DIPARTIMENTO DI GIURISPRUDENZA

Cattedra di Tutela Internazionale dei Diritti Umani

Combating Trafficking in Human Beings: the Necessary Integration between the Criminal Justice Response and a Human Rights-Based Approach

RELATORE

Chiar.mo Prof.

Pietro Pustorino

CANDIDATA

Chiara Giustiniani

Matr. 143193

CORRELATORE

Chiar.mo Prof.

Marco Gestri

ANNO ACCADEMICO 2020/2021

A Demi

INDEX

INTRODUCTION

Human trafficking is a widespread phenomenon. While we are unable to quantify with statistical precision the global dimension of this scandalous and largely submerged phenomenon, the latest United Nations Office on Drugs and Crime (UNODC) report, relating to 2020 and presented in February 2021, starts from a database of about 50,000 victims, 800 of which in Italy. [1]

The present thesis analyzes the legal framework of the phenomenon of trafficking in human beings, both in the international setting and in the national scenarios; it moreover examines the different forms of exploitation that constitute the end-purposes of human trafficking. Furthermore, the thesis presents the achievements and the shortcomings of the UN Trafficking Protocol, the first international instrument to define human trafficking and the one which laid the foundation for international and national laws to address the problem. However, the prosecution of traffickers is the priority under the UN Trafficking Protocol, to the detriment of victim protection. Trafficking is a complex phenomenon and one that cannot be defeated if its prevention and the trafficked persons' rights are formally considered at least as important as the prosecution of the perpetrators. In this perspective, the Council of Europe Anti-Trafficking Convention comes to the rescue, with its human rights-based approach and with its focus on trafficking survivors. The preamble itself of the Convention defines human trafficking as "a violation of human rights and an offence to the dignity and the integrity of the human being".

In the first Chapter of this thesis, I analyze the historical development of the notion of human trafficking, which evolved into what is now the internationally recognized definition of trafficking in human beings, contained in Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

Since the entire dissertation revolves around the notion of trafficking, it is useful to introduce it here. The offence of (adult) [2] trafficking in human beings is constituted by three elements. The act, namely the recruitment, transportation, transfer, harbouring or receipt of

---

[1] United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2020* (January 2021), at 25. Available at: https://www.unodc.org/unodc/data-and-analysis/glotip.html.
Also, *see* OnuItalia, *UNODC: rapporto su traffico persone punta riflettori su bambini* (2 February 2021), available at: https://www.onuitalia.com/unodc-rapporto-su-traffico-persone-punta-riflettori-su-bambini/.

[2] As it will be analyzed, the necessary elements for the offence of child trafficking to be constituted are only two: the acts and the purpose of exploitation. It is not necessary to prove the "means" element with regards to child trafficking.

persons; the means by which the act is committed, which can consist in the use of threats or of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. And last (but *not* least) the purpose of the act: the exploitation of the victim, which can manifest itself in many forms. Indeed, the purpose can include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. All these forms of exploitation will be analyzed separately in Chapter II, with a particular focus on the historical debate on whether prostitution itself amounts to trafficking or not – and the demonstration that prostitution is not *inherently* trafficking.

The entire Chapter II is therefore dedicated to the core concept of human trafficking, as recognized by the Palermo Protocol, by the other relevant international instruments and by the European Court of Human Rights: the exploitation of an individual, rather than the cross-border movement. Throughout my research, I will indeed demonstrate why it is necessary to interpret human trafficking also as an internal phenomenon, not necessarily involving more than one State. Another relevant part of the second Chapter addresses the debate on migrant smuggling and its interplay with human trafficking. The main theorical difference revolves around the consent of the smuggled person to the movement, absent with regards to the trafficking victim; however, as it will be shown, in practice the two phenomena often overlap.

The essence of the second Chapter, and the purpose of describing all the different forms of exploitation, relies in the display of the incredibly various and complex nature of human trafficking and in the consequent demonstration of the potentially relevant role of operational indicators that give value to the contextual elements, and the opposite negative impact of rigid legislative definitions.

Chapter III addresses the shortcomings of the UN Trafficking Protocol, which focuses on the State Parties obligations to prosecute the traffickers, much more than it does on trafficking prevention or victim protection. The aim of Chapter III, and of the whole thesis, is precisely to demonstrate that, in the battle against human trafficking, a response based uniquely on the obligation to criminally prosecute the perpetrators is not effective. It is of utmost important to integrate the current policies with a human rights-based approach. Here, the Council of Europe Anti-Trafficking Convention comes to the rescue, with provisions that oblige the States to ensure the victims' assistance, protection and social reintegration, without neglecting the criminalization/prosecution aspect. Different provisions of the Anti-Trafficking Convention are

discussed, along with their implementation and potential. The European Court of Human Rights in this scenario has an incredibly relevant role: by enhancing the principle of systemic integration, the Court has been able to condemn the failure of the States to comply with the obligations under the international conventions on trafficking in human beings, and in particular with the Anti-Trafficking Convention applied in conjunction with the European Convention of Human Rights (ECHR), without exceeding the powers assigned to the Court by Article 19 of the ECHR.

The battle against human trafficking is not one that can be won without shifting the focus from border control and State security in order to relocate in on victim protection and on defending the human rights of the trafficked persons, intended as *exploitation* victims, so in the extensive application of the term.

The scope of this dissertation is therefore to propose an alternative path: the integration between a criminal justice response to the trafficking phenomenon and a human rights-based approach.

CHAPTER I

THE "DYNAMIC" NOTION OF HUMAN TRAFFICKING AND THE RELEVANT LEGAL INSTRUMENTS

1.1 The historical development of the notion of Human Trafficking: Trafficking in Women, Slavery and Forced Labour

The analysis of the historical development of the notion of Human Trafficking, and in particular its relation to prostitution, is crucial to understand the roots of the current definition of Trafficking under the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (the Palermo Protocol),[3] and the transition away from its conventional framing.

1.1.1 The International Agreement for the Suppression of the White Slave Traffic (1904) and the International Convention for the Suppression of White Slave Traffic (1910)

The first international instrument which sought to combat human trafficking - nowadays we would precise: a manifestation of human trafficking - was the "International Agreement for the Suppression of the White Slave Traffic", adopted in 1904. This International Agreement aimed at suppressing the "White Slave Traffic" [4] of women or girls procured for "immoral purposes" [5]. This Agreement and the International Convention for the Suppression of White Slave Traffic (1910) were substantially negotiated at the 1902 International Conference on the White Slave Trade. [6]

---

[3] UN General Assembly, "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime", adopted by resolution A/RES/55/25 of 15 November 2000, opened for signature on 12 December 2000, entered into force 25 December 2003, *United Nations Treaty Series*, vol. 2237, p. 319 (henceforth, the Palermo Protocol or the Trafficking Protocol).

[4] The term "White Slave Traffic" was here placed in quotation marks to highlight the author's discomfort with the expression, clearly the product of a Euro-centric racism. With this clarification in mind, the quotation marks are dispensed henceforward.

[5] "International Agreement for the Suppression of the White Slave Traffic", Paris, 18 May 1904, *United Nations Treaty Series*, vol. 92, p. 19 (henceforth, the 1904 Convention): Article 1.

[6] Although with some differences, which will be mentioned later in this paragraph.

The issue became internationally relevant due to the 1880 scandal in Belgium, where the so-called "white slave trade" was brought to light revealed by Alfred Dyer's London publication, "The European Slave Trade in English Girls" [7]. Approximately forty under-age women (among whom ten were British) had been admitted into officially recognized brothels in Brussels. [8] The consent of at least one of these under-age girls, Louisa Hennessey, was falsified by police officers and doctors: Louisa was working as a servant in London when she was promised a better career as a receptionist in France; instead, she was forced to prostitute herself in Brussels from May 1879 to March 1880. [9]

As Chaumont explains, what truly shocked the general public was not the prostitution of under-age women itself, but rather the "close ties" that the police officers and the doctors had with the brothel keepers. [10] Indeed, the latter were unofficially told that the police officers in charge of the admission of underage British women "would not ask any awkward questions if by any chance there appeared to be a discrepancy between the declared age and the age they appeared to be". [11]

The scandal of the first *traite des blanches* affair galvanized public opinion and paved the way for government response, resulting in the 1899 International Congress on the White Slave Trade and prominently in the 1902 International Conference on the White Slave Traffic. In general, the White Slavery campaign has been described as an example or "moral panic". [12]

What emerged from the 1902 International Conference was a mutual unsatisfaction between the Italian representative and the French jurist regarding the term "White Slave Traffic", prevalent from this quote of the Italian Delegate, Marquis Paulucci de Calboli:

> the words 'white slave traffic' appeared to be improper. The word 'white' does not apply to the generality of women, yellow, black etc. As for 'slave traffic' this also indicated the notions of import and export, characteristics which do not always appear in the violation in question which, as a result of the discussion on which the delegates are unanimous, are not aiming to deal only with an international violation. [13]

---

[7] *See* Jean Allain, "White Slave Traffic in International Law", *Journal of Trafficking and Human Exploitation* 1, no. 1 (2017): 2.
[8] Jean-Michel Chaumont, "L'affaire De La Traite Des Blanches (1880-1881): Un scandale bruxellois?", *Brussels Studies* no.46 (January 2011): 3-4.
[9] Chaumont, "L'affaire De La Traite Des Blanches (1880-1881): Un scandale bruxellois?", 4-5.
[10] Ibid, 6.
[11] Ibid, 3.
[12] Anne T. Gallagher, *The International Law of Human Trafficking*. (New York: Cambridge University Press, 2010), 55, https://doi.org/10.1017/CBO9780511761065.
[13] Procès-Verbaux des Séances, Troisième Séance, Ministère des Affaires Étrangères, *Conférence Internationale pour la Répression de la Traite des Blanches*, Documents Diplomatiques, 1902, p. 111. Referenced in Allain, Jean. "White Slave Traffic in International Law." Journal of Trafficking and Human Exploitation 1, no. 1 (2017): 5.

As specified previously, the term "white" stems from a 20th century language, and, fortunately, the debate on the essence of human trafficking over the years has shed its colonial roots. However, the discussion - which began precisely in 1902 - on whether trafficking in human beings necessarily entails a transborder element, or instead it can happen entirely into one country, is a much modern one, and it will be examined thoroughly further on in this research.

As mentioned before, the first "international" [14] debate on trafficking that took place in the 1902 Conference contributed substantially to both the 1904 International Agreement for the Suppression of the White Slave Traffic and the 1910 International Convention for the Suppression of White Slave Traffic. However, the Conference failed to produce a draft convention that could be enforced.

The 1904 International Agreement aimed at the protection of women and girls (or rather, at the protection of their "purity"). It focused on establishing a system of repatriation of the women and girls "destined for an immoral life" [15] procured *abroad*. Thus, here the term "trafficking" was interpreted as a domestic and international threat but with transborder origins only, against the advice of the Italian Delegate at the 1902 Conference.

The 1904 International Agreement's focal point was the cooperation between the (mostly European) participant States: each contracting party was tasked with creating a department dedicated to the exchange of information "relative to the procuring of women or girls for immoral purposes", [16] but the States were not obliged to punish the procurement. For what concerns cooperation aimed at repatriation, Article 4 stated that when a woman or a girl could not pay helserf the cost of transfer (and she didn't have a husband, relations, nor a guardian who could cover the cost), the cost of repatriation had to be borne by the country where she was in residence "as far as the nearest frontier or port of embarkation in the direction of the country of origin", and, for the rest, by the country of origin. [17]

The 1904 Agreement proved to be ineffective. Therefore, the States held a Second International Conference on the White Slave Traffic in 1910, which resulted in the 1910 International Convention for the Suppression of White Slave Traffic. The Convention created

[14] Even if the Conference was referenced as "International", mostly European countries participated in the 1902 International Conference (in addition to Brazil): Austria, Belgium, Brazil, Denmark, France, Hungary, Italy, Germany, Norway, Portugal, Russia, Spain, Sweden, Switzerland, The Netherlands, the United Kingdom.
[15] "International Agreement for the Suppression of the White Slave Traffic" (1904): Article 2.
[16] Ibid, Article 1.
[17] Ibid, Article 4.

a criminal offense, which punished whoever "to gratify the passions of others, has hired, abducted or enticed, even with her consent" both underage women and girls (Article 1) and adult women (Article 2) "for immoral purposes, even when the various acts which together constitute the offence were committed in different countries". [18]

The 1910 Convention was the first instrument in which the offence of procurement, an embryony of the offence of human trafficking, was created. Four remarks are important. First, it must be underlined that the Convention, differently from the 1904 Agreement, contemplates that the offence could be perpetrated wholly in one country. The wording of the last clauses of Article 1 and Article 2 makes it clear: "*even* when the various acts which together constitute the offence *were committed in different countries*", the international offence being a possibility, and not the only option. Secondly, the offence is limited to the first stage of what today we could call the trafficking process, namely the *procurement* stage. The detention of the women and girls in the brothels was outside the scope of the Convention, [19] as specified by the closing statement:

> The case of the retention, against her will, of a 'woman or girl in a house of prostitution could not, in spite of its gravity, be included in the present Convention, because it is exclusively a question of internal legislation. [20]

Thirdly, the 1910 Convention created system of cooperation centered on the "transmission of rogatory commissions", providing that the transmission of rogatory commissions relating to the offences covered by the Convention could take place as follows:

> 1.Either by direct communication between the judicial authorities;
>
> 2. Or through the diplomatic or consular agent of the country making the application in the country to which application is made; that agent shall send the rogatory commission direct to the competent judicial authority and shall receive direct from that authority the documents showing that the rogatory commission has been carried out;
>
> 3. Or through the diplomatic channel. [21]

Each of the Contracting Parties had to state, "by means of a communication sent to each of the other Contracting Parties which of the above-mentioned methods of transmission it accept[ed] for rogatory commissions coming from that State". [22] The rogatory commissions are

---

[18] "International Convention for the Suppression of the White Slave Traffic", Paris, 4 May 1910, *United Nations Treaty Series*, vol. 98, p. 101 (henceforth, the 1910 Convention).: Articles 1 and 2.
[19] Anne T. Gallagher, *The International Law of Human Trafficking*, 14.
[20] "International Convention for the Suppression of the White Slave Traffic" (1910): Annex, clause D.
[21] Ibid, Article 6.
[22] Ibid.

formal requests addressed by one judicial authority to another for the performance of an act outside the territorial jurisdiction of the requesting authority; in this case, abroad. The one contained in Article 6 was an important step towards a greater cooperation, particularly considering that at the time of the International Convention for the Suppression of the White Slave Traffic, the rogatory commissions usually could not be transmitted directly between the applicable courts. Instead, often they had to be transmitted via consular or diplomatic channels, at least until the adoption of the 1965 "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters". [23]

Finally, and most importantly, a closer look at Article 2 of the Convention is fundamental to then analyze the current definition of trafficking in the Palermo Protocol. Article 2 displays the "means" of the offense, a necessary element for the procurement of women of full age and an aggravating factor for the procurement of underage girls, individuating such means in the "use of violence, threats, abuse of authority", fraudulent methods or "any other means of constraint". [24] This passage is crucial since the terms "fraud" and "abuse of power" are now incorporated in the international definition of trafficking in persons, displayed in Article 3 of the Palermo Protocol,[25] as the "means" element – one of the three elements of human trafficking. Another similarity between the existing international framework [26] and the 1910 Convention [27] consists in the fact that when it comes to minors (in the 1910 Convention, underage girls) it's not necessary for the means element to be proven. Therefore, the 1910 Convention shifted away the focus from the social concerns of "immorality" – which instead dominated the 1904 Agreement – towards the criminalization of procurement. [28]

[23] The Hague Conference on Private International Law, "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters", concluded 15 November 1965. Available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=17.
[24] Ibid, Article 2.
[25] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime " (2000), *United Nations Treaty Series*, vol. 2237, p. 319: Article 3(a).
[26] Ibid, Article 3(b).
[27] Compare Articles 1 and 2 of the International Convention for the Suppression of the White Slave Traffic (1910).
[28] Anne T. Gallagher, *The International Law of Human Trafficking*, 55.

1.1.2 The International Convention for the Suppression of Traffic in Women and Children (1921) and the International Convention for the Suppression of the Traffic in Women of Full Age (1933)

Both the "International Convention for the Suppression of Traffic in Women and Children" (1921 Convention) [29] and the "International Convention for the Suppression of the Traffic in Women of Full Age" (1933 Convention) [30] were concluded under the auspices of the League of Nations. One of the aims of the League of Nations involved improving the global welfare, an objective carried on also by supervising the execution of agreements concerning the traffic in women and children.[31]

During the 1921 Convention, the expression "white slavery" was (fortunately) abandoned, thanks to a gradual de-racialization of the debate on trafficking, at least in its explicit manifestations.[32] The novelty of this Convention was that of including among the victims of the crime of procurement, of "immoral trafficking" related to prostitution, created by the 1910 Convention, not only women and underage girls, but also boys under twenty-one years of age.[33]

In the 1933 Convention on the Suppression of the Traffic in Women of Full Age, one can note an expansion of the embryonal notion of trafficking. The Contracting States aimed at regulating also the results of trafficking which went beyond prostitution, to include all sexual and immoral purposes. Moreover, in regards to women of any age the notion of consent was eliminated, deleting the previous constitutive nature of the "means" element.

Therefore, the offence of trafficking under the 1933 Convention and with relation to women and underage girls sought to punish "whoever, in order to gratify the passions of another person, has procured, enticed or led away, even with her consent, a woman or girl of full age or immoral purposes to be carried out in another country".[34]

As Anne Gallagher, referencing Jones-Pauly, explains, the main focus of the international legislative attention has been placed on the countries of origin, rather than "on the demand side

---

[29] League of Nations, "International Convention for the Suppression of Traffic in Women and Children", Geneva, 30 September 1921, *League of Nations Treaty Series*, vol. 9, p. 415 (henceforth, the 1921 Convention).
[30] Leage of Nations,"International Convention for the Suppression of the Traffic in Women of Full Age", Geneva, 11 October 1933, *League of Nations Treaty Series*, vol. 150, p. 43 (henceforth, the 1933 Convention).
[31] Anne T. Gallagher, *The International Law of Human Trafficking*, 56.
[32] *See* Laura Lammasniemi, "International Legislation on White Slavery and Anti-Trafficking in the Early Twentieth Century", *The Palgrave International Handbook of Human Trafficking,* Springer International Publishing AG (2020): 73, https://doi.org/10.1007/978-3-319-63058-8_112 for the argument of racial components having an impact on the anti-trafficking movement even after 1921.
[33] "International Convention for the Suppression of Traffic in Women and Children" (1921): Article 2.
[34] Ibid, Article 1.

of the prostitution/trafficking equation". [35] Additionally, the League of Nations advocated for the supported repatriation of victims, but the States "pushed for a system of compulsory return".[36]

1.1.3 The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949)

The four Conventions just exposed were consolidated in one instrument in 1949: the United Nations "Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others" (the 1949 Convention). [37]

In Article 1, the 1949 Convention prohibits the act of procuring, enticing and leading away, for purposes of prostitution, another person (even with his or her consent) and in general every act of exploitation of the prostitution of another person (again, even with his or her consent).[38]

Furthermore, in Article 2, the instrument criminalizes the running of brothels and renting a building or any other accommodation for prostitution-related purposes. [39] Therefore, the 1949 Convention focuses on trafficking for prostitution and related "immoral" purposes, both cross-border and domestic in protecting both women and men, minors and adults.

It must be noted that the 1949 Convention targets third parties, not sex workers: in doing so, it does not prohibit prostitution as such. On the other hand, the Convention does not prohibit the States from criminalizing, in addition to the exploitation for sexual purposes, also prostitution itself (so, sex workers in addition to third parties).

This international instrument does require the States Parties to promote "measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution" through their "public and private educational, health, social, economic and other

[35] Anne T. Gallagher, *The International Law of Human Trafficking*, Chapter 2, Paragraph 2.1.1.
[36] Ibid.
[37] UN General Assembly, "Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others", approved by the General Assembly of the United Nations in Resolution 317 of 2 December 1949, entered into force on 25 July 1951, *United Nations Treaty Series*, vol. 96, p. 271 (henceforth, the 1949 Convention).
[38] "Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others" (1949): Article 1.
[39] Ibid, Article 2.

related services". [40] However, this provision unfortunately resulted to be too vague and therefore ineffective.

The 1949 Convention also mandates the States to provide some level of international cooperation, consisting in the extradition of the offenders;[41] it allows the States to deport trafficked persons "who desire to be repatriated or who may be claimed by persons exercising authority over them or whose expulsion is ordered in conformity with the law". [42] Notably, trafficked persons generally do not have legal residency in the country, therefore it is likely for them to be deported, with the possibility of being subjected to detention or to forced rehabilitation. [43]

Because the 1949 Convention focuses on the sexual exploitation, it fails to define trafficking as a whole phenomenon. "The treaty equates trafficking with the exploitation of prostitution" [44] and it doesn't address the multitude of other purposes that human trafficking is undertaken for, such as domestic and industrial forced labor, forced marriage, forced begging, removal of organs and slavery-like practices. We will see that the core of trafficking as an offense in the Palermo Protocol is the *exploitation*, or, in other words, the abuse of the victim: the exploitation, for whichever purpose, is the "defining criterion" of human trafficking, and not the movement across borders or the actual practice that the victims of trafficking are forced to undertake.[45]

The enforcement mechanism of the 1949 Convention consisted in annual reports to the United Nations Secretary General to be published periodically and to be submitted to the Convention's "guardian", the Working Group of Contemporary Forms of Slavery, which no longer exists. Indeed, since 1974, the States Parties were asked to submit the reports to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which now became the Sub-Commission on the Protection and Promotion of Human Rights. Some authors [46] argue

---

[40] "Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others" (1949): Article 16.
[41] Idib, Articles 8 and 9.
[42] Ibid, Article 19.
[43] *See* United Nations, Economic and Social Council, Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences,* Ms. Rhadika Coomaraswarmy (January 2000), referenced in Janie Chuang, Anne Gallagher, and Dina Haynes, *Human Trafficking: The Law, Policy, and Practice of Responding to Human Trafficking* (forthcoming), Chapter 2, page 8.
[44] Ibid.
[45] "International Legal Framework – United Nations," La strada International, February 3, 2021, https://www.lastradainternational.org/un-palermo-protocol/.
[46] *See* for instance, Anne T. Gallagher, *The International Law of Human Trafficking*, Chapter 2, Paragraph 2.1.2, discussing the issue.

that the abolition of the Working Group of Contemporary Forms of Slavery could be one the signs showing that the 1949 Convention is gradually becoming obsolete; worsened by the fact that the instrument is not included in the preamble of the "Council of Europe Convention on Action against Trafficking in Human Beings", [47] when listing "the most important international legal instruments which deal directly with trafficking". [48]

1.1.4 Slavery and slavery-like practices: The Slavery Convention (1926), the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); the difference between slavery and human trafficking

The terms slavery, trafficking and forced labor are often used as synonyms: however, they are not interchangeable. Slavery, practices similar to slavery and forced labor are forms of exploitation, one of the modes of manifestation of the third element of human trafficking, as defined by the Palermo Protocol. [49]An over-extensive approach, which allows to use such labels without differentiating, may be dangerous: many scholars argue that the outcome can be that of a lack of focus, resulting in "the absolving of actors from tackling systemic causes of exploitation" [50] and in general failing to undertake impactful measures. Thus, the next subparagraphs will provide the internationally accepted definitions of slavery, slavery-like practices and forced labor.

