effective than administrative or civil sanctions.\textsuperscript{195} Moreover, Member States that have introduced criminal liability of legal persons are more likely to have adjusted

\textsuperscript{190} Ibid, Part I at para. 251 and 257.
\textsuperscript{191} Ibid, Part I, at para. 247.
\textsuperscript{192} Explanatory Report, at para. 4.
\textsuperscript{193} Tiedemann, K., \textit{Corporate Criminal Liability as a Third Track}, p. 14.
\textsuperscript{194} Ibid.
\textsuperscript{195} Engelhart, M., \textit{Corporate Criminal Liability from a Comparative Perspective}, p. 66.
the sanctions to specifically target legal persons, which is important in order for the sanctions to be effective.\textsuperscript{196}

However, although criminal sanctions against legal persons for trafficking may be the preferable alternative to fulfill the required standard of effective, proportionate and dissuasive under international law, it may also be problematic with regards to those Member States that do not consider criminal liability of legal persons compatible with the principles in their domestic legal system. It is important to note that the term ‘criminal’ is not defined in the international legal framework.\textsuperscript{197} It is also clear that Member States interpret and apply ‘criminal’ liability and ‘criminal’ sanctions differently, depending on the legal principles and theories of their domestic legal systems.\textsuperscript{198} Some scholars would argue that the difference between criminal and civil sanctions is only procedural in the sense that civil sanctions are enforced at the discretion of a private party, whereas criminal sanctions are enforced at the discretion of the State.\textsuperscript{199} Others would argue that criminal sanctions are distinguished from civil sanctions due to their different purpose. While criminal law aims are retribution and deterrence, civil law aims at reparation. However, in practice such difference is relative since both forms of sanctions result in some form of economic loss.\textsuperscript{200} In conclusion, whether sanctions are labeled ‘criminal’, ‘civil’ or ‘administrative’ might not in practice tell us whether the sanctions imposed against legal persons fulfill the sanction requirement under international law. Consequently, it is understandable that international law does not impose a requirement for ‘criminal’ sanctions but rather focus on the desirable effects of imposing sanctions.

Some Member States’ reluctance to allow criminal sanctions against legal persons held liable for trafficking offences could though still be considered as a disadvantaged in one aspect. When considering the commercial and financial purposes of legal persons, the negative connotation that follows from sanction being ‘criminal sanctions’ itself may contribute to the deterrent effect. Thus with regards to sanctions against legal persons having a dissuasive effect on businesses involved in trafficking, a preference for

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{196}] Ibid, pp. 87-88.
\item[\textsuperscript{197}] Ibid, p. 56.
\item[\textsuperscript{198}] Ibid.
\item[\textsuperscript{200}] Ibid, p. 314.
\end{enumerate}
\end{footnotesize}
criminal sanctions can still be found. Sanctions, whether criminal, civil or administrative, may have a dissuasive effect if the sanction has a direct negative economic impact on the legal person in question. However, there are indications that corporations tend to be concerned of the negative impact criminal proceedings might have on their ‘good will’ and the public perception of the company.\textsuperscript{201} It is thus arguable that the stigmatization from imposing ‘criminal’ sanctions may have an additional dissuasive effect on legal persons and their involvement in human trafficking, as opposed to other sanctions. Currently, however, Member States’ use of sanctions against legal persons varies to a great extent.\textsuperscript{202}

4.4 Conclusion

The above analysis makes clear that States have an obligation under international law to punish traffickers. With regards to legal persons, this amounts in a requirement for States to impose sanctions against legal persons held liable for trafficking, which are effective, proportionate and dissuasive. The required standard for sanctions to be considered as effective, proportionate and dissuasive is not clearly defined in international law. However, international law offers some guidance as to which factors to consider when determining whether the sanctions imposed are adequate. Firstly, international law indicates that sanctions against legal persons held liable for trafficking must take into account the gravity of the offence, which includes considering aggravated circumstances in the present case. Secondly, international also requires sanctions imposed on legal persons to have a deterrent effect. It is arguable that international law at a minimum requires that the sanctions imposed do not render trafficking beneficial. It is arguable that States must also consider the forms of sanctions. Although, international law allow States a wide discretion to decide what kind of sanctions to impose, this discretion is not absolute and must be considered in relation to the requirement of sanctions being effective, proportionate and dissuasive. It is thereby reasonable to argue that States should choose a form of sanctions that target legal persons efficiently and reflect the nature of the crime committed. Furthermore, it is arguable that States should consider criminal sanctions as a preferable option if it is consistent with the principles of their domestic legal systems. However, it is fair to

\textsuperscript{201} Tiedemann, K., Corporate Criminal Liability as a Third Track, p. 14.