As previously mentioned, slavery and the slave trade were the subject of numerous treaties throughout the nineteenth century. However, it was only in 1926, with the adoption of the Slavery Convention, [51] that an international legal definition of slavery was formally articulated.

Article 1 of the Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".[52]

---

[47] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", signed in Warsaw on May 16, 2005, entered into force February 1, 2008, *Council of Europe Treaty Series*, no. 197.
[48] Council of Europe, *Explanatory Report on the Convention of Action against Trafficking in Human Beings*, CEST 197, paragraph 49.
[49] The European Court of Human Rights itself, in Chowdury and others v. Greece, stated that "exploitation through work is one of the forms of exploitation covered by the definition of human trafficking", thus emphasizing the intrinsic connection between trafficking and forced labour, which however are not interchangeable terms. Forced labour is *one of the forms of exploitation* for the purpose of which human trafficking is perpetrated. *See* European Court of Human Rights, *Chowdury and Others v. Greece* (Application no. 21884/15), judgment of 30 March 2017, at para. 95. Emphasis added.
[50] Nicola Piper, Marie Segrave and Rebecca Napier-Moore, "Editorial: What's in a Name? Distinguishing forced labour, trafficking and slavery", *Anti-Trafficking Review*, issue 5 (2015): 2. www.antitraffickingreview.org.
[51] "Slavery Convention", signed in Geneva on September 25, 1926, *United Nations Treaty Series,* vol. 212, p. 17.
[52] Ibid, Article 1.

Therefore, the prohibition of slavery would be applicable to trafficking cases only "where there is clear evidence of the exercise of the powers of ownership". [53] However, the panorama of trafficking situations involves a greater level of complexity and articulation, and often the cases lacking such definite exercise of ownership are not given the attention they deserve. [54] For this reason, the Palermo Protocol provides a list of the possible purposes of trafficking, without however limiting the offense of human trafficking only to the forms of exploitation indicated. [55]

The Slavery Convention obliges all the Contracting States to abolish completely slavery *in all its forms*. [56] However, this Convention does not provide a definition of different forms of slavery. Instead, another UN instrument, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) [57] addressed the so called "slavery-like practices", or practices similar to slavery: such as, but not limited to, debt bondage and serfdom.

In the Supplementary Convention, debt bondage is defined as

> the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined. [58]

Debt bondage will be further analyzed in Chapter II. However, for the purposes of this paragraph, is sufficient to state that debt bondage usually refers to situations in which a person should paid off a debt through their labor, but cannot do so due to a variety of reasons, such as manipulation of the debt, of credit or of a contract, by the employer or by an intermediary; therefore, the person, to try to repaid the debt, must continue to work involuntarily. [59]

---

[53] Janie Chuang, Anne Gallagher, and Dina Haynes, *Human Trafficking: The Law, Policy, and Practice of Responding to Human Trafficking* (forthcoming): Chapter 2, page 11.
[54] Precisely for this reason it's important to avoid using the terms "slavery" and "human trafficking" interchangeably.
[55] Article 3 of the Palermo Protocol provides an open-ended list of examples including, at a minimum, "the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs".
[56] "Slavery Convention" (1926), Article 2 (emphasis added).
[57] UN General Assembly, "Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery", Geneva, 7 September 1956, *United Nations Treaty Series,* vol. 266, p. 3 (henceforth, the Supplementary Convention).
[58] "Supplementary Convention" (1956): Article 1(a).
[59] Genevieve LeBaron, "Reconceptualizing Debt Bondage: Debt as a Class-Based Form of Labor Discipline", *Critical Sociology* 40, no. 5 (2014): 777. https://doi.org/10.1177/0896920513512695.

Another slavery-like practice is serfdom, defined by the Supplementary Convention as:

> the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status. [60]

The Supplementary Convention defines as institutions and practice similar to slavery also the selling of women by their families for marriage (also called "servile marriage"), certain forms of abuse of women, and the buying and selling of children for labor or prostitution.[61]

This instrument calls for the abolition of slavery and slavery-like practices "where they still exist and *whether or not* they are covered by the definition of slavery contained in article 1 of the Slavery Convention". [62]

The Supplementary Convention also introduces the concept of a "person in a servile status" to refer to a victim of slavery-like practices, as opposed to the term "slave", a victim of slavery. The division between slavery and slavery-like practices or servitude will be reflected by the international human rights framework: the Universal Declaration of Human Rights [63] and the International Covenant on Civil and Political Rights [64] prohibit slavery, and state that no one should be held in servitude, a term that is considered [65] connected to the Supplementary Convention's concept of a "person in a servile status".

1.1.5 Forced labor: The Forced Labour Convention of 1930 (ILO Convention No. 29), the Abolition of Forced Labour Convention of 1957 (ILO Convention No. 105) and ILO Protocol 29 to the Forced Labour Convention

Although the 1926 Slavery Convention already prohibited practices of forced and compulsory labour, it was in 1930 with the International Labour Organization (ILO) "Forced

---

[60] "Supplementary Convention" (1956): Article 1(b).
[61] Ibid, Article 1(c).
[62] Ibid, Article 1 (emphasis added).
[63] UN General Assembly, "Universal Declaration of Human Rights", proclaimed by the United Nations General Assembly in Paris on 10 December 1948, General Assembly Resolution 217 (III) A: Article 4.
[64] UN General Assembly, "International Covenant on Civil and Political Rights", adopted by the United Nations General Assembly on 16 December 1966, with Resolution 2200A (XXI), *United Nations Treaty Series*, vol. 999, p. 171: Article 8.
[65] *See* Anne T. Gallagher, *The International Law of Human Trafficking*, Chapter 3, para. 3.3.1.

Labuor Convention", 1930 (ILO Convention No. 29) [66] that a widely accepted definition of forced labour was established: "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".[67] This definition was then reaffirmed in Article 1(3) of the Forced Labour Protocol. [68]

Therefore, the fundamental elements of forced labour are three: (i) "work or service", indicating any type of work occurring in any activity, industry or sector [69]; (ii) a subjective element, the "involuntariness"; (iii) an objective element, the exaction of the work or service under the "menace of penalty".

The latter refers to situations in which "persons are coerced to work through the use of violence or intimidation, or by more subtle means such as manipulated debt, retention of identity papers or threats of denunciation to immigration authorities". [70] Thus, the menace of penalty includes modes of physical and psychological coercion. [71]

With regards to the subjective element of forced labour, the "involuntariness" occurs when the worker's consent to take a job was not free and informed, as the worker was compelled or deceived, and their freedom to leave at any time is compromised. [72]

Article 2(2) of the ILO Convention No. 29 provides some exceptions to the "forced labour" definition such as compulsory military service, work in emergency situations (for instance, a war or an earthquake), prison labour (under certain conditions).

Most importantly, Article 25 of this instrument criminalizes the exploitation of forced labour:

---

[66] International Labour Organization, "Forced Labour Convention", Geneva, 14th ILC session (28 Jun 1930). Entry into force: 1 May 1932. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.

[67] "Forced Labour Convention" (1930): Article 1.

[68] International Labour Organization, "Protocol of 2014 to the Forced Labour Convention, 1930", Geneva, 103rd ILC session (11 Jun 2014), entry into force: 9 November 2016. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029.

[69] "What is forced labour, modern slavery and human trafficking", International Labour Organization's website, accessed June 17, 2021. https://www.ilo.org/global/topics/forced-labour/definition/lang-en/index.htm#:~:text=The%20Definition%20of%20forced%20labour&text=%22all%20work%20or%20service%20which,offered%20himself%20or%20herself%20voluntarily.%22&text=Menace%20of%20any%20penalty%20refers,to%20compel%20someone%20to%20work.

[70] Ibid.

[71] *See* for instance Rohit Malpani, "Legal Aspects of Trafficking for Forced Labour Purposes in Europe", ILO Special Action Programme to Combat Forced Labour Workin Paper No. 48, 2006. https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082021.pdf.

[72] "What is forced labour, modern slavery and human trafficking", International Labour Organization's website.

the illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation of any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced [73]

thereby obligating all the Contracting Parties to eradicate forced labour as a practice.

The "Abolition of Forced Labour Convention", 1957 (ILO Convention No. 105) [74] primarily sought to eliminate forced labour imposed by state authorities. Indeed, the Convention prohibits the use of forced labour:

as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; b) as a method of mobilising and using labour for purposes of economic development; c) as a means of labour discipline; d) as a punishment for having participated in strikes; e) as a means of racial, social, national or religious discrimination. [75]

It is important to note that both the Forced Labour Conventions enjoy nearly universal ratification, therefore obliging almost all countries to eradicate forced labour and to report their improvements to the ILO's supervisory bodies.

The ILO Protocol of 2014 to the Forced Labour Convention (ILO Protocol 29) supplements the 1930 Forced Labour Convention, "recognizing that the prohibition of forced or compulsory labour forms part of the body of fundamental rights" [76] and that

the context and forms of forced or compulsory labour have changed and trafficking in persons for the purposes of forced or compulsory labour, which may involve sexual exploitation, is the subject of growing international concern and requires urgent action for its effective elimination. [77]

The ILO Protocol 29 provides guidance to States Parties on how to take effective measures to prevent and eliminate compulsory labour. Examples of this include educating and informing people who are considered to be particularly vulnerable in order to prevent them from becoming

[73] "Forced Labour Convention" (1930): Article 25.
[74] International Labour Organization, "Abolition of Forced Labour Convention", ILO Convention No. 125, Geneva, 40th ILC session (25 Jun 1957), entry into force: 17 January 1959. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312250:NO.
[75] "Abolition of Forced Labour Convention" (1957): Article 1.
[76] "Protocol of 2014 to the Forced Labour Convention, 1930" (2014): preamble.
[77] "Protocol of 2014 to the Forced Labour Convention, 1930" (2014): preamble.

victims of forced labour and educating employers as well, in order to prevent their becoming involved in forced labour practices. [78] With regards to the prevention sector, another important guidance is the one contained in Article 2(e): "supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour"; [79] the potential of due diligence in the fight against trafficking in persons for the purposes of forced labour will be analyzed in depth in Chapter III.

Also, the Protocol urges the States Parties to "provide to victims protection and access to appropriate and effective remedies, such as compensation, and to sanction the perpetrators of forced or compulsory labour". [80]

As previously stated with reference to slavery, for the measures to be effective is fundamental to avoid using "forced labour" and "human trafficking" as interchangeable terms: forced labour is one of the end-purposes of human trafficking.

1.2 The definition of human trafficking: the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons and the Convention Against Transnational Organized Crime

1.2.1 Overview of the Convention Against Transnational Organized Crime and its Protocols

The "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000), henceforth the Palermo Protocol or the Trafficking Protocol, is the most important legally binding international instrument to combat trafficking in persons. This instrument is one of the three additional treaties to the Convention Against Transnational Organized Crime. [81]

[78] Ibid, Article 2(a) and 2(b).
[79] Ibid, Article 2(e).
[80] Ibid, Article 1.
[81] United Nations General Assembly, "United Nations Convention against Transnational Organized Crime", adopted by the UN General Assembly with Resolution A/RES/55/25 of 15 November 2000, opened for signature in Palermo, 12 December 2000, entered into force on 23 September 2003, *United Nations Treaty Series*, vol. 2225, p. 209.

Indeed, this Convention is supplemented by three protocols, dealing with Smuggling of Migrants; [82] Trafficking in Persons, Especially Women and Children (the Palermo Protocol); and Trafficking in Firearms. [83] The ratification of the Convention Against Transnational Organized Crime is necessary to the ratification of each one of the three additional treaties.

The Convention and its Protocols were the outcome of a shift in the international legal framework, occurred in the 1990s, towards a perspective connecting human trafficking and "migrant smuggling" with the transnational organized crime.[84] The UN General Assembly decided to establish an intergovernmental Ad Hoc Committee to draft the Convention and its Protocols; the Committee concluded its work in October 2000. The Convention, the Smuggling of Migrants Protocol and the Trafficking Protocol were opened for signature in Palermo in December 2000. The Trafficking Protocol entered into force on December 25, 2003. As of June 2021, the Convention had attracted 190 States Parties; the Trafficking Protocol 178 States Parties.

The Convention aims at promoting interstate cooperation to combat transnational organized crime and its core obligation is the one of criminalization of the range of offences included in the instrument.[85]

The pre-requisites for the application of the Convention to a particular case are: (i) the relevant offense must be "transnational in nature"; [86] (ii) it must involve an organized criminal

[82] United Nations General Assembly, "Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime", adopted by the UN General Assembly with Resolution A/RES/55/25 of 15 November 2000, opened for signature in Palermo, 12 December 2000, entered into force on 28 January 2004, *United Nations Treaty Series*, vol. 2241, p. 507.
[83] United Nations General Assembly, "Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime", adopted by the UN General Assembly with Resolution 55/255 of 31 May 2001, opened for signature in New York, 2 July 2001, entered into force on 3 July 2005, *United Nations Treaty Series*, vol. 2326, p. 208.
[84] Anne T. Gallagher, *The International Law of Human Trafficking*, Chapter 2, Paragraph 2.2.
[85] Such as participation in an organized criminal group, money laundering, corruption and obstruction of justice.
[86] "United Nations Convention against Transnational Organized Crime" (2000): Article 3(1). Specifically, Article 3(2) explains "an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation; planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State".

group;[87] (iii) it must constitute a "serious crime". [88] These three elements are defined broadly by the Convention itself, therefore the States Parties are able to use the Convention's provisions to combat a variety of criminal activities, human trafficking included. Moreover, the Convention establishes a Conference of the Parties to promote and review the implementation of the instrument. [89]

As stated in Article 2, the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children" has three purposes:

> a) to prevent and combat trafficking in persons, paying particular attention to women and children; (b) to protect and assist the victims of such trafficking, with full respect for their human rights; and (c) to promote cooperation among States Parties in order to meet those objectives. [90]

The Palermo Protocol's Article 3 gives the definition of Human Trafficking, a three-element definition:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. [91]

Therefore, the offense of trafficking in persons is constituted by three elements: (i) an act ("the recruitment, transportation, transfer, harbouring or receipt of persons"); (ii) committed by specific means ("by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or

---

[87] "United Nations Convention against Transnational Organized Crime" (2000): Article 3(1). Article 2(a) of the same instrument specifies that an organized criminal group means "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit".

[88] United Nations Convention against Transnational Organized Crime" (2000): Article 3(1). Article 2(b) precises that serious crime means "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty".

[89] "United Nations Convention against Transnational Organized Crime" (2000): Article 32.

[90] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 2.

[91] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 3(a).

receiving of payments or benefits to achieve the consent of a person having control over another person"); (iii) for purposes of exploitation, which includes, at a minimum, "the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

The action and means elements constitute what one would consider the *actus reus* of trafficking, while the third element, the end-purposes of exploitation, could be considered the necessary *means rea*. In the next sections, the three constitutive elements of human trafficking will be analyzed separately.

Article 3 of the Palermo Protocol also makes clear that consent is irrelevant when determining whether or not the crime of trafficking occurred: "The consent of a victim of trafficking in persons to the intended exploitation […] shall be irrelevant where any of the means set forth in subparagraph (a) have been used". [92] Indeed, the consent in human trafficking situations is compromised through force, deception, abuse of power, abuse of a position of vulnerability or other means: these means nullify consent.

A visual will help to better understand this concept: a common case of trafficking is one that occurs when someone is tricked into the belief of a certain job's wage and determinate living conditions, only to then discover that the situation was completely different from the one prospected at the beginning; their eventual consent concerns those conditions, and not the ones that they will be subjected to. Therefore, their consent (if there was one) is nullified by the means used.

[92] Ibid, Article 3(b).

THE ELEMENTS OF TRAFFICKING: DIFFERENCE BETWEEN ADULTS & CHILDREN

	UN TRAFFICKING PROTOCOL	
KEY ELEMENT	*Three elements must be present for a situation of trafficking in adults*	*Two elements must be present for a situation of trafficking in children (persons under 18 years old)*
1. An action: *What traffickers do*	Recruitment, transportation, transfer, harbouring or receipt of persons	
2. By means of: *How they do it*	Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another	(Not required)
3. For the purpose of: *Why they do it*	Exploitation (including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs)	

Table 1: The table represents the three constitutive elements of human trafficking, along with the difference between the requirements in a situation of trafficking in adults and of trafficking in children. [93]

As portrayed in Table 1, and as stated in Article 3(c), the "means" element is relevant only to trafficking in adults: "the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" *even if this does not involve any of the means* set forth in subparagraph (a) of this article". [94]

The baseline argument for this provision is that minors cannot provide an informed consent, even if none of the "means" are used. For the purposes of this Protocol, child is a person under the eighteen years of age. [95]

The debate on whether trafficking in human beings, as defined in the Palermo Protocol, is only a cross-border offence or it can also happen within a country, is still ongoing. Many argue that, since the action can also be the one of "harbouring", human trafficking does not necessarily

[93] Table used in the book by Janie Chuang, Anne Gallagher, and Dina Haynes, *Human Trafficking: The Law, Policy, and Practice of Responding to Human Trafficking* (forthcoming). The table was reproduced with the consent of the author.
[94] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 3(c), (emphasis added).
[95] Ibid, Article 3(d).

entail a movement from one country to another. Others, [96] however, claim that since the Palermo Protocol is a supplement of the Convention against Transnational Organized Crime, the context consists in the involvement of organized criminal groups in the *movement* of people – thus, according to this theory, the offence of human trafficking as defined by the Protocol can only be cross-border. Throughout my research, I will demonstrate why is necessary to interpret human trafficking as also an internal phenomenon.

Finally, it's important to note that the core of the concept of human trafficking in the Palermo Protocol, and in general in international law, it's the exploitation of an individual: accordingly, the offense refers both to the process by which an individual is moved into a situation of exploitation *and* the maintenance of that person in a situation of exploitation. [97] Therefore, traffickers will not only be the recruiters, or the transporters, but also the individual or entity who is responsible for sustaining the exploitation. [98]

1.2.2 The Act

The action element of trafficking in persons includes, but is not limited to, the "the recruitment, transportation, transfer, harbouring or receipt of persons", [99] although none of these activities is defined by the Protocol.

The terms "harbouring" and "receipt" are critical as they confirm that, as stated before, the offense of human trafficking refers both to the process by which an individual is moved into a situation of exploitation (recruitment, transportation, transfer) and the maintenance of that person in a situation of exploitation (harbouring or receipt). As Anne Ghallagher explains, "the references to harbouring and receipt operate to bring not just the process […] but also the end situation of trafficking within the definition". [100] Accordingly, not only a transporter or recruiter, but also the supervisor of a factory could be potentially considered, for instance, criminally liable for the offense of human trafficking for the purpose of forced labor.

---

[96] *See* for instance Kathryn Kosanovich, "The Difference Between Trafficking And Forced Labor". Blog. *Research On Human Trafficking* (2 April 2021). http://www.kosanovich.net/essays/2017/04/the-difference-between-trafficking-and-forced-labor/.
[97] Janie Chuang, Anne Gallagher, and Dina Haynes, *Human Trafficking: The Law, Policy, and Practice of Responding to Human Trafficking* (forthcoming).
[98] Ibid.
[99] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 3(a).
[100] Anne T. Gallagher, *The International Law of Human Trafficking*, Chapter 1, Paragraph 1.1.2.

1.2.3 The means. The role of consent. The "abuse of a position of vulnerability"

The second element of human trafficking refers to the means that have been used to commit the action or render it possible:

> by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. [101]

The reference is both to "direct" methods – such as the use of force, abduction, threat and other forms of coercion – and to more subtle, "indirect" means, that have an effect on the psyche of the potential trafficked individual – such as fraud, deception, abuse of power or of a position of vulnerability. Also, the means can consist in giving or receiving payments or benefits in order to achieve the consent of a person having control over another person.

This element can be considered the second part of the *actus reus* – but only when the individuals subjected to trafficking are adults. Indeed, according to Article 3(c), when applying to minors of eighteen years of age, the Protocol does not require the means element to be proven. [102] The *ratio* of this provision is to be found in one of the core principles of the Protocol: "the consent of a victim of trafficking in persons to the intended exploitation […] shall be irrelevant where any of the means set forth in subparagraph (a) have been used". [103] When methods like force, fraud, deception are used on someone, that individual is not in the position of giving free and informed consent. In case of minors, however, the possibility of a free and informed consent is already non-existent because of their age; thus, the use of determinate means is irrelevant.

A clarification is necessary. Theoretically, the "lack of consent to a situation of exploitation is considered integral to the understanding of trafficking".[104] However, a survey conducted by the United Nations Office of Drugs and Crime (UNODC) revealed that, in practice, considerations concerning consent still assume a role in the domestic legal framework of many countries, [105] in which the means are often critical to considerations of consent. For instance, it

---

[101] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 3(a).
[102] Ibid, Article 3(c).
[103] Ibid, Article 3(b).
[104] United Nations Office of Drugs and Crime, "The role of 'Consent' in the Trafficking in Persons Protocol", *Issue Paper*, Vienna (2014): 6. https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf.
[105] Ibid, 7.

is common for States to rely significantly on victim testimony as a key form of evidence. In those cases, the actions, experiences and views of the victims, along with their perception of the situation they were subjected to, will be front and centre of investigations and prosecutions, reinforcing the relevance of consent. [106]

Another key aspect to consider is the concept of "abuse of a position of vulnerability".