\textsuperscript{202} Vermeulen, G., De Bondt, W., Ryckman, C., Liability of legal Persons for Offences in the EU, p. 88.
conclude that States do not have an obligation under international law to impose criminal sanctions against legal persons for being held liable for trafficking. This view is also consistent with Member States’ obligations under the EU Trafficking Directive.

5 Preventing Trafficking

5.1 Introduction

International law recognizes that States have a responsibility to prevent the occurrence of an international wrongful act, such as trafficking. States are thereby obligated to take positive measures to prevent trafficking from occurring in the future. The required standard implied by this obligation is one of due diligence, meaning that States are required to take “all reasonable and necessary measures to prevent a given event from occurring”. The following section will look more specifically at the scope and nature of States’ obligation to prevent trafficking as reflected in international law and the EU Trafficking Directive. This will further be followed by an examination of whether and to what extent States’ obligation to prevent trafficking infers a requirement on States to impose corporate criminal liability for trafficking offences.

5.2 Criminalization as a Preventive Measure

As already established, States are required to criminalize trafficking and ensure liability of legal persons for trafficking offences under international law. Although the criminalization of trafficking and ensuring corporate liability for trafficking offences can be considered as obligations of their own under international law, they are also seen as an essential part of States’ wider obligation to take positive measures to prevent trafficking from occurring in the future. Several international law instruments recognize the link between prevention and the need to criminalize trafficking. For instance, the

UNTOC recognizes that the criminalization requirement was intended as an element of a global counterstrategy to combat trafficking.204 This is further supported by the European Trafficking Convention, which recognizes that the criminalization of trafficking prevents ‘safe havens’ for traffickers where they can operate with impunity, which is essential in order to combat trafficking.205 The ECtHR also stated in Rantsev that States are obligated to put in place effective criminal law provisions in order to deter the commission of trafficking offences.206 In conclusion, international law recognizes that a States’ failure to criminalize trafficking also is a failure to provide adequate protection for victims of trafficking and prevent future occurrences of trafficking as required under international law.207 It is further clear, that the criminalization of trafficking must be followed by liability for natural and legal persons in order to have a preventive effect. For instance, the UNTOC recognizes that the overall objective of ensuring liability of legal persons for trafficking offences is deterrence.208 Thus, it is clear that the criminalization of trafficking as well as establishing corporate liability for trafficking offences are both necessary requirements for States to fulfill their obligation to prevent trafficking under international law.

However, the question remains whether the scope of States’ obligation to criminalize trafficking, as well as to ensure corporate liability for trafficking offences needs to be modified in order to comply with States’ wider obligation to prevent trafficking under international law. As established in previous chapter in this thesis, international law allows States a wide discretion as to what form and how corporate liability for trafficking offences is ensured in their domestic legal systems. However, an argument can still be made that this wide discretion must be interpreted against the standard of due diligence imposed by international law with regards to preventing trafficking. Thus, States’ need to take all reasonable and necessary measure in order to prevent the future occurrence of trafficking. An argument can be made that imposing criminal liability on corporations for trafficking offences is considered as a necessary and reasonable State measure to prevent corporations’ involvement in trafficking. For instance, there are