The term is used to refer to any situation in which "the person involved has no real and acceptable alternative but to submit to the abuse involved".[107] The inclusion of the abuse of a position of vulnerability among the means element of trafficking "reflected a general desire to ensure that the definition was capable of encompassing the myriad, subtle means by which people are exploited". [108] However, even with the aid of the *Travaux Préparatoires*, the definition is still vague; probably, intentionally vague. Indeed, the introduction of the "means" in the definition has to be read within the context of the heated debate around trafficking and prostitution. The Drafters were not too explicit so that the abuse of a position of vulnerability could promote an expansion of the concept of human trafficking, while at the same time being sufficiently indefinite to avoid forcing the States to take a fixed position about their domestic response to prostitution. [109]

The UNODC's Model Law against Trafficking in Persons proposes a wide range of factors, precising that the abuse of power and the abuse of a position of vulnerability could be defined in domestic law, for instance, as the "pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance", [110] or a "reduced capacity to form judgements by virtue of being a child, illness, infirmity or a physical or mental disability",[111] and also "being in a precarious situation from the standpoint of social survival". [112] An example will be useful to clarity how the abuse of a position of vulnerability can have a

---

[106] Ibid, 77-78.
[107] United Nations General Assembly, "Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols", A/55/383/Add.1, (2001): 12. https://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf.
[108] United Nations Office of Drugs and Crime, "The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised", *Issue Paper*, Vienna (2019): 7. https://www.unodc.org/documents/human-trafficking/2018/Issue_Paper_International_Definition_TIP.pdf.
[109] Ibid. *See* also United Nations Office of Drugs and Crime, "Abuse of a position of vulnerability and other 'means' within the definition of trafficking in persons", *Issue Paper*, Vienna (2013): 2-3. https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf.
[110] United Nations Office of Drugs and Crime, "Model Law against Trafficking in Persons" (2009): 9. https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf.
[111] Ibid.
[112] Ibid.

role in the exploitation of the victims. In "Chowdury and Others v. Greece", the European Court of Human Rights clarified that because the applicants "began working at a time when they were in a situation of vulnerability as irregular migrants without resources and at risk of being arrested, detained and deported", [113] they probably realized that had they stopped working, they would have never received their overdue wages, the amount of which was constantly accruing as the days passed. [114] Thus, in this case, the employer abused of the position of vulnerability of the migrants. And the fact that the victims might have offered themselves for work voluntarily at the time of their recruitment does not change the Court's evaluation of the facts, since their situation changed afterwards, as a result of their employers' conduct. [115]

1.2.4 The purpose: exploitation.

The third element of human trafficking as defined by the Palermo Protocol is the exploitation, which is the purpose to the action, the *mens rea* aspect of the offence. Indeed, trafficking will occur if the individual or entity intended the action for the purposes of exploitation: trafficking is a crime of specific intent. However, it is not required for the exploitation to have actually occurred. [116] Under the Protocol, the crime is complete once the relevant elements of act and purpose (or, in the case of children, only the act) are made out, with an intention to exploit. [117]

Article 3(a) of the Protocol does not define the term "exploitation"; rather, it provides an open-ended list of examples. The aim of this approach was that of avoiding to unduly narrow the purpose of trafficking, while still providing sufficient indication of the nature of exploitation that the Protocol refers to.

According to Article 3(a), "exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organ". [118]

---

[113] European Court of Human Rights, *Chowdury and Others v. Greece,* Application no. 21884/15 (2017), at para. 97. Henceforth, Chowdury v. Greece.
[114] Ibid.
[115] Ibid.
[116] United Nations Office of Drugs and Crime, "The Concept of 'Exploitation' in the Trafficking in Persons Protocol", *Issue Paper*, Vienna (2015): 24. https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf.
[117] Ibid.
[118] United Nations General Assembly, "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 3(a).

As stated above, the core of the offense of trafficking in persons is precisely the purpose of exploitation. The forms of exploitation listed in the Palermo Protocol are "an integral part of its substantive content",[119] thus they will be analyzed separately, and in depth, in Chapter II.

It is, however, useful to state three clarifications that the *Travaux Préparatoires* provide, which are relevant to the concept of exploitation.

First, *Travaux Préparatoires* specify that "the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation *only* in the context of trafficking in persons". [120] As explained above, the absence of a definition of "sexual exploitation" and "exploitation of the prostitution of others" allows the States Parties address prostitution in their respective domestic laws without the Protocol's interferences. This topic will be further investigated in Chapter II.

Secondly, "the removal of organs from children with the consent of a parent or guardian for legitimate medical or therapeutic reasons should not be considered exploitation". [121]

Lastly, the *Travaux Préparatoires* confirm the existence of a link between illegal adoption and human trafficking in some circumstances:

> where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, it will also fall within the scope of the Protocol.[122]

[119] United Nations Office of Drugs and Crime, "The Concept of 'Exploitation' in the Trafficking in Persons Protocol" (2015): 27.
[120] United Nations General Assembly, "Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols" (2001): 12.
[121] Ibid.
[122] Ibid.

1.2.5 Key obligations of State Parties

The Palermo Protocol aims at (i) preventing and combating trafficking in persons; (ii) protecting and assisting the victims of such trafficking, with full respect for their human rights; and (iii) promoting cooperation among States Parties in order to these ends. [123]

The Protocol uses a three-parts approach, which echoes the three purposes set forth in Article 2: Prosecution (combating trafficking, Article 5), Protection ("protecting and assisting the victims of trafficking", Articles 6-8), Prevention and cooperation among States Parties (Articles 9-13). As will be underlined throughout this section, not all the three goals have the same relevance within the Palermo Protocol.

In examining the key obligations that the Protocol prescribes, we must not forget that this is *not* a human rights instrument. Both the Trafficking Protocol and the Convention against Transnational Organized Crime are crime control treaties. In both cases, the core obligations are the ones that prescribe criminalization of the range of offences included in the treaties themselves. This is also clarified by the Protocol's Article 4, by specifying the scope of application of the instrument (and by its reference to Article 5):

> This Protocol shall apply, except as otherwise stated herein, *to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol*, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences. [124]

The nature of the Protocol as a crime control treaty is confirmed by the fact that Article 5, the first Article regarding the obligations of the State Parties, concerns the criminalization of the offense of trafficking; Article 5 belongs to the "General Provisions" sections, unlike the other Articles stating the remaining obligations; lastly, Article 5 prescribes a hard obligation, is mandatory (while the following provisions concern softer obligations).

> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: *(a)* Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; *(b)* Participating as an accomplice in an offence established in

[123] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 2.
[124] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 4.

accordance with paragraph 1 of this article; and *(c)* Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article. [125]

According to Article 5, States are obliged to criminalize trafficking in persons as defined in the Palermo Protocol, subjecting to penalties not only the direct perpetrators of the crime, but, if necessary, also the accomplices and whoever directed or organized the offence. Also, if in compliance with the State's legal system, the Party shall establish the attempt of committing human trafficking.

Part two of the Protocol, composed by Articles 6, 7 and 8, deals with the Protection of the trafficking victims and it does not contain many hard obligations, as can be noted by the wording used. State Parties are indeed obliged to protect the privacy and identity of individual subjected to human trafficking only "*in appropriate cases* and to the *extent possible* under domestic law"; [126] the States "*shall consider* implementing measures to provide for the physical, psychological and social recovery of victims of trafficking" [127] as for instance those regarding appropriate housing, counselling "in a language that the victims of trafficking in persons can understand" [128], psychological assistance, employment and educational opportunities. The wording used, as opposed to the hard obligation of criminalizing the offence of human trafficking, again underlines ones again the crime control nature of the Protocol, and the choice of the States Parties of using primarily the method of Prosecution, over the ones of Prevention and Protection of the trafficking victims.

However, Article 6 does oblige the States Parties to ensure that the legal system contains measures that offer the victims the possibility of obtaining compensation for the damages suffered. [129]

Moreover, Article 7 asks the States to "consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases", and in doing so the States should take into account humanitarian and compassionate factors. [130]

---

[125] Ibid, Article 5.
[126] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 6(1), emphasis added.
[127] Ibid, Article 6(2), emphasis added.
[128] Ibid.
[129] Ibid, Article 6(6).
[130] Ibid, Article 7.

Article 8 of the Protocol concerns the repatriation of victims of trafficking and it states that a State Party has the obligation to "facilitate and accept, with due regard for the safety of that person" the return of any trafficking victim who is a national of the State Party or who had permanent residence at the time of entry to the receiving State. [131]

The third part of the Palermo Protocol concerns the Prevention of trafficking and the promotion of cooperation among the States. The key provisions of this section are Articles 9, 10 and 11.

Article 9 is the only provision that deals with the Prevention of human trafficking; it is indeed often said that Prevention is the "neglected P". [132]

According to Article 9, States Parties "shall establish comprehensive policies, programmes and other measures" to both promote the prevention of trafficking and protection of its victims from re-victimization. [133] In order to do so, States "shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons" [134] and shall take measures "to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity". [135] The vagueness of this provision hinders its effectiveness and further underlines how the Prevention of human trafficking is not the priority of the Palermo Protocol.

Article 10 concerns "information exchange and training"; according to this provision, the States, where appropriate, shall provide or strengthen training for officials in the recognition and prevention of trafficking, including human rights awareness training.[136]

According to Article 11, which deals with border measures, States Parties shall strengthen, when possible, such border controls as it might be necessary to prevent trafficking (without prejudice to other international obligations that allow the free movements of people). [137]

---

[131] Ibid, Article 8.
[132] The "three Ps" are: Prosecution (mandatory for States Parties); Protection of trafficking victims (softer obligation) and Prevention of human trafficking (the most neglected purpose).
[133] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 9(1).
[134] Ibid, Article 9(2).
[135] Ibid, Article 9(4).
[136] Ibid, Article 10.
[137] Ibid, Article 11.

1.3 Other relevant international instruments protecting the rights of trafficked persons

One of the stated purposes of the Palermo Protocol is to protect and assist the victims of trafficking, with full respect for their human rights. [138] However, as previously underlined, this is not the priority of the instrument. Also, the Protocol is mostly a crime control treaty. The investigation on whether the Protocol's lack of human rights perspective and tools can be compensated by other human rights international instruments is one that will be conducted throughout this thesis. In this section, we will briefly touch on the most relevant provisions that could help to "make up" for the Palermo Protocol shortcomings in this area. Besides, in the interpretation of a treaty it should be taken into account "any relevant rules of international law applicable in the relations between the parties" (Vienna Convention on the Law of the Treaties, Article 31, para. 3, lit. c). [139] This provision "highlights systemic integration as a function of treaty interpretation", [140] thus having "great potential to be one of the means to mitigate the effects of the […] fragmentation of international law" [141] – in this case, the incomplete, though extremely relevant, regulation of human trafficking by the Palermo Protocol. [142]

---

[138] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 2.

[139] Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, entered into force on 27 January 1980, *United Nations Treaty Series*, vol. 1155, p. 331. Available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

[140] Oliver Dörr and Kirsten Schmalenbach (edited by), *Vienna Convention on the Law of Treaties - A Commentary*, second edition (Berlin: Springer-Verlag GmbH Germany, 2018): 604.

[141] Ibid.

[142] *See* Oliver Dörr and Kirsten Schmalenbach (edited by), *Vienna Convention on the Law of Treaties - A Commentary* (2018): 604-610, as reference for the following considerations.
Many scholars consider the reference to "any relevant rules of international law" as comprehending *all recognized sources* of international law: "Since no restrictions are contained in that phrase, and its meaning is even widened by the word 'any', it must be taken to refer to all recognized sources of international law the emanations of which can in principle be of assistance in the process of interpretation". Therefore, the terms of the treaty can be interpreted in the light of those of another treaty (and this concerns bilateral treaties in force between two parties to a dispute on the interpretation of a multilateral treaty), binding resolutions of the UN Security Council, the general rules of customary international law. Also, parts of international judicial practice apply para. 3 lit. 3 in a less restrict way, considering non- binding documents as material relevant for interpretation.

1.3.1 Obligation to Remedy Violations of Human Rights Law: The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Migrant Workers Convention, the Convention against Torture and the Convention on the Rights of the Child

The Trafficking Protocol, at Article 6(6), requires State Parties to ensure that the legal system contains measures that offer the victims the possibility of obtaining compensation for the damages suffered. [143] At a closer look, we can note that this provision does *not* require the States to *provide remedies*, but only to offer the *legal possibility* of compensation.

Here, international human rights law can "come to the rescue" with obligations that consist precisely in providing remedies. As an established rule of international law, indeed, "the States have a duty to provide domestic legal remedy to victims of human rights violations […] committed in their territory".[144]

The first human rights instrument to contain the formal articulation of this obligation was the Universal Declaration of Human Rights, establishing that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".[145] Although human trafficking is not directly addressed in the Universal Declaration of Human Rights, that instrument, at Article 4, prohibits slavery and states that no one should be held in servitude: again furthering the point made in prior sections, slavery and slavery-like practices are end-purposes of human trafficking. Therefore, in this sense the Universal Declaration of Human Rights can help in "filling the gap", at least for what concerns trafficking for the purposes of slavery or servitude. [146] The same argument could be made with regards to trafficking for the purposes of forced labour, when reading Article 23 of the Declaration.

> Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
>
> Everyone, without any discrimination, has the right to equal pay for equal work.
>
> Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

---

[143] Ibid, Article 6(6).
[144] Anne T. Gallagher, *The International Law of Human Trafficking*, Chapter 6, Paragraph 6.2.1.
[145] UN General Assembly, "Universal Declaration of Human Rights", proclaimed by the United Nations General Assembly in Paris on 10 December 1948, General Assembly Resolution 217 (III) A: Article 8.
[146] It is necessary to underline the non-binding nature of the Universal Declaration of Human Rights: it can be used, however, as a starting point for the reconstruction of the practice and the *opinio juris* of the States Parties.

Everyone has the right to form and to join trade unions for the protection of his interests.[147]

Other claims of human trafficking being subjected to the Declarations originate from its Article 5, since often trafficking victims are subjected to inhumane and degrading treatments.[148]

Another international human rights instrument, which recognizes the substantive and procedural right to remedy is the International Covenant on Civil and Political Rights (ICCPR), requiring States Parties "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy". [149]

Since the rights and freedoms are recognized in the ICCPR, this provision is applicable to numerous trafficking situations: for instance, the right to freedom from slavery and servitude; [150] the right to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; [151] the right to freedom of movement. [152]

The Migrant Workers Convention's Article 83 is similar to the one of the ICCPR just analyzed.[153]

Furthermore, the "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" states that "each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible". [154]

---

[147] "Universal Declaration of Human Rights" (1948): Article 23.
[148] Ibid, Article 5. In particular, the Article states "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".
[149] "International Covenant on Civil and Political Rights" (1966), Article 2(3). The full Article states: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.".
[150] International Covenant on Civil and Political Rights" (1966), Article 8.
[151] Ibid, Article 7.
[152] Ibid, Article 12.
[153] United Nations General Assembly, "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families", adopted by Resolution A/RES/45/1581 of 18 December 1990, entered into force on 1 July 2003, *United Nations Treaty Series*, vol. 2220, p. 3.
[154] United Nations General Assembly, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", adopted by Resolution 39/462 of 10 December 1984, entered into force on 26 June 1987, *United Nations Treaty Series*, vol. 1465, p. 85. Article 14. The full Article is the following: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

The "Convention on the Rights of the Child" (CRC) contains a similar provision, at Article 39,[155] which also requires State Parties to "take all the appropriate measures to promote the physical and psychological recovery and social integration"[156] of a child victim of trafficking. The CRC also directly addresses trafficking, by prohibiting the trafficking in children for any purpose and the sexual exploitation of children and the forced labour committed by children, at Article 32.

1.3.2 The Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Economic, Social and Cultural Rights

Neither the "Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW), [157] nor the "International Covenant on Economic, Social and Cultural Rights" (ICESCR) [158]explicitly recognize a substantive and procedural right to remedies (therefore they were not included in the previous sub-paragraph). However, both these instruments identify rights that are being engaged in human trafficking.

CEDAW, in its Article 2, prohibits the discrimination against women caused directly or indirectly by States Parties and imposes a due diligence obligation on the States to prevent discrimination by private actors. Discrimination can occur through the failure of the States to take necessary legislative measures to ensure the full realization of women's rights.

CEDAW and ICESCR recognize rights that are regularly violated when trafficking in persons occurs, among which the right to health (Article 12 ICESCR, Article 14 CEDAW), the right to freely choose one's work and to just and favorable conditions of work (Articles 6 and 7 ICESCR, Article 11 CEDAW), the right to freedom from slavery, servitude, forced labour (Article 10 ICESCR), the right to not be sold, traded, promised or forced into marriage (Article 16 CEDAW).

---

[155] United Nations General Assembly, "Convention on the Rights of the Child", adopted by resolution 44/252 of 20 November 1989, entered into force on 2 September 1990, *United Nations Treaty Series*, vol. 1577, p. 3. Article 39.
[156] Ibid.
[157] United Nations General Assembly, "Convention on the Elimination of All Forms of Discrimination against Women", adopted with Resolution 34/180, opened for signature at the United Nations Headquarters on 1 March 1980, entered into force on 3 September 1981, *United Nations Treaty Series*, vol. 1249, p. 13.
[158] United Nations General Assembly, "International Covenant on Economic, Social and Cultural Rights", adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, *United Nations Treaty Series*, vol. 993, p. 3.

1.4 Regional approaches to combating human trafficking

1.4.1 The Council of Europe Convention on Action Against Trafficking in Human Beings. Comparisons with the UN Trafficking Protocol. Recovery and reflection period. The European Court of Human Rights

Anne Gallagher argues that the Council of Europe "Convention on Action against Trafficking in Human Beings" [159] (henceforth, Anti-Trafficking Convention) deals with trafficking in a revolutionary way in the sense that, contrarily to the Trafficking Protocol, "it explicitly recognizes trafficking as a violation of human rights". [160]

The Anti-Trafficking Convention adopts the same purpose [161] and follows the same structure of the Trafficking Protocol. The Convention's definition of trafficking[162] reflects the one set out in the Protocol.

Article 2 of the Convention explicitly specifies that is considered trafficking in human beings also a fully domestic phenomenon: "This Convention shall apply to all forms of trafficking in human beings, *whether national or transnational*, whether or not connected with organised crime". [163]

In terms of recognition of the rights of victims of trafficking to identification, protection, support, and remedies, the Convention represents a step forward in the battle against trafficking. Indeed, it binds the States and the relevant domestic authorities to recognize victims of trafficking as such, and not as illegal migrants or criminals. [164]

The Convention affirms that victims of trafficking require physical and psychological assistance and support, which *should not* be conditional on the victim's cooperation with national authorities. [165] This passage is crucially related to the so-called "recovery and reflection period": the Anti-Trafficking Convention also states that victims of trafficking require time and space to recover and escape from the influence of the traffickers before they take a decision regarding their possible cooperation with the authorities. [166] According to Article 15, victims

[159] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings" (2005).
[160] Anne T. Gallagher, *The International Law of Human Trafficking* (2010), Chapter 2, Paragraph 2.3.2.
[161] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings" (2005): Article 1.
[162] Ibid, Article 4.
[163] Ibid, Article 2.
[164] Ibid, Article 10.
[165] Ibid, Article 12 (emphasis added).
[166] Ibid, Article 13.

are entitled to legal assistance and compensation; and trafficked persons whose personal situation requires them to stay in the country of destination or who are cooperating in the prosecution of their exploiters should be issued a residence permit. [167]

The Convention also provides a clear set of obligations regarding the prevention of trafficking. [168] States parties are required to take legislative, administrative, educational, social, cultural, or other measures to "discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking". [169]

One of the most important innovations of the Convention is the establishment of a monitoring system, consisting in a Group of Experts on Action against Trafficking in Human Beings (GRETA) and a Committee of the Parties. GRETA submits its reports to the Committee of the Parties. This monitoring system is extremely efficient and GRETA's reports useful as the data collected helps to point out the specific measures that need to be taken in a specific period of time. There is, unfortunately, a constant transformation of trafficking means and purposes of exploitation: a continuous and detailed monitoring system is an efficient tool to address the issue. One of the advantages of a regional framework is that it is, indeed, more specific.

Furthermore, article 41 of the European Convention on Human Rights, [170] allows the European Court of Human Rights to ensure the "just satisfaction" to victims of violations of their rights (contained in the Convention and its Protocols). This means that a victim of trafficking might be able to obtain relief in a declaratory judgement or/and in monetary compensation, but only if the violation he or she was subjected to is recognized as a violation of the European Convention on Human Rights (ECHR). Trafficking in human beings is not mentioned in the European Convention on Human Rights: article 4 proscribes slavery, servitude, forced and compulsory labor. [171] This could certainly provide a lack of protection and denial of relief for victims of trafficking.

---

[167] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings" (2005): Article 14.
[168] Ibid, Article 5.
[169] Ibid, Article 6.
[170] Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms" (European Convention on Human Rights), opened for signature in Rome on 4 November 1950, entered into force on 3 September 1953, *Council of Europe Treaty Series,* No. 5. Henceforth, ECHR.
[171] But as argued below, the European Court of Human Rights took very relevant steps towards the integration of human rights norms and anti-trafficking rules, arguing, in *Rantsev v. Cyprus and Russia*, that "trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention". *See* footnote 186.

A crucial element of the European Convention of Human Rights is the recovery and reflection period. The relevance of this institution can be exposed through the case "S.M. v. Croatia". [172] The victim, a Croatian national, filed a criminal complaint against the defendant, T.M, who allegedly had forced the victim into prostitution over several months. T.M., a former police officer, initially contacted the victim stating he would find a job for her; instead, he arranged for her to provide sexual services. He threatened and punished her if she did not comply with his demands. T.M. was indicted and was brought to trial. However, the Municipal Criminal Court acquitted the defendant on the basis that it could not conclude T.M. had forced or pressured the victim into prostitution as the courts found the applicant's testimony *incoherent and unreliable.* The Appeal was dismissed. In June 2020, the Grand Chamber of the European Court of Human Rights concluded that both the national criminal investigation and the criminal proceedings against the defendant amounted to a violation of procedural obligations under Article 4 of the European Convention of Human Rights.

The European Court of Human Rights noticed that "the national authorities did not make any assessment of the possible impact of psychological trauma on the applicant's ability to consistently and clearly relate the circumstances of her exploitation", [173] resulting in an unjust inconsideration of her testimony. The victims of violent, annihilating and deeply humiliating crimes as trafficking crimes often experience terrible traumas. These traumas have a severe impact on the mental health of the victims, but, unfortunately, they could also affect the perceived reliability of their testimony while being witnesses in a criminal proceeding (as in the case just mentioned).

One of the solutions to this mechanism is the recovery and reflection period.[174] A recovery and reflection period is a period during which the suspected or identified victims of trafficking are entitled to receive assistance from the institutions regardless of their decision to cooperate with the authorities.