204 Legislative Guide, Part I, at para. 35.
206 ECtHR, Rantsev v. Cyprus and Russia, at para. 218.
207 See Recommended Principles and Guidelines on Human Rights and Human Trafficking, Principles 2, 6, and 13 and related Guidelines.
several arguments supporting the fact that imposing criminal liability on legal persons will have a deterrent effect on corporations’ involvement in trafficking. Firstly, criminal liability of legal persons can be seen as a regulatory strategy to prevent offences committed by corporations.\textsuperscript{209} For instance, corporations that are held criminal liable for trafficking offences may suffer reputational damage that can be very costly and would thereby push companies to implement effective management and supervisory structures in order to ensure compliance with the law.\textsuperscript{210} Studies indicate that such compliance programs are an effective tool to prevent and detect legal infringements within companies as it has a significant impact on the corporate climate of the company.\textsuperscript{211} Although the preventive effects of corporate criminal liability have been disputed, research by Max Planck Institute for Foreign and International Criminal Law confirms that criminal measures are more effective than administrative and civil sanctions.\textsuperscript{212} This analysis shows that there are strong arguments for why imposing corporate criminal liability for trafficking could be considered as a necessity for States to prevent trafficking in corporate contexts. However, as previously stated, international law does not impose a requirement on States to ensure corporate ‘criminal’ liability for trafficking offence in general. Thus, the question remains whether international law imposes a different requirement regarding corporate liability when considering States’ obligation to prevent trafficking in corporate contexts. In order to determine this, it is necessary to further examine provisions under international law with regards to prevention of trafficking and how it applies to legal persons.

5.2 Preventive Measures against Legal Persons?

The UNTOC together with the Trafficking Protocol include provisions that imposes mandatory requirements on States to take, or at least consider taking, measures against legal persons to prevent trafficking. For instance, Article 31 of UNTOC holds that

\textsuperscript{209} See for example International Convention for the Suppression of the Financing of terrorism, Article 5; UNTOC, Article 10; and Convention against Corruption, Article 26.

\textsuperscript{210} Legislative Guide, Part I, at para. 240.

\textsuperscript{211} Engelhart, M., \textit{Corporate Criminal Liability from a Comparative Perspective}, p. 66.

States “shall endeavor to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational crime”. This includes taking measures to reduce existing or future opportunities for organized criminal groups to participate in lawful markets with proceeds of crime.\(^{213}\) Article 31 further suggests that such measures focus on the prevention of the misuse of legal persons by organized criminal groups. This could include measure such as establishing public records on legal persons or the possibility to disqualify convicted persons from acting as directors of legal persons.\(^{214}\) Furthermore, the Trafficking Protocol provides in Article 9 (1) that States must establish comprehensive policies, programs and other measures to prevent and combat trafficking in persons, as well as to protect victims from revictimization. Moreover, Article 9 (5) holds that States shall adopt or strengthen legislative or other measures to discourage the demand that fosters trafficking in persons. Thus, States are also required to adopt preventive measures that address the supply and demand of trafficking in persons.\(^{215}\) However, the Trafficking Protocol fails to elaborate further as to the substance of these preventive measures, allowing States a wide discretion as to which measures to adopt. Moreover, the preventive measures provided for in the Trafficking Protocol involves mainly non-legislative measures, by the exception of addressing the demand of trafficking which could be achieved partly through legislative measures.\(^{216}\) However, Article 34 (3) of UNTOC states that “each State Party may adopt more strict or severe measures” than the ones required under the UNTOC.

At European level, both the European Trafficking Convention and the ECHR also infer obligations on States to prevent trafficking in persons. Article 5 (2) of the European Trafficking Convention obligates States to “establish and/or strengthen effective policies and programmes to prevent” trafficking in persons. However, such measures do not have to be legislative measures. Article 6 of the European Trafficking Convention further obligates States specifically to adopt or strengthen legislative or other measures to discourage demand that fosters trafficking in persons. However, such measures could be legislative, administrative or other measures as long as they effectively discourage

\(^{213}\) UNTOC, Article 31 (2).

\(^{214}\) UNTOC, Article 31(2)(d) (i) and (ii).


\(^{216}\) Ibid, Part II, at para. 74.
demand of trafficking in persons. Article 19 of the European Trafficking Convention further requires States to consider criminalizing the use of services, when a natural or legal person knows the person providing the services is a victim of trafficking. None of the provisions under the European Trafficking Convention require States to adopt legislative measures to prevent trafficking from occurring or target legal persons involved in trafficking specifically. However, it could be argued that the ECtHR decision in Rantsev implies a stricter standard with regards to prevention of trafficking and that States must adopt preventive measures that target legal persons.

The analysis above shows that the UNTOC and the Trafficking Protocol impose weak requirements on how and to what extent States should adopt measures to prevent trafficking in persons. This is due to the fact that only some of the provisions impose mandatory requirements and even when this is the case, States tend to have a wide discretion as to what measures to adopt. Furthermore, most provisions include preventive measures in general rather than specifically targeting businesses involved in trafficking. It is also noteworthy that none of the provisions under the Trafficking Protocol require States to adopt legislative measures to prevent trafficking. Even Article 9 (5) which requires States to” adopt or strengthen legislation or other measures”, only aims to recognize that legislative measures could be an option. However, States’ obligation to prevent trafficking is arguably stricter under the European Trafficking Convention and the ECHR. As already established, the ECtHR in Rantsev held that States’ obligation to prevent trafficking includes adopting safeguards through national legislation and other measures to protect and prevent future occurrences of trafficking. Furthermore, the State obligation of prevention also includes taking actions against legislations and other practices that tolerate or facilitate trafficking in persons. The ECtHR also explicitly stated that such measures must also aim to regulate operations of businesses that functions as a cover for trafficking in persons. Furthermore, the ECtHR held that States’ duty to penalize and prosecuting traffickers must be understood in the broader context of also preventing and protecting potential victims. On a different note, while the European Trafficking Conventions require States to take measures to reduce the demand of trafficking, it also requests States to consider the criminalization

218 ECtHR, Rantsev v. Cyprus and Russia (2010), at para. 284.
219 ECtHR, Rantsev v. Cyprus and Russia, at para. 284
of the use of services provided by trafficking victims. The required standard on States’ obligation under international law to prevent trafficking is partly reflected in the EU Trafficking Directive. For instance, the EU Trafficking Directive holds that Member States should establish and/or strengthen policies to prevent trafficking in human beings, including measures to discourage and reduce the demand of trafficking.\textsuperscript{220} Similar to the European Trafficking Convention, the EU Trafficking Directive refers to preventive measure in the form of polices and other measures of non-legislative character. With regards to discouraging demand, Article 18 (4) also requests Member States to consider criminalizing the use of services.

5.3 Criminalizing the ‘use of services’ provided by Trafficking Victims

International law recognizes that States’ obligation to prevent trafficking under international law to some extent also implies taking measures to address the causes of trafficking in persons. Several international treaty bodies have recognized that the demand for goods and services by trafficking victims is one of the root causes for trafficking in persons. This view has been reflected by the UN Human Rights Council, which recognizes that “some of the demand for prostitution and forced labour is met by trafficking in persons” while also urging States to take legislative or other measures to discourage demand.\textsuperscript{221} The UN General Assembly has further called on States to enhance their legislative preventive measures to deter exploiters and ensure their accountability.\textsuperscript{222} Moreover, the Recommended Principles and Guidelines on Human Rights and Human Trafficking identify demand as one of the root causes for trafficking in persons and stress the need for States to address demand in their measures to combat trafficking.\textsuperscript{223} It also recognizes that the demand that fosters trafficking can be divided into two distinctive groups: (1) employers demand for cheap exploitative labour; and 2) the demand by consumers for the goods or services produced or provided for by

\textsuperscript{220} See EU Trafficking Directive, preamble at para. 25 and Article 18 (1)-(3).
\textsuperscript{221} See Human Rights Council, Trafficking in persons, especially women and children, 17 June 2009, (A/HRC/RES/11/3), preamble and para. 3(g).
\textsuperscript{223} Recommended Principles and Guidelines on Human Rights and Human Trafficking, Principle 4.
trafficking victims.\textsuperscript{224} In conclusion, States’ obligation to prevent trafficking includes taking measures to address the demand that fosters trafficking. The remaining question is how the scope and nature of this obligation is reflected in international law.