Indeed, this period of at least 30 days is precisely designed to allow the victims to recover and escape the influence of traffickers, also in order for them to take an informed decision on whether they are willing to cooperate with the authorities. [175]

---

[172] European Court of Human Rights, *S.M. v. Croatia* (Application no. 60561/14), Judgment of 19 July 2018.
[173] Ibid, para. 80.
[174] *See* Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings" (2005): Article 13.
[175] Ibid.

Moreover, the case "S.M. v. Croatia" is interesting since in that occasion the Court pointed out that it relied on the Palermo Protocol definition of trafficking to decide whether the specific case falls within Article 4 of the European Convention.

In this sense, we could affirm that the regional framework is not enough, since the Court is "borrowing" the protection guaranteed under international law instruments; on the other hand, it could be a sign of consolidation of the world- widely accepted definition of human trafficking.

Although both considerations are valid, a greater weight has to be attributed to the second. Often, the European Court of Human Rights has resorted to instruments which are internal or external to the ECHR system: both for purposes of argumentative effectiveness and as a technique of evolutionary interpretation of the Convention – the Convention is considered to be a "living instrument" by the European Court of Human Rights itself, [176] "a living instrument anchored to the reality of the Member States in which it applies". [177]

Also, the Court likely made a reference to the Palermo Protocol because, having been widely ratified, it offers the Court proof of the existence of a "European consensus" [178] as regards the notion of human trafficking, referring to a level of uniformity present in the legal frameworks of the Council of Europe Member States on the rules which aim at combating human trafficking.

It is important to note that it is still quite rare to find *ad hoc* norms on the prohibition of human trafficking in human rights protection treaty systems. In such cases, as it can be inferred by the aforementioned mechanism in the case S.M. v. Croatia, the general prohibitions of slavery, servitude and forced or compulsory labour can help to integrate the Palermo Protocol framework: they can be applied to cases that formally fall within specific cases of trafficking in persons.

---

[176] Also called the "living instrument doctrine". For instance, *see* the following quote: "The Convention is a living instrument which must be interpreted in the light of present day conditions". *Tyrer v. the United Kingdom*, 26 European Court of Human Rights (Ser .A, 1978) at para 183.

[177] Council of Europe Portal, *Interpretative mechanisms of ECHR case-law: the concept of European consensus*. Available at: https://www.coe.int/en/web/help/article-echr-case-law (accessed on 22 July 2021).

[178] The interpretative technique of the "European consensus" is used by the European Court of Human Rights "to justify a wide margin of appreciation given to the Member States in the absence of consensus" and also "to impose new standards, where there is a clear trend in most Member States, thus advancing the interpretation of the Convention". Indeed, the Court often operates through a comparative analysis to support its arguments in the interpretation of the EHCR. And it is precisely the concept of the Convention being a "living instrument" that supports use of interpretative principles such as that of the "European consensus", "which provides the material foundation necessary to support the arguments of the Court when it decides to develop its jurisprudence in a certain direction". *See* the article *Interpretative mechanisms of ECHR case-law: the concept of European consensus* on the Council of Europe Portal, available at: https://www.coe.int/en/web/help/article-echr-case-law.

The application of the general prohibitions is justified in the light of the relationship between general and special norms, with the result that, in the absence of specific norms applicable to these particular forms of slavery or servitude, it is possible to apply to the specific cases the above-mentioned general prohibitions. [179] More examples of this "integrative approach" of the Court in human trafficking cases can be found in "Siliadin v. France" and "Rantsev v. Cyprus and Russia".

The first time trafficking in human beings was considered by the European Court of Human Rights was in "Siliadin v. France". [180] The applicant was a Togolese national who lived in Paris; she had served as an unpaid servant for several years as a minor and her passport was confiscated. The Court considered that the applicant had been subjected to forced labour and held in servitude (but not in slavery) within the meaning of Article 4 of the Convention.

In that case, the Court stated "that Article 4 enshrines one of the fundamental values of democratic societies" [181] and that the provision cannot be derogated, even in the event of a public emergency threatening the life of the nation. [182] For this reason, the Court considered that, in accordance with the contemporary norms and trends in this field, "the member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation". [183] In that case, the French criminal law did not afford the applicant sufficient and effective protection against the forced and compulsory labour which in practice made her a domestic slave. Moreover, the Court confirmed that a State may be held responsible under Article 4 of the ECHR not only for its direct actions, but also for its failure to effectively protect the victims of slavery, servitude, or forced or compulsory labour by virtue of its positive obligations and to conduct a comprehensive investigation. [184]

In Siliadin v. France the Court also reminded that the "striking similarity" between paragraph 3 of Article 4 of the Anti-Trafficking Convention and paragraph 2 of Article 2 of the ILO Convention No. 29 was "not accidental". [185]

---

[179] Pietro Pustorino, *Lezioni di tutela internazionale dei diritti umani* (Bari: Cacucci Editore, 2019): 133.
[180] European Court of Human Rights, *Siliadin v. France* (application no. 73316/01), judgment of 26 October 2005.
[181] European Court of Human Rights, *Siliadin v. France* (2005), para. 112.
[182] *See* Article 15, paragraph 2 of the European Convention of Human Rights.
[183] European Court of Human Rights, *Siliadin v. France* (2005), para. 112.
[184] Ibid, at 89.
[185] Ibid, para. 116. It continued: "Paragraph 1 of the last- mentioned Article provides that 'for the purposes' of the latter convention, the term 'forced or compulsory labour' shall mean 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'".

Another case where the Court used this interpretative integrative approach in the human trafficking field is "Rantsev v. Cyprus and Russia". Indeed, here, like in S.M. v. Croatia, the Court applied Article 4 of the ECHR qualifying in particular trafficking in human beings - associated, in this case, with the exploitation of prostitution - in terms of "exercise of powers attaching to the right of ownership", [186] leading back the conduct in question to the overall framework of Article 4 of the Convention. [187]

Moreover, the Court specified:

> there can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention […] the Court concludes that *trafficking itself,* within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, *falls within the scope of Article 4 of the Convention*. [188]

Therefore, as Professor Pustorino argues, this jurisprudential trend seems to plead for the complementarity of human rights norms and aims at filling any potential gap existing in this field of the international law system. [189]

This principle has been reaffirmed by the European Court of Human Rights on several occasions; for instance, in 2016 in the case "L.E. v. Greece", [190] where a Nigerian national was forced into prostitution in Greece and her criminal complaint, even though she was officially recognized as a victim of human trafficking, was not dealt with by the Greek authorities in a way compatible with the Convention.

There, the Court recalled the aforementioned positive obligations of the States to prevent and repress violations of the prohibition of slavery and servitude perpetrated at the inter-individual level and to conduct effective investigations to punish the perpetrators of such serious harmful conduct, thus extending the application of these positive obligations to cases of human trafficking. [191]

---

[186] European Court of Human Rights, *Rantsev v. Cyprus and Russia* (Application no. 25965/04), judgment of 7 January 2010, at para. 281.
[187] Pietro Pustorino, *Lezioni di tutela internazionale dei diritti umani* (2019): 133.
[188] European Court of Human Rights, *Rantsev v. Cyprus and Russia* (2010), at para. 282. Emphasis added.
[189] Pietro Pustorino, *Lezioni di tutela internazionale dei diritti umani* (2019): 134.
[190] European Court of Human Rights, *L.E. v. Greece,* (Application no. 71545/12), judgment of 21 January 2016.
[191] Ibid.

1.4.2 *(Continuing)* Preliminary observations on the integration between anti-trafficking rules and human rights norms

As mentioned above and as will be further exposed in Chapter III, the European Court of Human Rights has taken steps towards a greater integration of the rules on combating trafficking in human beings with the norms concerning the protection of human rights. This integration has been forwarded using the interpretative approach of the "European consensus",[192] because, according to the Court, there are indicators in the Member States legal frameworks that show a general consensus amongst States that *trafficking is*, in all its forms, a *serious violation of human rights*. Also, the same preamble to the Anti-Trafficking Convention states: "Considering that *trafficking in human beings constitutes a violation of human rights* and an offence to the dignity and the integrity of the human being". [193]

The Court's approach is a confirmation of a trend that can be observed in other international instruments: for instance, as the Office of the High Commissioner for Human Rights pointed out, the clear prohibition on trafficking in the Convention on the Rights of the Child and the reference to trafficking in the Convention on the Elimination of all forms of Discrimination against Women "indicate that at least in relation to trafficking in children and women, international law recognizes a relatively unambiguous prohibition". [194]

Moreover, United Nations resolutions go in the same direction; for instance, the preamble of the General Assembly resolution 58/137 on strengthening international cooperation in preventing and combating trafficking in persons and protecting victims of such trafficking, reminds that "trafficking in persons [is] an abhorrent form of modern-day slavery and an act that *is contrary to universal human rights*". [195]

The United Nations Human Rights Committee, in its concluding observations, has identified trafficking as constituting a potential violation of Article 3 (right to the enjoyment of all civil and political rights), Article 8 (prohibition of slavery, servitude and forced labour),

---

[192] *See* footnote 178.
[193] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings" (2005): preamble. Emphasis added.
[194] United Nations, Office of the High Commissioner for Human Rights, *Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2010): 38. Available at: https://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf.
[195] United Nations, Resolution 58/137 adopted by the General Assembly on 22 December 2003, "Strengthening international cooperation in preventing and combating trafficking in persons and protecting victims of such trafficking": preamble. Emphasis added.

Article 24 (rights of the child) and Article 26 (equality before the law) of the International Covenant on Civil and Political Rights. [196]

In conclusion, it is becoming easier to point out the existence of a generally applicable norm prohibiting trafficking. An incredibly important progress, that needs to be promoted further because if trafficking *itself* (and not just its constitutive elements) was characterized as against international human rights law, we could expect a different level of response by the States, and broader legal and policy interventions. [197] Identifying trafficking as a human rights violation would establish a direct link with secondary rules of responsibility, and it would "activate State obligations where States have introduced special measures, including protection measures, for those victims deemed to have suffered 'human rights' violations".[198]

However, although, as shown above, there is evidence of the general trend of integrating anti-trafficking rules and human rights norms, as of today it remains difficult to identify the nature, scope and effect of a generally applicable human rights norm prohibiting trafficking with absolute certainty, probably also due to the complexity of the trafficking phenomenon, the range of rules implicated or which could, potentially, be implicated, and the difficult and delicate question of State responsibility for acts that typically lie outside their direct sphere of control. [199]

1.4.3 EU Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims

In 2011, the European Union adopted the Directive 2011/36/EU on "Preventing and Combating Trafficking in Human Beings and Protecting Its Victims". [200]

The definition of human trafficking is the one set out in the Trafficking Protocol, but the European Union definition extends the open-ended list of practices included in the third element

---

[196] *See* for instance Human Rights Committee, Eighty-ninth session, "Consideration of Reports submitted by State Parties under Article 40 of the Covenant" for Barbados, 12-30 March 2007 (CCPR/C/BRB/CO/3, at para . 8); and Eighty-seventh session, "Consideration of Reports submitted by State Parties under Article 40 of the Covenant" for Kosovo (Serbia), 14 August 2006 (CCPR/C/UNK/CO/1, at para. 16).

[197] Supporting the same argument, *see* Office of the High Commissioner for Human Rights, *Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2010): 38.

[198] Ibid.

[199] Ibid.

[200] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and replacing Council Framework Decision 2002/629/JHA. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32011L0036&print=true.

to "exploitation of activities associated with begging or of unlawful activities",[201] in order to provide a further specification for the national legislators.

It's crucial to note that the Directive explicitly affirms trafficking to be both a serious crime and a gross violation of human rights. [202]

Member States are required to exercise jurisdiction over trafficking-related offenses that have any connection with that State (through the place of offense or the nationality or habitual residence of either perpetrator or victim). [203]

Member States are required to establish "appropriate measures aimed at early identification and support to victims", [204] irrespective of whether they are cooperating with criminal justice agencies. Victims of trafficking are entitled to a wide range of assistance measures – these measures, however, are all framed within the context of criminal proceedings.

The most extensive victim support provisions relate to measures aimed at avoiding secondary victimization of "vulnerable persons" in criminal proceedings (all children and adult victims of trafficking). [205] Member States are, for example, required to provide all "vulnerable persons" with access to free legal counseling and legal representation as well as to protection based on risk assessment.

Under Article 8, victims are not to be penalized for status-based offences, i.e. the detention, prosecution, or punishment of victims for crimes that are committed as a direct result of their status as trafficked persons (for instance, immigration offences or involvement in unlawful activities such as prostitution). [206]

The Directive also contains several important prevention provisions. Member States are required to "promote" regular training for officials likely to encounter victims and potential victims of trafficking and to "consider taking measures" to establish as a criminal offense the use of services of a victim of trafficking with the knowledge that the individual is a victim of a trafficking-related offense. [207]

Association South-East Asian Nations (ASEAN) Convention Against Trafficking in Persons, Especially Women and Children

---

[201] Ibid, Preamble Para. 11.
[202] Ibid, Preamble Para 1.
[203] Ibid, Article 10.
[204] Ibid, Article 11.
[205] Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims: Preamble Para. 12 and 22.
[206] Ibid, Article 8.
[207] Ibid, Article 18.

The Association of the South-East Asian Nations [208] developed the "ASEAN Convention Against Trafficking in Persons, Especially Women and Children" (ACTIP) in 2015, which recognizes trafficking as a violation of human rights and an offence to the dignity of human beings. The definition of trafficking for the purposes of this regional instrument echoes the Palermo Protocol definition. The objectives of ACTP are the prosecution of traffickers, along with the prevention of trafficking, the protection of trafficked victims and the promotion of cooperation among the State Parties in order to meet these goals. Even if principles of corporate liability and monitoring compliance are contained in the ACTIP, the main focus (as in the Trafficking Protocol) is on the States obligations with regards to the criminalization of human trafficking and prosecution of the perpetrators.

1.5 National approaches to combating human trafficking

1.5.1 The United States Legislation

The main instrument for the analysis of the United States Legislation on Trafficking is the Trafficking in Victims Protection Act (TVPA) of 2000 [209] and its Reauthorization Acts (of 2003, 2005 and 2017).

The United States government established a set of "U.S. minimum standards" for the elimination of trafficking and sought to give those standards international reach. The TVPA also established a new anti-trafficking bureaucracy within the State Department [210] to coordinate the U.S. government's efforts to influence global anti-trafficking policy. The State Department's annual TIP Report has been the most prominent tool of U.S. influence abroad. The TIP Report ranks countries according to the extent that they comply with U.S. anti-trafficking standards. Tier 1 includes the countries which fully comply with the U.S. standards,

[208] The Association of the South-East Asian Nations (ASEAN) is composed by Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, The Republic of Singapore, The Kingdom of Thailand, and the Socialist Republic of Viet Nam. It must be noted that all ASEAN members other then Brunei have ratified the UN Trafficking Protocol.

[209] *United States of America: Victims of Trafficking and Violence Protection Act of 2000* (United States of America), Public Law 106-386 [H.R. 3244], 28 October 2000, available at: https://www.refworld.org/docid/3ae6b6104.html.

[210] The Office to Monitor and Combat Trafficking in Persons ("U.S. TIP Office").

while Tier 2 countries are not in full compliance, but are making significant efforts in order to comply. Tier 3 countries are not in compliance and are considered to not be making any efforts; thus, a country rated in Tier 3 does not receive funds. [211] Though perhaps with less visibility than the TIP Office, the U.S. Department of Labor Bureau of International Labor Affairs (ILAB) also exercises global influence regarding trafficking-related issues.

The United States approach developed in respect to the so-called "3Ps' method": Prosecution, Prevention and Protection.

As stated previously, the main priority of anti-trafficking regimes remains investigating, prosecuting, and penalizing the traffickers: thus, the protection and prevention stages are, in many respects, neglected. In a criminal prosecution, the parties are, on one side, a federal or state prosecutor, and, on the other, one or more people accused of engaging in (or otherwise facilitating) human trafficking. The prosecutor's burden of proof is high: to successfully prosecute a case, the prosecutor must typically establish *beyond a reasonable doubt* that the defendant committed the alleged crimes. United States law empowers the U.S. courts to exercise jurisdiction over these crimes not only when committed within U.S. territory, but, importantly, also abroad. Indeed, U.S. courts may exercise extraterritorial jurisdiction over any offense under Chapter 77. The TVPA introduced the concept of labor trafficking in 18 U.S.C. § 1590, which criminalizes trafficking with respect to peonage, slavery, involuntary servitude, or forced labor. [212]

A specific focus is on sex trafficking. Sex trafficking cases are prosecuted using the provision 18 U.S.C. § 1591, which criminalizes sex trafficking of both minors and adults. Section 1591 thus criminalizes anyone who engages in – or benefits from – sex trafficking. Also, anyone who obstructs efforts to prosecute sex traffickers is punished. For adult victims, the prosecutor must demonstrate the *means* element – i.e., the use of force, fraud, or coercion – when causing an adult victim to engage in commercial sex. In contrast, for minors who are victims of trafficking, prosecutors are *not* required to establish the means element, [213] mirroring the Palermo Protocol provisions.

Concerning the Protection part, the TVPA normally contains various provisions related to the protection of trafficked people, established in Section 107. A victim can access the

---

[211] An issue, however, related to the Tier classification, is that can also be seen as a political instrument.
[212] Moreover, it criminalizes Involuntary Servitude, 18 U.S.C. § 1584 (*see* the case "U.S. v. Kozminski"), Peonage, 18 U.S.C. § 1581 (*see* the case "U.S. v. Farrell"), Forced Labor, 18 U.S.C. § 1589 (*see* the case "U.S. v. Calilim" and "U.S. v. Dann"); Document Servitude, 18 U.S.C. §§ 1592, 1597.
[213] *See* also "U.S. v. Maynes", "U.S. v. Duong", "U.S. v. Wolff".

protective benefits only by obtaining the "HHS Certification", which is issued by the U.S. Department of Health and Human Services. An adult [214] can obtain such Certification in case he or she is a victim of a severe form of trafficking in persons and he or she is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking (a dispense is guaranteed if the victim is unable to cooperate due to physical or psychological trauma); also, in order to obtain the HHS Certification, the victim must have received a certificate of Continued Presence from the U.S. Department of Homeland Security in order to contribute to the prosecution of traffickers or the victim made a bona fide application for a T-visa that has not been denied. [215] The T-visa "allows victims to remain in the United States to assist federal authorities in the investigation and prosecution of human trafficking cases for up to four years". [216]

As for the prevention, the U.S. government's approach to trafficking prevention was first articulated in Section 106 of the TVPA, providing various methods to prevent trafficking. The first one concerns as economic alternatives, stating that the U.S. President has to establish and carry out "international initiatives to enhance economic opportunity for potential victims of trafficking as a method to deter trafficking" such as "microcredit lending programs, training in business development, skills training, and job counseling" or "development of educational curricula regarding the dangers of trafficking", and also "programs to keep children, especially girls, in elementary and secondary schools, and to educate persons who have been victims of trafficking". [217]

Another method useful to prevent trafficking, provided by Section 106, is awareness-raising:

> the President, acting through the Secretary of Labor, the Secretary of Health and Human Services, the Attorney General, and the Secretary of State, shall establish and carry out programs to increase public awareness, particularly among potential victims of trafficking, of the dangers of trafficking and the protections that are available for victims of trafficking. [218]

---

[214] Indeed, foreign victims of a severe form of trafficking, who are under 18 years of age, do not need to be certified to receive benefits.
[215] U.S. Department of Health and Human Services, Administration for Children and Families, Office on Trafficking in Persons, *Certification for adult victims of human trafficking – fact sheet* (2016): 2. Available at: https://www.acf.hhs.gov/sites/default/files/documents/otip/otip_fact_sheet_certification.pdf.
[216] Ibid.
[217] Trafficking Victims Protection Act of 2000, Section 106(a).
[218] Ibid, Section 106(b).

In both cases, the President has to consult with the appropriate non-governmental organizations, in order to obtain suggestions on the best ways to prevent human trafficking.[219]

Also, Section 7202 of the Intelligence Reform and Terrorism Prevention Act [220] established the Human Smuggling and Trafficking Center "to achieve greater integration and overall effectiveness in the U.S. government's enforcement". [221]

1.5.2 The Italian legislation

Although the Italian legislation on human trafficking and the different forms of exploitation will be analyzed in detail in Chapter II, at this point a preliminary and brief summary can be useful.

The most important legal provisions regulating the Italian response to trafficking are constituted by Article 18 of the National Law on Migration [222] and Article 13 of the National Law against Trafficking in Human Beings, [223] along with the transposition of the already analyzed Directive 2011/36/EU (Legislative Decree No 24 of 4 March 2014).

Trafficking in persons is criminalized in Italian Criminal Code, Article 601, introduced in 2003 by Law No 228/2003. The definition mirrors the one set out in the Palermo Protocol. According to Article 601, is punished:

> anyone who recruits, introduces into the territory of the State, transfers, transports, hosts one or more people who are in the conditions referred to in article 600, that is, carries out the same conduct on one or more people, through deception, violence, threat, abuse of authority or taking advantage of a situation of vulnerability, physical, mental or necessity inferiority, or by promise or giving of money of other advantages to the person who has authority over it, in order to induce or force them to work or sexual performance, or begging or in any case to carry out illegal activities that involve their exploitation, or to undergo the removal of organs. [224]

The Italian criminal code also provides the offences of 'slavery' (Article 600 of the Italian Criminal Code) and "trade of slaves" (Article 602; both have been amended by Law No 228/2003.

---

[219] Ibid, Section 106(c). Consultation requirement.
[220] *See* United States Federal Legislation, "The Intelligence Reform and Terrorism Prevention Act" of 2004 (Title I of Public Law 108-458; 118 Stat. 3688), Section 7202. Available at: https://www.dni.gov/index.php/ic-legal-reference-book/intelligence-reform-and-terrorism-prevention-act-of-2004.
[221] United States Department of Homeland Security, *Human Trafficking Laws & Regulations* (2019). Available at: https://www.dhs.gov/human-trafficking-laws-regulations.
[222] National Law on Migration, Legislative Decree No 286 of 1998.
[223] National Law against Trafficking in Human Beings, Law No 228 of 2003.
[224] Italian Criminal Code, Article 601.

Furthermore, the Italian Criminal Code provides for prosecution for trafficking in children under other offences such as 'child prostitution' (article 600-bis), 'child pornography' (article 600-ter) and 'possession of pornographic material' (article 600-quater).

Pursuant to the Italian Criminal Code, anyone who commits trafficking in human beings shall be liable to a term of imprisonment of 8 to 20 years. However, the penalty is harsher if the offence is perpetrated against minors. Prostitution is not criminalized in Italy, but the act of procuring is a crime (Article 3 of Law No 75/1958).

1.5.3 A comparative approach *(renvoi)*

Throughout the thesis, reference will be made to legislations, in specific sectors, of other States, such as Germany, [225] Sweden, [226] New Zealand, [227] Hungary, [228] Belgium.[229]

[225] *See* paragraph 2.2.7.
[226] *See* paragraph 2.2.5.
[227] *See* paragraph 2.2.6.
[228] *See* paragraph 2.5
[229] *See* paragraph 2.5.

CHAPTER II

A TYPOLOGY OF THE FORMS OF EXPLOITATION RELATED TO TRAFFICKING IN HUMAN BEINGS

2.1 The indicators of trafficking in persons and the importance of the context in the evaluation of trafficking scenarios

The indicators of human trafficking can be useful tools in the identification of potential trafficking cases by various actors, such as (but not limited to) police officers, NGOs, immigration officials. [230]

The following list of indicators is non-exhaustive, but it can help as an introduction of how the indicators are structured and it can give an idea of some common "red flags" in the human trafficking field. [231]

In general, trafficking victims may believe that they must work against their will and that they can't leave; they could be subjected to violence or threats of violence against themselves or against their significant others (for instance, they could be threatened with being handed over to the authorities). Two of the most common indicators of trafficking are: receiving little or no payment at all and having no access to earnings. [232] Also, it's common for victims of human trafficking to live in poor conditions and be in a situation of dependance.

The ILO and the European Commission elaborated an extensive list of trafficking indicators: the "operational indicators of trafficking in human beings". [233] [234] The set of indicators exposed in the document is particularly relevant for two reasons: the use of a

---

[230] It is however important to note that due to the scale of trafficking cases and the variety of ways in which human trafficking cab be enacted, the trafficking indicators will not be always useful in the same intensity.

[231] For a longer list of trafficking indicators, *see* United Nations Office of Drugs and Crime, "Indicators of trafficking" in *Defining the Concept of Trafficking in Persons,* available at: https://www.unodc.org/e4j/en/tip-and-som/module-6/key-issues/indicators-of-trafficking-in-persons.html (accessed 12 July, 2021).

[232] *See* paragraph **Errore. L'origine riferimento non è stata trovata.**.

[233] International Labour Office, *Operational indicators of trafficking in human beings. Results from a Delphi survey implemented by the ILO and the European Commission*, first published in March 2009, revised version of September 2009. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf.

[234] International Labour Office, *Explanations for indicators of trafficking for labour exploitation*, issued on 21st April 2009. Available at: https://www.ilo.org/global/topics/forced-labour/publications/WCMS_105035/lang--en/index.htm.

particular methodology, the Delphi Method, and of a particular structure, qualifying different indicators as "strong", "medium" or "weak".

The Delphi Method is a technique which involves surveying a panel of experts and eventually leads to a group opinion on a specific matter. Each expert is asked to answer a set of questions and to then make adjustments to the responses of the other panel members, until consensus is reached. The Delphi technique has been widely used in the social and political sciences. [235] In the case at hand, the experts in the fight against human trafficking were selected from the 27 European Union Member States from "police, government, academic and research institutes, NGOs, international organisations, labour inspectorates, trade unions and judiciaries". [236] [237]

The experts identified four sets of indicators, for (i) child victims of trafficking for labour purposes, (ii) child victims of trafficking for sexual exploitation, (iii) adult victims of trafficking for labour exploitation and (iv) adult sex trafficking victims.

Each set is a structured list of indicators, relevant to different dimensions of the trafficking definition, as seen in Chapter I.

For instance, in each set ten indicators of deceptive recruitment are analyzed, as well as other ten for coercive recruitment. Sixteen factors are analyzed in each set indicating recruitment by abuse of vulnerability; nine in relation to exploitative conditions of work.

As already mentioned, each indicator is qualified as either strong, medium or weak.

But in practice, how do operational indicators work? And how can they be actively used in the battle against human trafficking? As the Guide explains, [238] for each potential victim, each of the six dimensions of the trafficking definition (deceptive recruitment, coercive recruitment, recruitment by abuse of vulnerability, exploitation, coercion at destination, abuse of vulnerability at destination) is assessed independently from the others. [239]

The result of the assessment is positive if the dimension is present for the potential victim;[240] in order to be assessed as positive, a dimension must include alternatively: (i) two

---

[235] International Labour Office, *Operational indicators of trafficking in human beings. Results from a Delphi survey implemented by the ILO and the European Commission* (2009): 2.
[236] Ibid.
[237] In particular, two successive electronic surveys were conducted: the first one in April 2008, in order to collect indicators from the expert group; and a second one in July 2008, to establish a rating of the indicators. *See* International Labour Office, *Operational indicators of trafficking in human beings. Results from a Delphi survey implemented by the ILO and the European Commission* (2009): 2.
[238] International Labour Office, *Operational indicators of trafficking in human beings. Results from a Delphi survey implemented by the ILO and the European Commission* (2009): 3.
[239] Ibid.
[240] Ibid.

strong indicators or (ii) one strong indicator and one medium or weak indicator or (iii) three medium indicators, or (iv) two medium indicators and one weak indicator. The Guide then states that "after an assessment is done for each dimension, the final analysis involves combining the six elements to identify the victims of trafficking". [241] However, it must be noted that, as already explained, the presence of deception and coercion is not necessary to characterize a case as trafficking according to the Palermo Protocol. [242]

Some examples are necessary to show how useful the described method in recognizing a human trafficking case can be, and a fictious scenario can serve the purpose.

The deception about the nature of the job, location or employer [243] is a strong indicator of adult trafficking for labour exploitation, in relation to the deceptive recruitment dimension. For instance, Janice [244] was told she was going to work as a receptionist in a hotel, but her actual job consists in cleaning the rooms. [245] Janice was also misled into thinking that, while working at the reception, she would also be trained to become the new hotel manager assistant: she was deceived about access to education opportunities [246] (a weak indicator). Are these two factors sufficient to conclude that Janice was trafficked for labour purposes? No, they are not. But they can be considered enough to recognize Janice's deceptive recruitment, which is one of the trafficking phenomenon dimensions; and which is, consequently (at least, it should be) a red flag for a police officer, an NGO volunteer, an immigration official to whom the scenario is presented. An alarm bell – and a useful one, if we appraise the critical relevance of the recognition, by the aforementioned actors, of a trafficking case.

The operational indicators are not only vital for the analysis, in a courtroom, of whether a scenario actually consists in a human trafficking case or not. They are the *key* to recognize a trafficking victim; their potential impact in the training of law enforcement will be analyzed in Chapter III. [247]

A more extensive list of the other operational indicators will be portrayed in the specific analysis of the forms of exploitation, in the following paragraphs. And in particular, it will be

---

[241] Ibid.
[242] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 3(c).
[243] International Labour Office, *Operational indicators of trafficking in human beings. Results from a Delphi survey implemented by the ILO and the European Commission* (2009): 4.
[244] The name here is used only for analysis purposes: the scenario is fictious.
[245] She was "deceived about the nature of the job".
[246] International Labour Office, *Operational indicators of trafficking in human beings. Results from a Delphi survey implemented by the ILO and the European Commission* (2009): 4.
[247] *See* paragraph 3.4

shown how the Italian Law uses some of these indicators with the function of evidential orientation of the judge, in assessing a human trafficking case for labour purposes. [248] Besides, the Group of Experts in Action Against Trafficking in Human Beings (GRETA) [249] itself has called for the use of indicators of exploitation in the definition of this concept, stimulating in this sense systems in which such a definition is absent, by "drawing a list of indicators that could be used by the relevant authorities to detect cases of [trafficking in human beings] for the purposes of labour exploitation". [250] And Professor Alberto di Martino explains, in these regards, that when the adequate interpretative tools (such as the trafficking indicators) are lacking, the result has proved to be that of cultural difficulties in recognizing the trafficking phenomenon, along with operational complications in the application of regulatory tools, although provided. [251]

2.2 Sex trafficking [252] and prostitution

According to the Palermo Protocol's definition, prostitution itself is not human trafficking. As already stated, human trafficking is the recruitment, transportation, transfer, harboring or receipt of persons, using force, fraud or coercion *to subject* such persons to prostitution (or to other non-sexual exploitative purposes). However, this definition can be considered as a compromise between a debate over whether or not prostitution is inherently trafficking.

[248] *See* paragraph 2.3.2.
[249] As discussed in Chapter I, the GRETA (Group of Experts in Action Against Trafficking in Human Beings) is an efficient monitoring system. GRETA's reports are useful as the data collected helps to point out the specific measures that need to be taken in a specific period of time.
[250] An example: in 2011, GRETA invited the Austrian authorities "to clarify what would constitute exploitation in the field of labour, for instance by drawing a list of indicators that could be used by the relevant authorities to detect cases of [trafficking in human beings] for the purposes of labour exploitation". *See* GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Austria. First evaluation round*, published 15th August 2011, paragraph 155. Available at https://rm.coe.int/greta-2011-10-fgr-aut-en-rev/168078b7d9.
[251] Alberto di Martino, *Sfruttamento del lavoro. Il valore del contesto nella definizione del reato* (Bologna: il Mulino, 2019), 102.
[252] The next paragraphs will be dedicated to adult sex trafficking and adult prostitution. For child trafficking for the purposes of sexual exploitation, *see* paragraph 2.6.

2.2.1 Is prostitution inherently trafficking? Presenting different approaches: Neo-abolitionists and Non-abolitionists

The debate on whether all prostitution amounts to trafficking is one that predated the development of the Palermo Protocol, and continues to this day.

On one side of the debate are those who would adopt what's known as the "Neo-abolitionist" position. That is a chosen label to invoke analogies to the anti-slavery movement, the idea being that prostitution is *always, in any case* a form of slavery. [253] The rationale behind this position implicates that prostitution is inherently degrading against women and can *never* be a true and free choice. [254] That position is favored by feminists often labeled as "radical feminists"; [255] its most famous advocates would probably be Catharine MacKinnon, Kathleen Barry and Sheila Jeffreys.

They claim that all prostitution is exploitative and therefore it's always trafficking, even when prostitution is undertaken voluntarily. In fact, for this group of Neo-abolitionists there is no such thing as *voluntary* prostitution: free consent is excluded by the absence of meaningful choices; when women "agree" to prostitute themselves, it's only because they have no other options. [256]

---

[253] For an explanation of the reference to the Abolitionst movement, *see* Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy", *University of Pennsylvania Law Review* 158 (2010): 1666. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1161&context=penn_law_review.

[254] Claire Renzetti and Jeffrey Edleson, *Encyclopedia of Interpersonal Violence*, "Abolitionist Approach to Prostitution", Thousand Oaks: SAGE Publications, 2008. http://dx.doi.org/10.4135/9781412963923.n2.

[255] Radical feminism can be described as a perspective within feminism, calling for a radical change in a patriarchal society that dominates women. At least in its original form, the radical feminism's approach displays power in dominance/subordination terms, with women being subjugated as men's object of desire. *See* "Radical Feminism" in *Stanford Encyclopedia of Philosophy,* "Feminist Political Philosophy", Center for the Study of Language and Information, Stanford University, first published March 1, 2009, revised October 12, 2018. https://plato.stanford.edu/entries/feminism-political/#RadFem.

[256] Catharine MacKinnon, "Trafficking, Prostitution, and Inequality", *Harvard Civil Rights - Civil Liberties Law Review* 46 (2011): 308. https://harvardcrcl.org/wp-content/uploads/sites/10/2009/06/MacKinnon.pdf.

According to Neo-abolitionists feminists, prostituted women [257] suffer from "false consciusness"[258] or, as Tracy Higgins calls it, "incomplete agency", [259] when they claim they are engaging in prostitution voluntarily: they are unaware of the oppression in which they live, of how the patriarchal society created a structure in which the prostitute women think that they are making a free choice, but, in reality, they are not. Indeed, according to Neo-abolitionists, the definition of human trafficking "should eliminate any distinction between forced and voluntary prostitution". [260]

Moreover, Catharine MacKinnon underlines that the Trafficking Protocol's definition "also includes sexual exploitation through 'abuse of power or a condition of vulnerability,' elements often elided in this discussion", [261] highlighting that sex and gender are conditions of vulnerability.

The Neo-abolitionist position, in the United States, is also favored by the neo-conservatives and evangelical Christians, although their theorizing behind why prostitution must be eradicated is based on the "morality" aspect. Indeed, they think that prostitution is a moral crime and a moral harm; thus, it should be eradicated. The faith-based organizations "treat prostitution as an issue of conscience and morality rather than of income possibilities and labor". [262]

Although there is a variety of ways in which States address prostitution, we can identify four general modes of regulation: (i) criminalization, (ii) partial criminalization, (iii) decriminalization, (iv) legalization. Examples of States legislation based on the four modes will be given forward, but briefly defining them in this section can help analyzing the debate occurred during the Trafficking Protocol negotiations.

---

[257] The Neo-abolitionists radical feminists prefer the term "prostituted women" over "sex workers" as they believe the latter dignifies the sex industry and that it "lays the groundwork for recognizing buyers of commercial sex as legitimate 'customers' and pimps as 'third party business agents or brokers'." Janice G. Raymond, Coalition Against Trafficking in Women et al., *Guide to the New U.N. Trafficking Protocol* (2001): 6, https://catwinternational.org/wp-content/uploads/2019/09/Guide-to-the-New-UN-Trafficking-Protocol.pdf.

[258] The term "false consciousness" was coined by Fredrich Engels and used, especially in the Marxist movements, to refer to the inability of the subordinate class to recognize the exploitation operated by the ruling class in a capitalist society. Radical feminists "borrowed" the term to indicate the prostituted women's unawareness of being subjected to oppression by the patriarchal society.

[259] The term "incomplete agency" expresses "the idea that, in a range of legal contexts, women's choices should be understood as neither fully free nor completely determined". *See* Tracy E. Higgins, "Democracy and Feminism", *Harvard Law Review* 110, no. 8 (June 1997): 1691, http://ir.lawnet.fordham.edu/faculty_scholarship/256.

[260] Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010): 1669.

[261] Catharine MacKinnon, "Trafficking, Prostitution, and Inequality" (2011): 299.

[262] Gretchen Soderlund, "Running from the Rescuers: New U.S. Crusades against Sex Trafficking and the Rhetoric of Abolition", *NWSA Journal*, Autumn, 2005, Vol. 17, No. 3, *States of Insecurity and the Gendered Politics of Fear* (Autumn, 2005): 81. https://www.jstor.org/stable/4317158.

The *complete criminalization* regime targets all actors and criminalizes all aspects of sex work, prosecuting criminally "both the sale and purchase of sex by the sex worker and the john,[263] and all third-party involvement (of the pimp, the brothel-keeper, and the landlord)". [264]

The *partial criminalization* approach does not target prostituted women, but it criminalizes the involvement of the other actors (including the customers), [265] whereas the *complete decriminalization* regime excludes criminalization *in toto*, but it does not provide the sex sector with specific legislation.[266] The fourth model, *legalization*, involves "positive legal provisions regulating one or more aspect of sex work businesses". [267]

In general, all the different Neo-abolitionists groups advocate for the partial criminalization model[268] (which indeed is also called "abolitionist" approach), but for different reasons. The Neo-abolitionists feminists choose this model because of "the assumption that sex workers are vulnerable victims of systematic patriarchal exploitation".[269] Therefore, the States must protect them and refrain from criminalizing their activity. The conservative and evangelical Christians prefer the partial criminalization model because they believe prostituted women are "victims of social deviance". [270]

On the other side of the debate, there are various group of advocates who take different positions on whether the sale of sex could be characterized as work as opposed to trafficking, the so-called Non-abolitionists. Although being a heterogenous movement, it can be argued that all Non-abolitionists make a distinction between trafficking and prostitution/sex work. [271]

At one end of the spectrum, there is a group of advocates who might consider themselves actively "pro-sex work", claiming that sex work is the ultimate expression of sexual self-determination and equality. An example of Non-abolitionist feminists is constituted by the

---

[263] In Anglo-Saxon settings, sometimes the buyer of sex is called "john".
[264] Janet Halley *et al.*, "From the International to the local in feminist legal responses to rape, prostitution/sex work, and sex trafficking: four studies in contemporary governance feminism", *Harvard Journal of Law & Gender* 29 (June 2006): 338. http://www.law.harvard.edu/faculty/jhalley/cv/HJLG.vol%2029-2.pdf.
[265] Ibid.
[266] Ibid, at 339.
[267] Ibid.
[268] Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010): 1669.
[269] Janet Halley *et al.*, "From the International to the local in feminist legal responses to rape, prostitution/sex work, and sex trafficking: four studies in contemporary governance feminism" (2006): 338-339.
[270] Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010): 1669.
[271] Non-abolitionists (and Non-abolitionists feminists in particular), prefer the term "sex worker" and "sex work" over "prostitute" and "prostitution", as they argue for the possibility of considering selling sexual services (in determinate circumstances) as a form of labor.

materialist feminists, who consider voluntary sex work as "not different from a range of other low status, marginalized jobs in which women engage". [272]

Other groups of Non-abolitionists wouldn't label themselves as pro-sex work, but they oppose to Abolitionism out of an objection to the "false consciousness" narrative, which fails to appreciate women's agency. They believe that some women can exercise that choice freely and consciously, although it may be a choice among very limited options: the right approach is to respect their agency to decide. [273]

All the different groups of Non-abolitionists reject both the total and partial criminalization of sex work. They claim that "prohibitionism subjects sex workers to the exploitation that follows from a legal regime that criminalizes and thus marginalizes their activities in the informal sector".[274] However, they disagree in indicating which regulation model best applies to sex work, if decriminalization or legalization. As Professor Chuang [275] explains, some would choose legalization because of the advantage of a formal recognition by the State, while others highlight the potential overregulation, resulting in a discriminatory regime against sex work, and therefore preferring decriminalization over legalization.

The analysis of the Neo-abolitionist and Non-abolitionist approach is significant because both movements had a relevant impact on the Trafficking Protocol negotiations debate, in particular regarding the definition of trafficking.

2.2.2 The Palermo Protocol negotiations

The negotiations on the Trafficking Protocol were almost entirely devoted to the debate over the definition of trafficking; and regrettably so, since little substantive attention was paid, on the contrary, to the pressing issue of victim protection. [276]

The reason why the debate on the legal definition of trafficking was so time-consuming lies in the "two diametrically opposed views on sex work" [277] just exposed. As Ditmore and Wijers

---

[272] Gabrielle Simm, "Negotiating the United Nations Trafficking Protocol: Feminist Debates", *Australian Year Book of International Law* 23 (2004): 139. https://heinonline.org/HOL/Page?handle=hein.journals/ayil23&id=1&size=2&collection=journals&index=journals/ayil.

[273] Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010): 1670.

[274] Ibid.

[275] Ibid, at 1671.

[276] Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010): 1674.

[277] Melissa Ditmore and Marjan Wijers, "The negotiations on the UN Protocol on Trafficking in Persons", *Nemesis* no. 4 (2003): 79.

explain, "the depth of this controversy was reflected in the presence of two opposed NGO-lobbying blocs, representing two types of feminist response to sex work and, consequently, the issue of how to define trafficking in persons", [278] the Neo-abolitionist approach and the Non-abolitionist one.

One of the two NGO lobbying [279] blocks operated under the name of Human Rights Caucus, and consisted in an alliance of human rights organizations, along with anti-trafficking and sex workers' rights activists and organizations, such as the International Rights Law Group (IHRLG), the Global Alliance Against Trafficking in Women (GAATW), La Strada. [280]

The Human Rights Caucus advocated for a broad and inclusive definition of human trafficking, specifying that "trafficking is defined by the presence of coercion, deception, debt bondage, abuse of authority or any other form of abuse in relation to the conditions of recruitment and/or the conditions of work". [281] This also means that a distinction is to be made between adults and children; when children are the trafficking victims, an element of coercion is not required. [282] In these regards, the impact of the Human Rights Caucus was extremely relevant, as can be noted by the fact that both instances were included in Article 3 of the Palermo Protocol. However, the Caucus also advocated for the definition of trafficking to *clearly* exclude voluntary, non-coercive prostitution, [283] which did not occur.

The Caucus took a sex workers' rights stance, claiming that, outside criminality, "sex work is a form of labour and should be addressed as such". [284] Therefore, we could consider the Human Rights Caucus' proposals as generally consistent with the Non-abolitionist positions.

Moreover, the Caucus advocated for the inclusion of "human rights protections for trafficked persons, regardless of their willingness to act as witnesses for the prosecution and including the right to a safe shelter, social, medical and legal assistance".[285]

---

https://www.researchgate.net/publication/287687445_The_negotiations_on_the_UN_protocol_on_trafficking_in_persons.

[278] Ibid.

[279] This term refers to the important role NGOs can play in the formation of international norms, especially when actively participating in the negotiations. *See* Pietro Pustorino, *Lezioni di tutela internazionale dei diritti umani* (Bari: Cacucci Editore, 2019), 219.

[280] Melissa Ditmore and Marjan Wijers, "The negotiations on the UN Protocol on Trafficking in Persons" (2003): 80.

[281] Ibid, at 81.

[282] Melissa Ditmore and Marjan Wijers, "The negotiations on the UN Protocol on Trafficking in Persons" (2003): 81.

[283] Ibid.

[284] Ibid.

[285] Ibid.

The Caucus was the first NGOs lobbying block to take part to the negotiations. The second block, led by the Coalition Against Trafficking in Women (CATW), [286] presented its proposals after the first meeting of the Criminal Commission. [287]

The CATW-led faction was composed, among the others, by the European Women's Lobby (EWL), the International Abolitionist Federation (IAF), Equality Now, Soroptimist International. This block "took a victim's stance, [claiming] that sex work is inherently a human rights violation and should be abolished and punished, without punishing prostitutes themselves as this would constitute blaming and punishing the victim". [288] [289]

According to them, "any distinction which refers to the will or consent of the women concerned is meaningless" [290] and there is no such thing as free or voluntary prostitution: prostitution is *always* forced. These positions are consistent with the ones of the Neo-abolitionist movement. [291]

Therefore, the CATW-led Network "sought to include all prostitution as well as other sex work in the definition of trafficking in the Protocol, irrespective of conditions of consent or force". [292]

As Professor Chuang explains, even though the U.N. Office of the High Commissioner for Human Rights (OHCHR) and the International Labor Organization (ILO) explicitly refused to adopt a stance on prostitution, they were labeled as "pro sex-work" by neo-abolitionists groups, because the two U.N. agencies "approached the negotiations with the goal of maintaining a legal distinction between trafficking and prostitution, with trafficking encompassing prostitution only where coerced, forced, or induced by fraud". [293]

As can be noted by the formulation of Article 3 of the Palermo Protocol, the formulation itself of the definition of human trafficking is a compromise between the two NGOs blocks – or better, a compromise between their positions.