The Trafficking Protocol requires that States adopt or strengthen legislative or other measures to discourage the demand that fosters trafficking in persons.\textsuperscript{225} This requirement is also reflected in both the European Trafficking Convention and the EU Trafficking Directive.\textsuperscript{226} With regards to the European Trafficking Convention, its Explanatory Report elaborates on the requirement stating that States have a positive obligation under Article 6 to adopt and reinforce measures to discourage demand for trafficking.\textsuperscript{227} Thus, the aim of Article 6 is for States to take legislative or other measures to effectively deter trafficking in persons.\textsuperscript{228} Moreover, the Explanatory Report also confirms that the measures to discourage demand for trafficking listed under Article 6 should be considered as a minimum standard.\textsuperscript{229} Furthermore, Article 19 of the European Trafficking Convention requires that States consider criminalizing the use of services provided by trafficking victims. This provision aims to target clients of trafficking victims of sexual exploitation or forced labour among others.\textsuperscript{230} Moreover, the Explanatory Report also suggests that criminalizing the use of services also targets business owners that knowingly use trafficked workers.\textsuperscript{231}

The EU Trafficking Directive reflects international law’s stand on discouraging demand. Article 18(1) holds that Member States must take appropriate measures to discourage and reduce the demand that fosters trafficking. Moreover, Article 18 (4) of the EU Trafficking Directive reflects the European Trafficking Convention’s requirement on States to consider criminalizing the use of services provided by trafficking victims. The EU Trafficking Directive further suggests that this

\textsuperscript{224} Anderson, B., O’Connell-Davidson, J., ”Trafficking: A Demand-led Problem? A Multi-country Pilot Study”, 2002, pp. 18 and 54.
\textsuperscript{225} Trafficking Protocol, Article 9 (5).
\textsuperscript{226} See The EU trafficking Directive, para. 26 and Article 18(1); European Trafficking Convention, Article 6.
\textsuperscript{227} Explanatory Report, at para. 108.
\textsuperscript{228} Explanatory Report, at para. 109.
\textsuperscript{229} Explanatory Report, at para. 110.
\textsuperscript{230} Explanatory Report, at para. 231.
\textsuperscript{231} Explanatory Report, at para. 232.
criminalization cover the behavior of employers as well as buyers of sexual services from trafficking victims.\textsuperscript{232} It also makes a direct reference to the Directive 2009/52/EC, which provides sanctions for employers that use work or services from a person that is an illegal third country national, with the knowledge that the person is a victim of trafficking. Thus, it is also suggested that the criminalization of use of services provided by trafficking victims cover all Union citizens as well as target buyers of sexual services.\textsuperscript{233} The analysis above establishes that States are obligated under international law and the EU Trafficking Directive to take measures to discourage the demand that fosters trafficking. However, international law allows States a wide discretion as to which measures to take and to what extent. With regards to criminalizing the use of services provided by trafficking victims, States are only obligated to consider such criminalization. It is thus fair to argue that international law does not provide a clear standard as to what measures States must adopt to discourage demand in order to fulfill their obligations under international law.

It is arguable that States’ measures to discourage demand must address the issues of corporations and their indirect involvement in trafficking that occurs in their supply chains. For instance, the UN General Assembly has held that trafficking has been identified as a problem in several economic sectors and that businesses could be linked to human trafficking in various ways. It was further highlighted that businesses tend to be indirectly involved with trafficking through their suppliers and subcontractors.\textsuperscript{234} The UN General Assembly also stressed that States have an obligation under international human rights law to protect human rights abuses such as trafficking from third parties, which includes corporations.\textsuperscript{235} It further recognizes that criminalizing the use of services provided by trafficking victims is highly relevant to combat trafficking in corporations’ supply chains.\textsuperscript{236} Thus, in this sense it is arguable that criminalizing the use of services could be seen as a necessary component for States to fulfill their obligation to prevent trafficking.