---

[286] Documents on their position can be found at catwinternational.org.
[287] Melissa Ditmore and Marjan Wijers, "The negotiations on the UN Protocol on Trafficking in Persons" (2003): 81.
[288] Ibid.
[289] Therefore, the CATW-led block advocated for the partial criminalization approach, analyzed in the previous paragraph.
[290] Melissa Ditmore and Marjan Wijers, "The negotiations on the UN Protocol on Trafficking in Persons" (2003): 81.
[291] Displayed in the previous paragraph.
[292] Melissa Ditmore and Marjan Wijers, "The negotiations on the UN Protocol on Trafficking in Persons" (2003): 81-82.
[293] Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010): 1672-1673.

Indeed, even if the U.N. agencies rejected the Neo-abolitionist claim to remove distinctions between trafficking and prostitution, at the same time they did not decide "to use anti-trafficking law to establish affirmative rights for those in the sex industry, to the disappointment of some sex-worker group". [294]

From one perspective, the differentiation between trafficking and prostitution, operated by the lack of (or, respectively, the presence of) consent, can be considered an evolution and an implicit international recognition of voluntary prostitution. By specifying what forced prostitution, as a purpose of exploitation, is, we also implicitly state that prostitution is not *always* forced. But some commentators argue that the Palermo Protocol did nothing more for sex workers than providing this implicit recognition, claiming that the definition of human trafficking "leaves 'room' for sex workers to exist only *outside* of the protected space carved out for trafficking victims". [295] Jo Doezema argues that when "distinguishing between 'trafficking' and 'voluntary prostitution' through the qualifier of 'consent', the Trafficking Protocol offers nothing to sex workers whose human rights are abused, but who fall outside of the narrowly constructed category of 'trafficking victim'".[296]

2.3 Men as trafficking victims for purposes of sexual exploitation and male prostitution: a clarification

In the previous sections, the focus has been on female sex workers and on female victims of trafficking for purposes of sexual exploitation. The reasons are the following: although of course the definition of human trafficking and the relative protective measures apply to all genders, the narrative historically has been focused on female prostitution and sex trafficking, both because statistically women are trafficked more than men [297] (especially for purposes of sexual exploitation) [298] and because of the relevant impact of the feminist groups' positions in the debate over sex trafficking and prostitution.

---

[294] Ibid, at 1673.
[295] Jo Doezema, "Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiations", *Social & Legal Studies* 14 (2005): 80. DOI: 10.1177/0964663905049526.
[296] Ibid.
[297] In 2018, 65% of trafficking victims were female (46% women and 19% girls), while 20% of trafficking victims were men, and 15% boys. Sources: UNODC elaboration of national data. *See* United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons – 2020,* United Nations publication, Sales No. E.20.IV.3 (January 2021): 16, figure 8. https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf.
[298] Over the years 2017 and 2018, in the European Union Member States, women were the vast majority (92%) of the victims of trafficking for sexual exploitation, whilst men represented 6% of victims for this form of exploitation. *See* European Commission, *Data collection on trafficking in human beings in the EU,*

However, men and boys are and have been affected by human trafficking for the purpose of sexual exploitation.

2.4 The four regulatory models: *complete criminalization*. The United States

The *complete criminalization* regime criminalizes all aspects of sex work. Therefore, all actors are targeted: the sex-worker [299], the clients, the third parties (for instance, the brothel owners, the pimp, the landlord). The complete criminalization *ratio* is the one of eradicating prostitution *in toto*. [300] The statal legislation of the United States of America is a good example for this model.

In the United States, there is no federal law proscribing prostitution as illegal; however, the complete criminalization model is adopted in almost every State (apart from Nevada).

The Neo-abolitionists organizations who actively participated to the negotiations of the Palermo Protocol were U.S. based, and after their instances were not – or not *fully*, one could argue – incorporated in an international instrument, they advocated for the conflation of prostitution and sex trafficking in the U.S. legal framework. Although no federal law identifies prostitution/sex work with sex trafficking, the Neo-abolitionists were still able to implement their agenda.

Indeed, on December 16, 2002, in the National Security Presidential Directive 22 (NSPD-22), President Bush made the Neo-abolitionist approach the official U.S. position:

> Our policy is based on an abolitionist approach to trafficking in persons, and our efforts must involve a comprehensive attack on such trafficking, which is modern day form of slavery. In this regard, the United States Government *opposes prostitution and any related activities*, including pimping, pandering, or maintaining brothels, *as contributing to the phenomenon of trafficking in persons*. These activities are inherently harmful and

Luxembourg: Publications Office of the European Union (September 2020): 22.

[299] Henceforth, apart from when quoting directly, the term "sex worker" will be used instead of "prostitute", since is the first term is usually preferred by the U.N. agencies over the second when discussing the issue of prostitution/sex work. Examples of this trend can be found in the various publications on the U.N. Women website (for instance, *see*: https://www.unwomen.org/en/digital-library/publications/2011/6/exploring-the-dynamics-and-vulnerabilities-of-hiv-transmission-amongst-sex-workers-in-the-palestinian-context), on the United Nations Development Program (UNDP) website (for instance, *see*: https://www.undp.org/publications/sex-work-and-law-asia-and-pacific), on the Joint United Nations Programme on HIV and AIDS (UNAIDS) website (for instance, *see* https://www.unaids.org/en/resources/presscentre/featurestories/2017/june/20170602_sexwork).

[300] In this case, the sex worker is not seen as a victim, contrary to the *partial criminalization* approach.

dehumanizing. The United States Government's position is that these activities should not be regulated as a legitimate form of work for any human being. [301]

The Neo-abolitionist anti-prostitution approach found key support in the bureaucracy, as can be noted also from the "Model Law to Combat Trafficking in Persons", "which encouraged countries to adopt a definition of trafficking that encompasses non-coerced prostitution" [302] and "signaled to other countries the U.S. government's interest in eradicating prostitution worldwide". [303]

As Professor Chuang explains, the Neo-abolitionist anti-prostitution agenda consisted in particular in three instances: (i) anti-prostitution restrictions on federal-grant administration, (ii) anti-prostitution restrictions on U.S. military personnel and government contractors, (iii) measures to end demand for prostitution and to federalize prostitution-related crimes. [304]

The Neo-abolitionists were successful with respect to the first two instances. Indeed, the anti-prostitution restrictions on federal-grant administration were incorporated by the Trafficking Victims Protection Reauthorization Act of 2003 (2003 TVPRA) [305] into the United States Code [306] (22 U.S. Code § 7110), prohibiting to make federal funds available for programs or organizations which promoted, supported or advocated the legalization of prostitution:

(g) Limitation on use of funds

(1) Restriction on programs

No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to *promote, support, or advocate the legalization or practice of prostitution*. Nothing in the preceding sentence shall be construed to preclude assistance designed to promote the purposes of this Act by ameliorating the suffering of, or health risks to, victims while they are being trafficked or after they are out of the situation that resulted from such victims being trafficked.

(2) Restriction on organizations

No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to implement any program that targets victims of severe forms of trafficking in persons described in section

---

[301] National Security Presidential Directive/NSPD-22, *Combating trafficking in persons*, at 2-3 (Dec. 16, 2002), emphasis added. Available at: https://ctip.defense.gov/Portals/12/Documents/NSPD-22.pdf.
[302] *See* Office to Monitor and Combat Trafficking in Persons, U.S. Department of State*, Legal Building Blocks to Combat Trafficking in Persons,* §§ 100, 206(a) (2004), cited in Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010): 1682.
[303] Ibid.
[304] Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010): 1682.
[305] Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.
[306] The positive law titles of the United States Code constitute legal evidence of the law in all Federal and State courts.

7102(9)(A) 1 of this title through any organization that has not stated in either a grant application, a grant agreement, or both, *that it does not promote, support, or advocate the legalization or practice of prostitution*. The preceding sentence shall not apply to organizations that provide services to individuals solely after they are no longer engaged in activities that resulted from such victims being trafficked. [307]

Also, the 2003 TVPRA incorporated in the U.S. Code (22 U.S.C. § 7104(g)) certain anti-prostitution restrictions on U.S. military personnel and government:

(g) Termination of certain grants, contracts and cooperative agreements

The President shall ensure that any grant, contract, or cooperative agreement provided or entered into by a Federal department or agency under which funds are to be provided to a private entity, in whole or in part, shall include a condition that authorizes the department or agency *to terminate the grant, contract, or cooperative agreement*, or take any of the other remedial actions authorized under section 7104b(c) of this title, without penalty, *if the grantee or any subgrantee, or the contractor or any subcontractor, engages in, or uses labor recruiters, brokers, or other agents* who engage in—

(1) severe forms of trafficking in persons;

(2) *the procurement of a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect* […] [308]

However, the Neo-abolitionists failed in bringing at a federal level the instances that represented their major goals – namely, the conflation of prostitution/sex work with sex trafficking and the federalization of prostitution-related crimes. Indeed, the Trafficking Victims Authorization Act (2000) does not criminalize "sex trafficking" unless it involves "trafficking of children" or is "effected by force, fraud, or coercion". [309]

The provision of the U.S. Code concerning sex trafficking ("Sex trafficking of children or by force, fraud, or coercion", 18 U.S. Code § 1591) does not identify prostitution *itself* with sex trafficking, and does not punish prostitution *per se*, but aims at punishing whoever knowingly "recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person" or whoever "benefits, financially or by receiving anything of value" from the participation in such venture knowing or in reckless disregard of the fact that means of force, threats of force, fraud, coercion "will be used to cause the person to engage in

[307] 22 U.S. Code § 7110(g), emphasis added.
[308] 22 U.S.C. § 7104(g), emphasis added.
[309] *See* TVPA § 103(8) and § 103(9) (codified at 22 U.S.C. § 7102 (2006)).

a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act". [310]

Although they failed in criminalizing at a federal level all prostitution-related activities, the Neo-abolitionists definitely succeeded in controlling the trafficking discourse,[311] which had a relevant impact on statal legislation on the subject matter. Indeed, as explained above, almost every State adopts the total criminalization model with regards to prostitution. As an example, the Tennessee law states that "a person commits an offense under this section who engages in prostitution", specifying that prostitution is a "Class B misdemeanor". [312]

Another example is offered by the Maryland law. There too prostitution is a misdemeanor;[313] as it is also the so called "pimping", [314] namely receiving or acquiring money or proceeds from the earnings of a person engaged in prostitution with the intent to promote the crime of prostitution, profit from it or conceal or disguise the nature, location, source, ownership, or control of money or proceeds of prostitution. [315] Maryland's Criminal Code also outlaws "human trafficking", as defined by Md. Code Ann. [Crim. Law], § 11-303, punishing whoever takes or causes another to be taken to any place for prostitution; place, cause to be placed, or harbor another in any place for prostitution; persuades or encourages by threat or

---

[310] 18 U.S. Code § 1591(a): "Whoever knowingly— (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b)". The criminal sanctions are provided by the subsequent paragraph, 18 U.S. Code § 1591(b): "The punishment for an offense under subsection (a) is— (1) if the offense was effectuated by means of force, threats of force, fraud, or coercion described in subsection (e) (2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or (2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life; (c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years. (d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 25 years, or both".

[311] Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010): 1682.

[312] Tennessee Code § 39-13-513 (2014).

[313] *See* Md. Code Ann. [Crim. Law], § 11-306.

[314] Although the Maryland Code does not use the term "pimping", it is commonly used to refer to the conduct described by provision Md. Code Ann. [Crim. Law], § 11-304.

[315] *See* Md. Code Ann. [Crim. Law], § 11-304.

promise another to be taken to or placed in any place for prostitution; unlawfully takes or detains another with the intent to use force, threat, or persuasion to compel the other to marry the person or a third person or perform a sexual act, sexual contact, or vaginal intercourse or receives consideration to procure for or place in a house of prostitution or elsewhere another with the intent of causing the other to engage in prostitution or assignation. [316]

According to Professor Chuang, the Neo-abolitionist groups in the U.S. are responsible for "promoting for mainstream consumption a reductive understanding of the very nature of the trafficking phenomenon" [317] as they "succeeded in characterizing trafficking as primarily about, if not limited to, prostitution (both "forced" and "voluntary")" [318]. According to her, the Neo-abolitionists "constructed trafficking as a moral or social problem driven by social deviance or entrenched male patriarchy", [319] instead of what trafficking really is, namely "a complex phenomenon driven by deep economic disparities between wealthy and poor communities and nations, and by inadequate labor and migration frameworks to manage their consequences". [320]

2.2.5 (Continuing) Partial criminalization. The Swedish and Italian Model

The *partial criminalization* model of regulation does not target the sex workers, but it criminalizes the involvement of the other actors: in some countries, the customers and the third parties (pimps, brothel keepers, anyone who encourages the sale of sex), the so called "Swedish Model" or "Nordic Model" [321]; in other countries, only the third parties, as, for instance, in Italy.

The Swedish Model could be summarized as follows: the purchase of sex is illegal, but the sale of sex is legal. Indeed, the sex workers' activity is not criminalized (hence, the term "partial criminalization").

---

[316] *See* Md. Code Ann. [Crim. Law], § 11-303.
[317] Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010): 1682.
[318] Ibid, at 1682-1683.
[319] Ibid, at 1683.
[320] Ibid.
[321] Sweden was the first country to adopt the partial criminalization model, which criminalizes the purchase of sex (along with the third parties' activities) in 1999; in 2009, other two Nordic countries followed Sweden: Norway and Iceland. For this reason, the partial criminalization approach is sometimes referred to as the "Nordic Model", even if only three Nordic countries, as of July 2021, adopted such model. It is indeed a common misconception the one that places Finland among the countries that follow the Nordic approach to prostitution. Finland has a partial ban on the purchase of sex, the discerning element being if the sex worker conducts her activity independently (in that case, the purchase of sex is legal), or if instead she is "managed" by someone else (commonly referred to as a "pimp").

The proposal that led, in 1998, to the introduction of the "Act Prohibiting the Purchase of Sexual Services", the Swedish law which criminalized sex purchase, formed part of the Government Bill Violence against Women and it was based on the report of the 1993 Prostitution Inquiry. [322] The *ratio* behind the law, also explicated in the report, can be summarized in the assumption that if there is no demand, there will be no prostitution. [323]

Chapter 6, section 11 of the Swedish Criminal Code states:

A person who, in cases other than those previously referred to in this Chapter, obtains casual sexual relations in return for a payment, is guilty of *purchase of sexual services* and is sentenced to a fine or imprisonment for at most one year.

The provision in the first paragraph also applies if the payment was promised or made by another person. [324]

For the crime of "Purchase of sexual services", the maximum criminal sanction is one year of imprisonment; however, the Swedish Government Report of 2010 explains:

eight out of ten cases in which buyers of sexual services are prosecuted involve situations in which the buyer has admitted to the offense. […] When suspects admit to an offense, *the prosecutor does not generally bring legal proceedings*; instead, a summary fine is imposed on the suspected buyer of sexual services. [325]

In terms of results accomplished, according to the Report, the ban on the purchase of sex both contributed to create, among the public, a shift in attitude towards prostitution and decreased demand. [326] Also, the Report states that "[a]ccording to the Swedish Police, it is clear that the ban on the purchase of sexual services acts as a barrier to human traffickers and procurers who are considering establishing themselves in Sweden". [327]

---

[322] Swedish Institute, Selected extracts of the Swedish government report SOU 2010/49, *The Ban against the Purchase of Sexual Services. An evaluation 1999-2008* (November 2010): 6. Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_ban_against_the_purchase_of_sexual_services._an_evaluation_1999-2008_1.pdf.

[323] Ibid, at 5.

[324] Swedish Criminal Code, Chapter 6: "Sex crimes", Section 11, defining the crime of "purchase of sexual services". In its original language: "*Den som, i annat fall än som avses förut i detta kapitel, skaffar sig en tillfällig sexuell förbindelse mot ersättning, döms för köp av sexuell tjänst till böter eller fängelse i högst ett år.*
Vad som sägs i första stycket gäller även om ersättningen har utlovats eller getts av någon annan". The Swedish Criminal Code in its entirety is available at: https://www.legislationline.org/download/id/9097/file/Sweden_CC.pdf.

[325] Swedish Institute, Selected extracts of the Swedish government report SOU 2010/49, *The Ban against the Purchase of Sexual Services*. *An evaluation 1999-2008* (2010): 10, emphasis added.

[326] Ibid at 9.

[327] Ibid.

The Swedish reform of the prostitution model of regulation starts from the assumption that sex work, in any case, is inherently problematic. However, many organizations promoting human rights and sex workers' rights, such as the Global Network of Sex Work Projects (NSWP), don't agree. They underline that sex work "is enormously variable, and this variability applies to the levels and rates of violence and harm that can be associated with sex work". [328]

According to NSPW, the right approach to sex work, both internationally and in Sweden, is one that complexifies engagement with the subject matter. [329] Many sex worker rights organizations and unions claim they "have tried to challenge a narrative that universally conceptualizes sex work as a form of violence, that argues that sex work is inevitably surrounded by violence, a narrative that is reductionist and that eclipses variability and nuance". [330]

Also, NSPW highlights how the fact that the Swedish law was part of the Government Bill Violence against Women, and that the "Swedish model defines sex work as a form of male violence against women", [331] is a symptom of a narrative in which transgender and male sex workers are effectively invisible. [332]

The Italian regulation model, although still being designed after the partial criminalization approach, is different from the one offered by the Swedish law, since in Italy neither the sale nor the purchase of sex is criminalized, but only the "parallel conducts" are illegal.

Law No. 75 of 20 February 1958, [333] and in particular, its Articles 3 and 4, substituted the original Italian legislation on prostitution. Article 3 states that it is punishable with imprisonment from two to six years, and with a fine from 100,000 to 4,000,000 lire (which would now amount, approximately, to a fine between 50 euros and 2,000 euros): [334] [335] whoever owns or exercises or administers, under any denomination, a "house of prostitution" or leases

---

[328] Global Network of Sex Work Projects, *The real impact of the Swedish Model on sex workers: Sweden's Abolitionist Understanding, and Modes of Silencing Opposition*, (December 2014): 1. Available at: https://www.nswp.org/sites/default/files/1.%20Sweden%E2%80%99s%20Abolitionist%20Understanding%2C%20and%20Modes%20of%20Silencing%20Opposition%2C%20Swedish%20Model%20Advocacy%20Toolkit%2C%20NSWP%20-%20December%202014.pdf.

[329] Ibid at 2.

[330] Ibid.

[331] Global Network of Sex Work Projects, *The real impact of the Swedish Model on sex workers: Sweden's Abolitionist Understanding, and Modes of Silencing Opposition* (2014): 10.

[332] Ibid.

[333] Law No. 75, 20 February 1958, "*Abolizione della regolamentazione della prostituzione e lotta contro lo sfruttamento della prostituzione altrui*".

[334] Except, in any case, the application of Article 210 of the Italian Criminal Code, which concerns the extinction of the criminal offense or of the criminal sanction.

[335] Unofficial translation. Article 3 was here translated by the author.

their premises for the purpose of operating a house of prostitution; [336] whoever, being the owner or manager of premises open to the public (hotel, club, performance venue and so on) frequently tolerates the presence of one or more people who engage in prostitution; whoever recruits a person in order to make them exercise prostitution, or facilitates prostitution for this purpose; whoever induces someone into prostitution; whoever induces a person to travel to the territory of another State or in any case in a place other than their usual residence in order to practice prostitution, or facilitates their departure; anyone who carries out an activity in associations and national or foreign organizations dedicated to the recruitment of people who will be exploited for the purpose of prostitution; whoever in any way favors or exploits the prostitution of others. [337]

Article 3 defines all the so called "parallel conducts", connected to the exercise of prostitution, which are criminalized. Law 75/1958 was criticized because of its fragmentary and confusing nature.[338] In an effort to simplify such complex legislation, each section of Article 3 will be briefly analyzed below and, where necessary, re-stated.

Sections 1 and 2 of the Article refer to the ownership, management and lease of the "houses of prostitution", which were abolished by the same Law.

---

[336] Houses of prostitution (*case di prostituzione*) are also called, in a colloquial way, "brothels".

[337] Law No. 75 of 20 February 1958, Article 3. In the text, translated (unofficial translation). As follows, in the original language: "*Le disposizioni contenute negli articoli 531 a 536 del Codice penale sono sostituite dalle seguenti: E' punito con la reclusione da due a sei anni e con la multa da lire 100.000 a lire 4.000.000, salvo in ogni caso l'applicazione dell'art. 210 del Codice penale: 1) chiunque, trascorso il termine indicato nell'art. 2, abbia la proprietà o l'esercizio, sotto qualsiasi denominazione, di una casa di prostituzione, o comunque la controlli, o diriga, o amministri, ovvero partecipi alla proprietà, esercizio, direzione o amministrazione di essa; 2) chiunque, avendo la proprietà o l'amministrazione di una casa od altro locale, li conceda in locazione a scopo di esercizio di una casa di prostituzione; 3) chiunque, essendo proprietario, gerente o preposto a un albergo, casa mobiliata, pensione, spaccio di bevande, circolo, locale da ballo, o luogo di spettacolo, o loro annessi e dipendenze, o qualunque locale aperto al pubblico od utilizzato dal pubblico, vi tollera abitualmente la presenza di una o più persone che, all'interno del locale stesso, si danno alla prostituzione; 4) chiunque recluti una persona al fine di farle esercitare la prostituzione, o ne agevoli a tal fine la prostituzione; 5) chiunque induca alla prostituzione una donna di eta' maggiore, o compia atti di lenocinio, sia personalmente in luoghi pubblici o aperti al pubblico, sia a mezzo della stampa o con qualsiasi altro mezzo di pubblicità; 6) chiunque induca una persona a recarsi nel territorio di un altro Stato o comunque in luogo diverso da quello della sua abituale residenza al fine di esercitarvi la prostituzione, ovvero si intrometta per agevolarne la partenza; 7) chiunque esplichi un'attività in associazioni ed organizzazioni nazionali od estere dedite al reclutamento di persone da destinate alla prostituzione od allo sfruttamento della prostituzione, ovvero in qualsiasi forma e con qualsiasi mezzo agevoli o favorisca l'azione o gli scopi delle predette associazioni od organizzazioni; 8) chiunque in qualsiasi modo favorisca o sfrutti la prostituzione altrui. In tutti i casi previsti nel numero 3) del presente articolo, alle pene in essi comminate sarà aggiunta la perdita della licenza d'esercizio e potrà anche essere ordinata la chiusura definitiva dell'esercizio. I delitti previsti dai numeri 4) e 5), se commessi da un cittadino in territorio estero, sono punibili in quanto le convenzioni internazionali lo prevedano*."

[338] Francesco Antolisei, *Manuale di Diritto Penale, Parte Speciale – I*, Sixteenth edition, edited by Carlo Federico Grosso (Milano: Dott. A. Giuffrè Editore, 2016): 778, 787.

Section 3 concerns the criminal offense of the conduct of whoever owns or manages premises open to the public and knowingly tolerates the exercise of prostitution in the same premises.

Section 4 criminalizes the recruitment of someone to make them engage in prostitution and the facilitation of prostitution for recruitment purposes. For this to be a crime, it's not necessary that the sex worker *actually* engages in prostitution afterwards; [339] what the section aims at repressing it's the process of recruitment itself. Section 7 criminalizes the same conduct, exercised in the form of national or international organizations or associations, with the purpose of prostitution for sexual exploitation.

Section 5 of Article 3 concerns two different criminal offenses: the inducement to prostitution ("anyone who induces an older woman into prostitution"), also called "panderism", and performing acts of pimping, namely receiving the earnings of a sex worker.

The sixth section of Article 3 regards two conducts that were originally disciplined as "trafficking" by Article 535 of the Italian Criminal Code: inducing someone to travel to the territory of another State (or in general, to travel to a place other than their usual residence) in order to practice prostitution, and the conduct of facilitating their departure.

Finally, [340] section 8 of the same article criminalizes generally the conduct of whoever in any way aids and abets the prostitution of others or exploits it.

Article 4 of Law 75/1958 contains all the different aggravating circumstances: for instance, if the conduct is committed by using violence, threats or deception, the criminal sanction is doubled.

The jurisprudence and the doctrinal opinions on the safeguarded legal value in the subject matter changed overtime. At first, the Italian regulation approach on prostitution was considered to be structured to protect society from damages against the so called "public morality". [341] However, in 2004 the Court of Cassation (with its ruling no. 35776/2004) redefined the safeguarded legal values of the legislation on prostitution, focusing on the right to sexual self-determination of the sex workers and on their dignity, "with particular attention to the free exercise of the sex work in order to avoid the sex workers' exploitation or, in general,

[339] Francesco Antolisei, *Manuale di Diritto Penale, Parte Speciale – I* (2016): 783-784.
[340] Section 7 of Article 3 was analyzed in conjunction with the fourth section.
[341] Alberto Cadoppi, "Dignità, prostituzione e diritto penale. Per una riaffermazione del bene giuridico della libertà di autodeterminazione sessuale nei reati della legge Merlin", *Archivio Penale* 1 (January-April 2019): 6-7. Available at: https://archiviopenale.it/dignita-prostituzione-e-diritto-penale-per-una-riaffermazione-del-bene-giuridico-della-liberta-di-autodeterminazione-sessuale-nei-reati-della-legge-merlin/articoli/18550.

the danger of any form of speculation". [342] The same approach was adopted also in 2015 by the Court of Cassation, in ruling no. 49643, when stating that the protected legal value is, *in toto*, the "sex worker's right to free self-determination in conducting her activities". [343]

Recently, however, the focus shifted on dignity as the *sole* legal value protected by the Italian legislation on prostitution – shift which provoked criticism among the scholars.[344] Indeed, the Court of Cassation, in 2018, stated that the interest safeguarded was not the sexual freedom, at least it its literal meaning, but the dignity of the sex worker, manifested also through the exercise of sexual activity, dignity which is not susceptible, according to the Court, of being bargained or in any case of being the source of patrimonial advantages that can be assessed in the hands of who is exploiting the sex worker. [345]

The Constitutional Court confirmed this interpretation with the ruling 141/2019, rejecting the claim that the legislation was unconstitutional in the part where it criminalizes aiding and abetting voluntary sex work. Indeed, the Constitutional Court defined prostitution as a form of economic activity, and not as a manifestation of sexual self-determination, denying that sex work represents an expression of the human personality (and therefore, is not protected by Article 2[346] of the Italian Constitution).[347] The safeguarded value is dignity, according to the Court, in its "objective" meaning: the legislator, acting as an interpreter of the "common social sentiment", sees in sex work, even when voluntary, an activity that degrades the individual, as

---

[342] Italian Court of Cassation, Criminal Division, Section III, ruling no. 35776, 2 September 2004. Available at: https://www.moltocomuni.it/wp-content/uploads/Cass.pen_.-n.35776-del-2004.pdf. Unofficial translation. In its original version: "*[i beni protetti sono] la dignità e la libertà della persona umana con particolare riguardo al libero esercizio del meretricio al fine di evitare lo sfruttamento della stessa o comunque il pericolo di una qualsiasi forma di speculazione*".

[343] Italian Court of Cassation, Criminal Division, Section III, ruling no. 49643, 22 September 2015, as cited in Alberto Cadoppi, "Dignità, prostituzione e diritto penale. Per una riaffermazione del bene giuridico della libertà di autodeterminazione sessuale nei reati della legge Merlin" (2019), at 8. In its original version: "*In questa sentenza si legge che il bene giuridico sarebbe tout court quello della 'libera autodeterminazione della prostituta a svolgere le proprie attività*'".

[344] *See* in general Alberto Cadoppi, "Dignità, prostituzione e diritto penale. Per una riaffermazione del bene giuridico della libertà di autodeterminazione sessuale nei reati della legge Merlin" (2019).

[345] Italian Court of Cassation, Criminal Division, Section III, ruling no. 14593, 30 March 2018, as cited in Alberto Cadoppi, "Dignità, prostituzione e diritto penale. Per una riaffermazione del bene giuridico della libertà di autodeterminazione sessuale nei reati della legge Merlin" (2019), at 16. In its original version: "*[d]eve viceversa rilevarsi che oggetto dell'interesse tutelato dalla normativa in tema di prostituzione non è la libertà sessuale intesa in senso stretto, intesa come facoltà di determinarsi in tale ambito […] dovendo tale interesse essere individuato, semmai, nella necessaria tutela della dignità della persona esplicata anche attraverso lo svolgimento della attività sessuale, dignità non suscettibile […] di essere oggetto di contrattazioni, o di atti attraverso i quali sia fatta disposizione di essa, aventi una rilevanza patrimoniale, o, comunque, di essere fonte di vantaggi patrimonialmente valutabili in capo a chi approfitti degli atti con cui di essa si sia disposto*".

[346] Constitution of the Italian Republic, Article 2.

[347] Italian Constitutional Court, ruling 214/2019, paragraph 5.2. In its original version: "*[l]'offerta di prestazioni sessuali verso corrispettivo non rappresenta affatto uno strumento di tutela e di sviluppo della persona umana, ma costituisce – molto più semplicemente – una particolare forma di attività economica*".

it reduces the most intimate sphere of corporeality to the level of goods available to the client. [348]

Some Italian scholars criticize Law 75/1958 because of its style, and in particular because of its fragmentary nature. [349]

Others [350] claim that a potential risk in the exercise of the sex worker's activity, *when voluntary*, is not a satisfactory justification for imposing a criminal sanction on third parties. The most recent Italian doctrine [351] and the international one [352] clarify that the sex work phenomenon is complex, and it encompasses a variety of different conditions and of typologies of sex workers and clients, ranging from trafficking for sexual exploitation and involuntary prostitution to voluntary sex work. Clearly, the debate revolves around the *voluntary* sex work (or better, whether is it possible or not to choose to engage in sex work, and if it deserves a different regulation approach, as analyzed in the previous paragraphs); and even if, in comparison with the abuses which unfortunately many victims are subjected to, voluntary workers are a minority, their activity is still an issue which should be addressed[353] - and it should be addressed through a mean of regulation which takes into account the complexity of the phenomenon.

2.2.6 (Continuing) Decriminalization. The New Zealand Model

The *complete decriminalization* approach excludes criminalization of voluntary adult prostitution *in toto*, but it does not provide the sex sector with specific legislation (although, there may be some regulations and limitations when it comes to the conduct of those who facilitate sex work).

New Zealand was the first country, in 2003, to adopt such model, with the passage of the Prostitution Reform Act (PRA). The formation process included the participation, in 1997, of

---

[348] Italian Constitutional Court, ruling 214/2019, paragraph 6.1. In its original version: *il legislatore […] facendosi interprete del comune sentimento sociale in un determinato momento storico – ravvisa nella prostituzione, anche volontaria, una attività che degrada e svilisce l'individuo, in quanto riduce la sfera più intima della corporeità a livello di merce a disposizione del cliente*".
[349] Francesco Antolisei, *Manuale di Diritto Penale, Parte Speciale – I* (2016): 778.
[350] *See* Alberto Cadoppi, "Dignità, prostituzione e diritto penale. Per una riaffermazione del bene giuridico della libertà di autodeterminazione sessuale nei reati della legge Merlin" (2019): 14.
[351] Merzagora and Travaini, *Prostituzioni*, in *Prostituzione e diritto penale*, edited by Alberto Cadoppi (Roma: Dike Giuridica Giuffrè, 2014).
[352] As an example, *see* Janie A. Chuang, "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy" (2010): 1682-1683.
[353] Arguing in this sense *see* Alberto Cadoppi, "Dignità, prostituzione e diritto penale. Per una riaffermazione del bene giuridico della libertà di autodeterminazione sessuale nei reati della legge Merlin" (2019): 14.

a women's forum to work on a bill, the group being constituted by representatives from the New Zealand Prostitutes' Collective (NZPC), Young Women's Christian Association, National Council of Women, and the AIDS Foundation.[354] However, the Bill underwent relevant changes during its passage through the Parliament: some modifications concern, for instance, the inclusion of a system of certification for brothel operators, as well as provisions prohibiting people on limited entry visas working or investing in prostitution businesses, and also the establishment of the Prostitution Law Review Committee. [355]

The purpose of the PRA, as can be read in the Act itself, is to:

> decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use) and to create a framework that— (a) safeguards the human rights of sex workers and protects them from exploitation; (b) promotes the welfare and occupational health and safety of sex workers; (c) is conducive to public health: (d) prohibits the use in prostitution of persons under 18 years of age: (e) implements certain other related reforms.[356]

One of the major aspects of the Prostitution Reform Act, apart from the prohibition on use in prostitution of minors, is constituted by the sector on health and safety requirements. All the operators of prostitution business (sex workers included) and the clients must adopt safer sex practices. For instance, every operator of prostitution business had to "take all reasonable steps to give health information (whether oral or written) to sex workers and clients" [357] and to "take all other reasonable steps to minimise the risk of sex workers or clients acquiring or transmitting sexually transmissible infections". [358] Every person who infringes such provisions is liable to a fine up to $10,000 [359] and sex workers and clients must also adopt safer sex practices or be liable to receive a fine not exceeding $2,000. [360] Also, Sections 24 to 29 of the PRA provide powers of entry to premises for the purpose of inspection for compliance with health and safety requirements. [361]

---

[354] Paul Bellamy, Research Services Analyst, for the New Zealand Parliament's website, *Prostitution law reform in New Zealand* (July 2012). Available at: https://www.parliament.nz/en/pb/research-papers/document/00PLSocRP12051/prostitution-law-reform-in-new-zealand/#footnote_32_ref.
[355] Ibid.
[356] Prostitution Reform Act 2003 (PRA), Part I – Preliminary provisions, *Purpose.* The PRA is available at: https://www.legislation.govt.nz/act/public/2003/0028/latest/whole.html#DLM197821.
[357] Prostitution Reform Act 2003, Part II – Section 8.
[358] Ibid.
[359] Ibid.
[360] Prostitution Reform Act 2003, Part II – Section 9.
[361] *See* Prostitution Reform Act 2003, Part II – Sections from 24 to 29; also, *see* Paul Bellamy for the New Zealand Parliament's website, *Prostitution law reform in New Zealand* (July 2012).

Another relevant aspect of the PRA is represented by the brothel operator certification system: "[e]very operator of a business of prostitution (other than a company) must hold a certificate issued under section 35", [362] otherwise the operators are subject to fines not exceeding $10.000. To be eligible for a certificate, applicants must be over the age of 18, be a citizen or permanent resident of New Zealand or Australia, and not have any disqualifying convictions. [363] Brothel operator's certificates are not required for the small owner-operated brothels (SOOBs), which do not have more than four sex workers. [364]

The PRA also provides a Prostitution Law Review Committee, constituted by eleven members (appointed by the Minister of Justice), reviewing the PRA's operation and goals. [365]

It is interesting to cite the Part dedicated to the "Protection for Sex Workers", consisting in Section 16 and Section 17.

Section 16 ("inducing or compelling persons to provide commercial sexual services or earnings from prostitution") [366] punishes whoever, *with the intent of inducing or compelling someone to provide or continue to provide sexual services*, threats or promises (i) to improperly use any power or authority to the detriment of that person, or (ii) to commit an offence punishable with imprisonment, or (iii) to make an accusation or disclosure (whether true or false) of any offence committed by any person or in general to make an accusation that could injure the victim's reputation; or (iv) promises to supply any drugs within the meaning of the Misuse of Drugs Act 1975.

Section 17 ("refusal to provide commercial sexual services") provides that "despite anything in a contract for the provision of commercial sexual services, a person may, at any time, refuse to provide, or to continue to provide, a commercial sexual service to any other person" [367] and "the fact that a person has entered into a contract to provide commercial does not *of itself* constitute consent" [368] to provide the commercial sexual services.

The one analyzed above is the voluntary adult prostitution legal framework in New Zealand, clearly separated from the human trafficking offense – which includes trafficking for the purpose of sexual exploitation, meaning prostitution or any other sexual services, under Section 98D of the Crimes Act 1961. The provision states that is liable of the trafficking in

---

[362] Prostitution Reform Act 2003, Part III – Section 34.
[363] Paul Bellamy for the New Zealand Parliament's website, *Prostitution law reform in New Zealand* (July 2012).
[364] Prostitution Reform Act 2003, Part I – Section 4.
[365] *See* Prostitution Reform Act 2003, Part IV – Sections from 42 to 46.
[366] Prostitution Reform Act 2003, Part II – Section 16.
[367] Prostitution Reform Act 2003, Part II – Section 17.
[368] Ibid, emphasis added.

persons offence whoever arranges, organises, or procures the entry of a person into, or the exit of a person out of, New Zealand or any other State (or receives, recruits, transports, transfers, conceals or harbors someone in New Zealand) for the purpose of exploiting or facilitating the exploitation of the person or knowing that the act involves one or more acts of coercion against the person, or of deception, or both. Paragraph 4 explains what exploitations means for the purpose of this article: it means to "cause, or to have caused, that person, by an act of deception or coercion, to be involved in prostitution or other sexual services; slavery, practices similar to slavery, servitude, forced labour, or other forced services: the removal of organs". [369]

As stated above, many groups of Non-abolitionists prefer this model of regulation. Indeed, it has been described as "the world's best example of how society and government can humanely accept and manage sex work". [370] This is because the decriminalization model distinguishes voluntary from involuntary prostitution, without necessarily regulating with special legislation the sex sector (which could lead to discrimination).

After the introduction of the PRA, sex workers are "more likely to report incidents of violence to the Police". [371]

One of the reports of the Prostitution Law Review Committee highlighted that "in case of New Zealand, there is no link between the sex industry and human trafficking". [372]

When it comes to the complete decriminalization and legalization approaches (and in particular to the first one), a general critic there is usually made is that because there aren't robust protections, trafficking could flourish under this mode of response to prostitution. However, New Zealand has always been in Tier 1 of the U.S. State Department Trafficking in Person Report (TIP Report). [373]

---

[369] New Zealand Legislation, Crimes Act 1961, Section 98D. Available at: https://www.legislation.govt.nz/act/public/1961/0043/latest/DLM328722.html.

[370] Decriminalize Sex Work (no-profit organization), *New Zealand: The Ideal Legal Framework for Decriminalized Sex Work* (2020). Website of the organization: https://decriminalizesex.work.

[371] Ministry of Justice, "Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003", New Zealand Government, May 2008, 14. Available at: http://prostitutescollective.net/wp-content/uploads/2016/10/report-of-the-nz-prostitution-law-committee-2008.pdf.

[372] Ibid, at 167.

[373] The TIP Report ranks countries according to the extent that they comply with U.S. anti-trafficking standards. Tier 1 includes the countries which fully comply with the U.S. standards, while Tier 2 countries are not in full compliance, but are making significant efforts in order to comply. Tier 3 countries are not in compliance and are not making any efforts.

2.2.7 (Continuing) Legalization. Germany

The fourth, and last, mode of regulation of sex work is *legalization*: in this case, specific legislation on prostitution is provided. This is the approach that Germany adopted with the Prostitution Act (in force since January 2002).

The Report by the German government on the Prostitution Act specifies that

> [t]he aim of the regulations set out in Sections 1 to 3 Prostitution Act and of simultaneously restricting criminal liability to the promotion of prostitution in cases involving exploitation of prostitutes (by amending Sections 180a, 181a Criminal Code) *was to enable the prostitutes to conclude proper employment contracts* and thereby to reduce their dependency on, for example, pimps and to improve the prostitutes' health and hygiene conditions at work. [374]

But probably the most important statement of intentions in the Report, concerning the impact of this mode of regulation on trafficking in human beings, was the following:

> At best these areas were addressed in the Prostitution Act to the extent that it was assumed that by concentrating on the criminal prosecution of actually punishable matters and shedding light into the grey area of prostitution, as was the intention*, it would become easier to combat violent and degrading forms of prostitution such as trafficking in human beings*, *forced prostitution*, prostitution by minors, exploitation of prostitutes and violent crime in the "scene". [375]

Therefore, the Prostitution Act rationale is that of regulating (and legalizing *in toto*) voluntary sex work in order to "shed some light" upon the "grey area" of human trafficking with the purpose of sexual exploitation, forced prostitution and prostitution by minors (but the latter, as already stated, is *always* prohibited, in each and every single mode of regulation).

The Prostitution Act's aim was that of improving the legal and social situations of sex workers, as considering prostitution immoral had negative impacts on the sex workers themselves, whereas with the Act the sex workers' access to social insurance is facilitated. [376]

---

[374] Germany, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)* (June 2007): 9. Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/federal_government_report_of_the_impact_of_the_act_regulating_the_legal_situation_of_prostitutes_2007_en_1.pdf.

[375] Germany, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)* (June 2007): 9-10.

[376] Ibid, at 9.

The Prostitution Act gave sex workers the right to demand that clients pay the agreed fee. [377] Also, "employment contracts and other contracts between prostitutes and operators of a brothel, or an escort agency, can now be legally entered into". [378] However, "the contracts are valid only if they comply with legal regulations and do not infringe the rights of prostitutes". [379]

Operators of a prostitution business have "limited power to give instructions": they may stipulate when and where the prostitutes will work in an employment contract, but they can't decide who sex workers will provide sexual services to. [380]

In July 2017, the Prostitute Protection Act entered into force, introducing important provisions such as the sex workers' obligation to register and to health consultation; the business prostitution permit; the condom requirement; the sex workers' tax obligations and social.

Since 2017, it is mandatory for prostitutes to personally register their work; [381] if they are eligible, when the sex workers register, they receive a certificate. The registration certificate is valid for two years for persons over 21; for one year for persons under 21. [382] Also, as the Report explains, "in addition to the registration certificate issued in your real name, the public authority can issue you with what is called an "alias certificate" *(Alias-Bescheinigung)* on request". [383] In this way, the privacy of the sex workers is protected: they can work without even the operator knowing their real name or their home address. The registration certificate cannot be issued it the sex worker:

> "is younger than 18; is younger than 21 and other people have caused them to take up prostitution or continue with prostitution; is coerced into taking up or continuing prostitution; is pregnant and will give birth within the next six weeks". [384]

Before being able to register, the sex worker has to attend a health consultation, which is usually carried out by the health office (*Gesundheitsamt*) and which "concerns topics such as

---

[377] Germany, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *The new Prostitute Protection Act (Das neue Prostituiertenschutzgesetz)*(February 2019): 3.
[378] Ibid, at 4.
[379] Ibid.
[380] Ibid.
[381] Ibid.
[382] Ibid.
[383] Ibid.
[384] Ibid.

protection against diseases, pregnancy, and contraception as well as the risks of alcohol and drug abuse". [385]

To operate a prostitution business, [386] it's necessary to have a permit: the permit will be issued only after the authorities' check of compliance with all the existing legal regulations – for instance, "the rooms in which the sexual services are provided must have a way to make emergency calls". [387] Also, if there are indications that people are being exploited, the permit won't be issued, and an existing permit will be withdrawn. [388]

Sex workers are covered by social insurance; moreover, the income from sexual services is subject to income tax if the sex worker is self- employed, or to wage tax, in case the sex worker is an employee. [389]

The key provisions in terms of sex trafficking in Germany are Section 232 of the Criminal Code (the general provision on human trafficking, which mirrors the Palermo Protocol one, setting the minor age at 21 years to the Section's purpose) [390] and Section 232(a), which was introduced to implement the EU Directive on Combating Trafficking in Human Beings and Protecting its Victims (2011/36/EU) and which concerns specifically forced prostitution as an exploitation purpose. The core element of Article 232(a) is the act of exerting influence over a person, in order to exploit that person at a later stage. [391] The provision punishes whoever,

> by taking advantage of another person's personal or financial predicament or helplessness on account of being in a foreign country, causes that person or causes another person under 21 years of age:
>
> 1. To engage in or continue to engage in prostitution or
>
> 2. To perform sexual acts, by way of which they are exploited, on or in the presence of the offender or a third person, or to allow sexual acts to be performed on them by the offender or a third person. [392]

---

[385] Ibid.
[386] Examples of prostitution businesses are sauna or nudism clubs, brothel flats, escort agencies.
[387] Germany, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *The new Prostitute Protection Act (Das neue Prostituiertenschutzgesetz)*(February 2019: 7.
[388] Ibid.
[389] Ibid, at 12.
[390] German Criminal Code, Section 232 (emphasis added). Unofficial translation. Available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.
[391] KOK – German Network Against Trafficking in Human Beings, *German Penal Code* in "Legal Framework in Germany". Available at: https://www.kok-gegen-menschenhandel.de/en/human-trafficking/legal-framework-in-germany/german-penal-code (accessed on July 15th, 2021).
[392] German Criminal Code, Section 232(a), paragraph 1. Unofficial translation. Available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

The major goal of such reform in Germany seems to be that by separating legal sex work and illegal, forced, exploitative prostitution in connection with human trafficking, "legal prostitution businesses have an incentive to screen out individuals who may have been coerced", [393] thus having a positive impact in the battle against trafficking. Also, the legalization model has the advantage of a formal recognition by the State.

However, as stated above, [394] many sex workers' activists and organization highlight the potential overregulation of the legalization approach, resulting in a discriminatory regime against sex work.