\textsuperscript{232} See EU Trafficking Directive, Article 18(4) and preamble para. 26.
\textsuperscript{233} EU Trafficking Directive, preamble at para. 26.
\textsuperscript{235} Ibid, at para. 12.
\textsuperscript{236} Ibid, at para. 15.
It is further arguable that criminalizing the use of services provided by trafficking victims allows States to comply with the ECtHR statement in Rantsev where it held that States have an obligation to regulate businesses involved in trafficking. The rationale behind criminalizing the use of services of trafficking victims is to influence companies to regulate whom they do business with, as they otherwise would risk penalties for the involvement in human trafficking, resulting in a drop of demand for trafficking.\textsuperscript{237} Theories suggest that corporations will structure their employment relationships to avoid liability. Thus when individual liability fails to deter agents of trafficking, corporate liability will encourage corporation to take due care when selecting agents to collaborate with.\textsuperscript{238} However, such liability must extent to independent contractors working for a corporation in order to have a deterrent effect. \textsuperscript{239} Some suggests that criminalizing the use of services should be established by creating a new separate criminal offense.\textsuperscript{240} However, when introducing a new criminal offense for holding “users” criminal liable, difficulties in distinguishing between voluntary and forced labour as well as establishing the proof of guilt of corporations could make it difficult to enforce it in practice.\textsuperscript{241} Instead of creating a new crime for “user accountability”, it has also been suggested to extend liability to users by a legal construction of participation in human trafficking.\textsuperscript{242} As of now, many Member States rely on self-regulation, namely that corporation’s voluntary take measures to prevent human trafficking in their supply chains.\textsuperscript{243} However, without mandatory requirements on due diligence, corporations may abuse the system for their own benefit or not apply due diligence to their supply chains at all.

\textsuperscript{239} Ibid, p. 137.
\textsuperscript{240} Ibid.
\textsuperscript{241} Ibid, p. 177.
\textsuperscript{242} Ibid, p. 180.
When considering the deterring effect criminalizing the use of services could have on combating trafficking in supply chains, it is arguable that this should be considered as a necessary requirement for States to fulfill their international obligation to prevent trafficking. Especially, when taking account the fact that the standard for States to prevent human rights abuses such as trafficking is one of due diligence, requiring States to take “all reasonable and necessary means” to prevent trafficking. However, it is also important to understand that the hesitation within international law to set out an obligation to criminalize the use of services provided by trafficking victims might also be justifiable. Such criminalization will only prevent trafficking in supply chains if it has a deterrent effect on corporation’s actions, which is dependent on States ensuring liability of legal persons for such offence. However, due to Member States wide discretion on how to ensure corporate liability for criminal offences in their domestic legal system, a criminalization requirement for the use of services might not equally have the desired effect. In conclusion, international law does not impose an obligation on States to criminalize the use of services provided by trafficking victims, nor ensure corporate criminal liability for such offence. However, it is arguable that international law promotes the idea to criminalize the use of services as a form to strengthen corporate accountability for trafficking in supply chains and thus discouraging the demand for forced and exploitative labour.

5.4 Conclusion

The analysis in this chapter clearly establishes that States have an obligation under international law to prevent trafficking from occurring in the future. It is further clear that although criminalizing trafficking and ensuring corporate liability for trafficking offences are considered as obligations on their own under international law, they are also essential requirements for States’ wider international obligation to prevent trafficking. However, it is further arguable that States’ obligation to prevent trafficking under international law goes beyond the explicit criminalization requirement of trafficking and also requires States to take a wider range of measures. As previously mentioned, the ECtHR in Rantsev, held that States’ obligation is not limited to criminal law measures to prosecute and punish traffickers but also requires States to take other measures to ensure practical and effective protection of victims and potential victims of trafficking. This includes also taking measures to regulate businesses from getting
involved in trafficking. Moreover, international law also recognizes that States’ obligation to prevent trafficking implies taking measures to address the demand for trafficking in persons. Since businesses play an essential role in fostering the demand for cheap and exploitative labour, it is fair to conclude that States must also take measures against businesses as well.

However, when examining the current international legal framework on States’ obligation to prevent trafficking it is difficult to establish a clear minimum standard as to what preventive measures States are required to adopt against businesses in order to fulfill their wide international obligation to prevent trafficking. Most of the provisions in international legal instruments regarding prevention focus on non-legislative measures and allow States a wide discretion as to what kind of measures to adopt and to what extent. With regards to preventive measures aimed at regulating businesses, very few provisions propose measures specifically aimed at legal persons. Another provision on preventive measures against legal persons that could be considered significant is found in the European Trafficking Convention which requires States to consider criminalizing the use of services provided by trafficking victims. It is arguable that such a measure could be used to combat trafficking in corporation’s supply chains. However, it is important to note that States are only required to consider criminalizing the use of services provided by trafficking victims. Thus, this is not a mandatory requirement under international law. The analysis above clarifies that international law does not impose a stricter requirement on States to ensure corporate liability for trafficking with regards to prevention than previously established.
6 Concluding Remarks

With the growing dominance of corporations in the political and economic spheres, corporations have become increasingly involved in criminal activities. Organized crime, such as trafficking, is often committed through or under the cover of private entities. Corporations involved in trafficking can be found in sectors such as tourism, entertainment, hospitality, labor recruitment, adoption and the provision of medical services among others. It is therefore important to ensure that legal persons are held legally accountable for trafficking offences as well. This thesis has examined Member States’ positive obligations with regards to trafficking under the international legal framework on trafficking and the EU Trafficking Directive, in order to determine as to what extent these obligations infer a requirement on States to impose corporate liability for trafficking offences. The analysis have examined three key areas of States’ positive obligations where corporate criminal liability becomes relevant; 1) criminalizing trafficking, 2) punishing traffickers, and 3) preventing trafficking. After examining each area, it is fair to conclude that Member States do not have a legal obligation under international law nor the EU Trafficking Directive to impose corporate criminal liability for trafficking offences. Instead international law imposes a minimum standard regarding how and to what extent States must ensure corporate liability for trafficking in their domestic legal systems. This minimum standard allows States a wide discretion to decide in which manner and to what extent corporate liability for trafficking is ensured. However, the minimum standard also allows States the possibility to impose corporate criminal liability for trafficking offences if they would want to.

Although States’ positive obligations with regards to trafficking do infer an obligation to ensure corporate liability for trafficking offences, international law allows States a wide discretion on how corporate liability is adopted in their domestic legal systems and to what extent, which not necessarily amounts in imposing corporate criminal liability.


for trafficking offences. However, imposing corporate criminal liability for trafficking could still be considered as a preferable option to ensure corporate liability for trafficking offences while also reducing the demand for trafficking in the private sectors. International law reluctance to impose a stricter standard on States to ensure corporate liability for trafficking offences could be partly explained by the fact that some States still do not recognize the concept of corporate criminal liability as consistent with their legal principles at domestic level. Moreover, international law recognizes that there are different approaches and models in which corporate liability for trafficking can be established and therefore does not recognize imposing a specific model as justifiable. However, State practice indicates that most Member States do recognize corporate criminal liability as a possibility in their domestic legal systems. However, even when States recognize corporate criminal liability in their domestic legal systems, such liability is still limited to certain attribution models, types of legal persons or criminal offences.

International law’s legal stand on corporate liability for trafficking offences is further reflected in the EU Trafficking Directive. When considering the EU’s recognition of the private sectors role in trafficking and its aim to deter trafficking in supply chains, one may ask why the EU has not imposed stricter requirements with regards to corporate liability for trafficking offences. EU’s reluctance to impose stricter requirements on how Member States should ensure corporate liability for trafficking offences in their domestic legal systems could partly be explained by EU’s questionable competence to impose requirements on States regarding criminal law matters. Article 2 of the TFEU sets out the EU competence in general. Moreover, Article 4(j) TFEU states that matters of security and justice, under which criminal law should be perceived, are a shared competence of the EU and Member States. Consequently, the principles of proportionality and subsidiarity proscribed in Article 5 of the TEU must be considered. In case of non-exclusive competence matters, such as criminal law, the EU is only allowed to act if the EU is considered to be in a better place than the Member State to take action and achieve the goals of the envisaged actions. It could be argued that imposing a stricter requirement of corporate criminal liability for trafficking would go beyond the EU’s competence. On the other hand, when considering the importance of harmonizing Member States’ measures regarding corporate accountability for trafficking as well as ensuring corporate liability for trafficking offences itself, an argument could be made that the EU should have the competence to impose a stricter
requirement on this matter. Nevertheless, it is fair to conclude that although State practice indicate a trend towards corporate criminal liability within the EU, this is not reflected in international law or the EU Trafficking Directive regarding corporate accountability for trafficking offences.
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