2.2.8 Concluding remarks on prostitution and on sex trafficking

In conclusion, the rationale of the complete criminalization model, implicating that prostitution is inherently degrading against women and can *never* be a true and free choice, and that all prostitution is exploitative and therefore it always amounts to trafficking, it is not sustained at the international level. The same fact that prostitution, in the Palermo protocol, is not punished as it is, but only if it amounts to sexual exploitation, is a confirmation that prostitution *can* be a free choice and is not *in itself* sexual exploitation. Moreover, the use itself of the trafficking indicators for sexual purposes ulteriorly corroborates this position: the operational tools help to verify *when* and *if* prostitution amounts to sexual exploitation and *when* and *if* prostitution is not chosen freely. The relevance of such operational indicators has already been proven. [395]

Some examples of operational indicators of sexual exploitation are bad living conditions, the absence of a salary, excessive working days or hours. [396] Moreover, an indicator of sexual exploitation could be the lack of respect of labour laws or the absence of a signed contract: "this includes cases where the individual was forced to work without a contract, where there was no respect to the contract signed, where the contract provided was unlawful, or where the recruitment of the individual was illegal". [397] Also, "exploitation through no respect of/ non-

[393] Ronald Weitzer, "Legal Prostitution: The German and Dutch Models" in *Dual Markets: Comparative Approaches to Regulation* (Springer International Publishing AG, 2017): 379-380. DOI 10.1007/978-3-319-65361-7_24.
[394] S*ee* paragraph 2.2.1.
[395] *See* paragraph 2.1.
[396] International Labour Office, *Operational indicators of trafficking in human beings. Results from a Delphi survey implemented by the ILO and the European Commission* (2009).
[397] International Labour Office, *Explanations for indicators of trafficking for labour exploitation* (2009), at 5.

compliance to labour laws or of the contract signed also refers to payment issues for example in cases where the individual is paid less than local prostitutes". [398]

Therefore, prostitution is not inherently trafficking, contrary to what the complete criminalization model argues.

Of course, this doesn't mean that sex work can never amount to trafficking for the purpose of sexual exploitation. A State *must* have a strong regulation to prevent and repress exploitative practices. The policy choices on how to regulate prostitution, substantiated in the three other models exposed (partial criminalization, complete decriminalization and legalization), need to be analyzed in terms of their victim protection potentialities. Indeed, one of the objectives of this thesis is to shift the focus from the regulation of human trafficking and exploitation as a "State security issue" or as a "moral purpose" to a victim-centered approach.

For instance, as mentioned, the Swedish model doesn't seem to offer effective remedies and protection to transgender and male sex workers. Since the Swedish law defines prostitution as a form of male violence against women, transgender and male sex workers are invisible. [399] In general, sex workers organizations like the Global Network of Sex Work Projects tried to challenge a narrative that universally conceptualizes sex work as a form of violence, because such narrative is reductionist, and it eclipses sex work's variability. [400]

In the legalization regime, which gives advantage of a formal recognition by the State, "legal prostitution businesses have an incentive to screen out individuals who may have been coerced", [401] thus having a positive impact in the battle against trafficking. However, it has been claimed that this model may result in a potential overregulation and, therefore, discrimination against sex work. [402]

In conclusion, the model that sex workers organizations seem to appreciate the most is the decriminalization regime, because it distinguishes voluntary from involuntary prostitution, without necessarily regulating with special legislation the sex sector. Indeed, the New Zealand

---

[398] Ibid.
[399] Global Network of Sex Work Projects, *The real impact of the Swedish Model on sex workers: Sweden's Abolitionist Understanding, and Modes of Silencing Opposition* (2014): 10.
[400] Ibid, at 2.
[401] Ronald Weitzer, "Legal Prostitution: The German and Dutch Models" in *Dual Markets: Comparative Approaches to Regulation* (Springer International Publishing AG, 2017): 379-380. DOI 10.1007/978-3-319-65361-7_24.
[402] Ibid, at 1671.

model has been described as "the world's best example of how society and government can humanely accept and manage sex work". [403]

If prostitution, as proven, is not *inherently* sex trafficking, then what can be defined as human trafficking for the purpose of sexual exploitation? As explained in the introduction, sex trafficking occurs when someone (the trafficker) recruits, transports, transfers, harbors, or receives a person (the victim), using force, fraud or coercion *in order to subject* such person to prostitution (or to other non-sexual exploitative purposes). In Rantsev v. Russia, [404] the European Court of Human Rights stated that trafficking in human beings "is based on the exercise of powers attaching to the right of ownership". [405] Sex trafficking, as all forms of trafficking, "implies close surveillance of the activities of victims"; [406] it "involves the use of violence and threats against victims, who live and work under poor conditions". [407]

Trafficking for the purpose of sexual exploitation, then, "treats human beings as commodities to be bought and sold" [408] and *forced* to work in the sex industry.

2.3 Trafficking for the purpose of forced labour. Forced labour in the agriculture industry: the Italian reform on labour exploitation. Forced begging

2.3.1 The general definition of forced labour and main affected sectors

Although the term forced labour is sometimes used to refer to the trafficking phenomenon itself, here it will be analysed as all the relevant international instrument collocate it: as one of the end purposes of human trafficking.

However, from a comparativist perspective, it must be mentioned that some countries envisage two separate offenses for trafficking and for forced labour. Italy, for instance, criminalized trafficking in human beings at Article 601 of its Criminal Code, [409] slavery

[403] Decriminalize Sex Work (no-profit organization), *New Zealand: The Ideal Legal Framework for Decriminalized Sex Work* (2020). Website of the organization: https://decriminalizesex.work.
[404] *See* also paragraph 1.4.
[405] European Court of Human Rights, *Rantsev v. Cyprus and Russia* (Application no. 25965/04), judgment of 7 January 2010, at para. 281.
[406] Ibid. *See* also para. 85.
[407] Ibid, para. 281, *see* also paragraphs 85-87.
[408] Ibid, para 281.
[409] Italian Criminal Code, Article 601, "Trafficking in persons".

(including slavery for forced labour) at Article 600, [410] and, most importantly, the illegal intermediation and labour exploitation at Article 603-*bis*, as amended by Law 199/2016.[411] In Hungary, in addition to trafficking in human beings for forced labour, forced labour is also a stand-alone offence. [412]

Also, it is common in literature to refer to forced labour as including both sexual and non-sexual coerced services.

In this section, however, forced labour will be analyzed as one of the exploitative end-purposes of human trafficking, indicating non-sexual services, exacted from someone under the menace of penalty and for which they have not offered themselves voluntarily. [413]

It is common to consider debt bondage and serfdom as forms of forced labour; however, for the purpose of this discussion they will be analyzed in the section concerning slavery-like practices, where they are collocated by the 1956 "Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery". [414]

As already stated, [415] the first international instrument to give a widely accepted definition of forced labour was the "Forced Labour Convention", 1930 (ILO Convention No. 29) [416]: "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily", [417] and the definition was then reaffirmed in Article 1(3) of the Forced Labour Protocol. [418]

Therefore, the fundamental elements of forced labour are three: (i) "work or service", indicating any type of work occurring in any activity, industry, or sector [419]; (ii) a subjective

---

[410] Italian Criminal Code, Article 600, "Reduction and maintenance in slavery or servitude".
[411] Italian Criminal Code, Article 603-*bis*, "Illegal intermediation and labour exploitation", as amended by Law 199/2016. For further analysis on this provision, *see* paragraph 0.
[412] Hungarian "new" Criminal Code (amended in 2012), Article 192 ("Trafficking in human beings") and Article 193 ("Forced Labour"). Available in English at: https://www.legislationline.org/download/id/5619/file/HUngary_Criminal_Code_of_2012_en.pdf.
[413] Trafficking for purposes of sexual exploitation has already been analyzed in Section 0.
[414] UN General Assembly, "Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery", Geneva, 7 September 1956.
[415] *See* paragraph 1.1.5.
[416] International Labour Organization, "Forced Labour Convention", Geneva, 14th ILC session (28 Jun 1930). Entry into force: 1 May 1932. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.
[417] "Forced Labour Convention" (1930): Article 1.
[418] International Labour Organization, "Protocol of 2014 to the Forced Labour Convention, 1930", Geneva, 103rd ILC session (11 Jun 2014), entry into force: 9 November 2016. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029. Note: Italy hasn't ratified the 2014 Protocol as of September 2021.
[419] "What is forced labour, modern slavery and human trafficking", International Labour Organization's website. https://www.ilo.org/global/topics/forced-labour/definition/lang-en/index.htm#:~:text=The%20Definition%20of%20forced%20labour&text=%22all%20work%20or%20ser

element, the "involuntariness"; (iii) an objective element, the exaction of the work or service under the "menace of penalty".

With regards to the first element, "all work or service" comprises *all* types of work, employment or occupation: the nature or legality of the employment relationship is irrelevant.[420]

The subjective element occurs when the worker's consent to take a job was not free and informed: the worker was compelled or deceived, and their freedom to leave at any time is compromised. [421] This means that consent is irrelevant when the employer or recruiter had used deception or coercion. Even if workers agreed to take a job, they must "always be free to revoke a consensually made agreement", [422] since "free and informed consent has to be the basis of recruitment and has to exist throughout the employment relationship". [423]

The objective element, instead, refers to situations in which "persons are coerced to work through the use of violence or intimidation, or by more subtle means such as manipulated debt, retention of identity papers or threats of denunciation to immigration authorities" [424] or confinement or even non-payment of wages. Thus, the menace of penalty includes modes of physical and psychological coercion. [425] The key issue to analyze whether a situation can be defined as forced labour is that workers should be free to leave an employment relationship without losing any rights or privileges. [426]

It is extremely important to distinguish between forced labour (where forms of coercion and deception are used to recruit or retain a worker) and *sub-standard working conditions:* "the lack of viable economic alternatives that makes people stay in an exploitative work relationship does not *in itself* constitute forced labour though it may constitute a position of vulnerability as defined by the Palermo Protocol". [427]

---

vice%20which,offered%20himself%20or%20herself%20voluntarily.%22&text=Menace%20of%20any%20penalty%20refers,to%20compel%20someone%20to%20work.

[420] Beate Andrees, *Forced labour and human trafficking: a handbook for labour inspectors*, International Labour Office (Geneva: ILO, 2008): 4. ISBN: 978-92-2-121321-5; 978-92-2-121322-2 (web pdf).

[421] "What is forced labour, modern slavery and human trafficking", International Labour Organization's website. *See* footnote 419.

[422] Beate Andrees, *Forced labour and human trafficking: a handbook for labour inspectors* (2008): 4.

[423] Ibid.

[424] What is forced labour, modern slavery and human trafficking", International Labour Organization's website. *See* footnote 419.

[425] *See* for instance Rohit Malpani, "Legal Aspects of Trafficking for Forced Labour Purposes in Europe", ILO Special Action Programme to Combat Forced Labour Workin Paper No. 48, 2006. https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082021.pdf.

[426] Beate Andrees, *Forced labour and human trafficking: a handbook for labour inspectors* (2008): 4.

[427] Ibid, at 5.

The main sectors in which trafficking for forced labour purposes occurs are agriculture; construction and service sectors; [428] domestic work; mining; forms of informal economic activities, such as organised begging.

The agricultural sector and the tourist industry are the most affected areas in respect to trafficking for forced labour because in both cases they require seasonal employment. Agricultural work, in particular, is "dependent upon the harvesting seasons of crops, necessitating a large amount of work to be completed within a very short window of time",[429] leading employers to rely upon employees on temporary work visas or upon "recruiters" or "crew leaders" who exert control over workers [430]. This temporary workflow also leads workers to frequently migrate – they don't spend enough time in each community to be able to understand the local support networks and to have a sufficient support system: hence, they often find themselves in a position of vulnerability.

Also, both domestic and agricultural work often occur in isolation or at least far away from "prying eyes" (migrant farmworkers traditionally live in housing provided by their employer and domestic workers often spend their entire time in private households and they may even be confined to the property), thereby reducing the likelihood of identification, of exploited workers, by community members. An example of a classical scenario of domestic work is offered by the European Court of Human Rights case "C.N. and V. v. France". In that case, the two applicants arrived in France from Burundi to work as *au pairs*, in a detached house in Ville d'Avray with a family with seven children. The applicants lived in the basement of the house and alleged that they were obliged to perform all the domestic chores, without having right to a salary or to any days off, they lived in unhygienic conditions and were subjected to both physical and verbal harassment, which resulted in psychological trauma. In that case, the European Court of Human Rights confirmed there had been a violation of Article 4 of the European Convention of Human Rights ("Prohibition to slavery and forced labour"), since France did not put in place a legislative framework which could adequately prohibit and punishe forced or compulsory labour, servitude and slavery. [431]

---

[428] Service sectors such as the cleaning industry and the tourist industry (hotels and catering).
[429] National Human Trafficking Hotline operated by Polaris, *Agriculture: industry vulnerabilities*, available at: https://humantraffickinghotline.org/labor-trafficking-venuesindustries/agriculture. Accessed on July 18th, 2021.
[430] In Italy, this figure is called *"caporale". See* further at paragraph 0.
[431] European Court of Human Rights, *C.N. and V. v. France,* (Application no. 67724/09), judgment of 11 October 2012, at para. 105. In that case, with regards to one of the applicants France was also found in violation of Article 3 ECHR.

As it can be observed from these scenarios, in the field of human trafficking in general, but in particular in the area of trafficking for forced labour purposes further analysis [432] of the "abuse of a position of vulnerability" is vital. In general, the term is used to refer to any situation in which "the person involved has no real and acceptable alternative but to submit to the abuse involved".[433] However, neither the Palermo Protocol, nor (for the European Union Member States) the EU Trafficking Directive give further guidance on the concept of position of vulnerability. In Italy, as examined below,[434] the new provision on the "Illegal intermediation and labour exploitation", Article 603-*bis*, has been developed criminalizing taking advantage of the victim's position of vulnerability.

2.3.2 The evolution of the Italian legislation on labour exploitation ("*il caporalato*")

As anticipated, Italy has three provisions concerning trafficking and forced labour: Article 601 of its Criminal Code (trafficking in human beings, including trafficking for forced labour), [435] slavery (including slavery for forced labour) at Article 600, [436] and, most importantly, the "Illegal intermediation and labour exploitation" at Article 603-*bis*, as amended by Law 199/2016. [437]

The historical development of Article 603-*bis* is particularly relevant to understand the innovative provision. The Article was originally introduced by Law 148/2011. The original formulation was the following:

> Unless the fact constitutes a more serious crime, whoever carries out an organized intermediation activity, recruiting workforce or organizing the work activity characterized by exploitation, through violence, threats, or intimidation, taking advantage of the state of need or necessity of the workers, is punished with the imprisonment from five to eight years and with a fine of between 1,000 and 2,000 euros for each worker recruited.
>
> For the purposes of the first paragraph, it constitutes an indicator of exploitation the existence of one or more of the following circumstances: 1) the systematic remuneration of workers which clearly differs from national collective agreements or which is in any case disproportionate with respect to the quantity and quality of the work

[432] *See* a general analysis of the position of vulnerability at 1.2.3.
[433] United Nations General Assembly, "Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols" (2001): 12. https://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf. Also, this is the definition of "abuse of a position of vulnerability" given by the Directive 2011/36/EU, at Article 2(2).
[434] *See* paragraph **2.3.2 The evolution of the Italian legislation on labour exploitation ("*il caporalato*")**.
[435] Italian Criminal Code, Article 601, "Trafficking in persons".
[436] Italian Criminal Code, Article 600, "Reduction and maintenance in slavery or servitude".
[437] Italian Criminal Code, Article 603-*bis*, "Illegal intermediation and labour exploitation", as amended by Law 199/2016.

performed; 2) the systematic violation of the regulations concerning the timetable work, weekly rest, compulsory leave, vacation days; 3) the existence of violations of the legislation on safety and hygiene in the workplace, such as exposing the worker to risks to health or personal safety; 4) subjecting the worker to degrading working conditions, methods of surveillance, or housing situations.

The following constitute specific aggravating circumstances and lead to an increase in penalty from one third to half: 1) the fact that the number of recruited workers exceed three; 2) the fact that one or more of the subjects recruited are minors in non-working age; 3) exposing the intermediary workers at situations of grave danger in regards to the characteristics of the services to be performed and the working conditions. [438]

The main deficiency of the original 603-*bis* was that it criminalized the conduct of the intermediator (usually called "*caporale*") but not the one of the employer, who knowingly benefited of the exploitation. Also, the conduct had to be characterized by violence, threats, or intimidation. The provision was structurally unable to wholly and efficiently address the labour exploitation in Italy because two phenomena (which were instead extremely common) remained completely outside of the criminally relevant area: (i) the conduct of hiring and employing workforce; [439] (ii) the recruitment of workers for an exploitative job, which was however not marked by violence, threat or intimidation. [440]

---

[438] Original Article 603-bis, as introduced by Legislative Decree 138/2011, converted with Law 148/2011. Unofficial translation (translated by the author). In its original version: "*Salvo che il fatto costituisca più grave reato, chiunque svolga un'attività organizzata di intermediazione, reclutando manodopera o organizzandone l'attività lavorativa caratterizzata da sfruttamento, mediante violenza, minaccia, o intimidazione, approfittando dello stato di bisogno o di necessità dei lavoratori, è punito con la reclusione da cinque a otto anni e con la multa da 1.000 a 2.000 euro per ciascun lavoratore reclutato.*
Ai fini del primo comma, costituisce indice di sfruttamento la sussistenza di una o più delle seguenti circostanze: 1) la sistematica retribuzione dei lavoratori in modo palesemente difforme dai contratti collettivi nazionali o comunque sproporzionato rispetto alla quantità e qualità del lavoro prestato; 2) la sistematica violazione della normativa relativa all'orario di lavoro, al riposo settimanale, all'aspettativa obbligatoria, alle ferie; 3) la sussistenza di violazioni della normativa in materia di sicurezza e igiene nei luoghi di lavoro, tale da esporre il lavoratore a pericolo per la salute, la sicurezza o l'incolumità personale; 4) la sottoposizione del lavoratore a condizioni di lavoro, metodi di sorveglianza, o a situazioni alloggiative particolarmente degradanti.
Costituiscono aggravante specifica e comportano l'aumento della pena da un terzo alla metà: 1) il fatto che il numero di lavoratori reclutati sia superiore a tre; 2) il fatto che uno o più dei soggetti reclutati siano minori in età non lavorativa; 3) l'aver commesso il fatto esponendo i lavoratori intermediati a situazioni di grave pericolo, avuto riguardo alle caratteristiche delle prestazioni da svolgere e delle condizioni di lavoro".

[439] Before the modification of Article 603-*bis* in 2016, only irregular foreign workers employed in exploitative conditions were protected from the unlawful conduct of the employer (Article 22, paragraph 12-*bis*, Immigration Consolidated Act, Legislative Decree 286/1998).

[440] Marco Omizzolo, *Sotto padrone. Uomini, donne e caporali nell'agromafia italiana* (Milano: Fondazione Giangiacomo Feltrinelli, 2019): 230. ISBN: 978-88-6835-360-5. Professor Omizzolo's contribution was extremely relevant to the development of the debate on the labour exploitation in Italy.

The inefficiency of the original 603-*bis* is confirmed by the fact that as of June 2016, only 34 registrations appeared (on a national basis) for such crime on the Registers of the Justices for Preliminary Inquiries. [441]

Article 603-*bis* was modified by Law 199/2016 into its current version, which punishes whoever either recruits someone for the purpose of allocating them to work for third parties in conditions of exploitation, taking advantage of the workers' state of need ("*approfittando del loro stato di bisogno"*); or makes use of, hires or employs workforce subjecting the workers to conditions of exploitation and taking advantage of their state of need. [442]

The most important part of the provision is the one which indicates the operational indicators of exploitation. The existence or one or more of the following conditions, constitute an evidentiary tool for proving the workers' exploitation:

The repeated payment of wages in a manner *clearly different from national collective agreements* or territorial agreements stipulated by the most nationally representative workers associations, or in any case disproportionate with respect to the quantity and quality of the work performed;

the *repeated violation* of the regulations relating to the *time of work*, rest periods, weekly rest, mandatory leave of absence, or vacation days;

the existence of *violations of the rules on safety and hygiene* in the workplace;

subjecting the worker to *working conditions*, methods of *surveillance* or *housing* situations which are *degrading*. [443]

---

[441] Chiara Pollastrini, *Tratta di esseri umani e sfruttamento lavorativo* (2018): 63. Available at: www.altrodiritto.unifi.it.

[442] Italian Criminal Code, Article 603-*bis* as amended by Article 1 of Law 199, 29 October 2016, "Provisions on combating the phenomena of undeclared work, the exploitation of labor in agriculture and wage realignment in the agricultural sector". Unofficial translation (provided by the author). Here in its original language: "*Salvo che il fatto costituisca più grave reato, è punito con la reclusione da uno a sei anni e con la multa da 500 a 1.000 euro per ciascun lavoratore reclutato, chiunque: 1) recluta manodopera allo scopo di destinarla al lavoro presso terzi in condizioni di sfruttamento, approfittando dello stato di bisogno dei lavoratori; 2) utilizza, assume o impiega manodopera, anche mediante l'attività di intermediazione di cui al numero 1), sottoponendo i lavoratori a condizioni di sfruttamento ed approfittando del loro stato di bisogno.*
Se i fatti sono commessi mediante violenza o minaccia, si applica la pena della reclusione da cinque a otto anni e la multa da 1.000 a 2.000 euro per ciascun lavoratore reclutato.
Ai fini del presente articolo, costituisce indice di sfruttamento la sussistenza di una o più delle seguenti condizioni: 1) la reiterata corresponsione di retribuzioni in modo palesemente difforme dai contratti collettivi nazionali o territoriali stipulati dalle organizzazioni sindacali più rappresentative a livello nazionale, o comunque sproporzionato rispetto alla quantità e qualità del lavoro prestato; 2) la reiterata violazione della normativa relativa all'orario di lavoro, ai periodi di riposo, al riposo settimanale, all'aspettativa obbligatoria, alle ferie; 3) la sussistenza di violazioni delle norme in materia di sicurezza e igiene nei luoghi di lavoro; 4) la sottoposizione del lavoratore a condizioni di lavoro, a metodi di sorveglianza o a situazioni alloggiative degradanti.
Costituiscono aggravante specifica e comportano l'aumento della pena da un terzo alla meta': 1) il fatto che il numero di lavoratori reclutati sia superiore a tre; 2) il fatto che uno o piu' dei soggetti reclutati siano minori in età non lavorativa; 3) l'aver commesso il fatto esponendo i lavoratori sfruttati a situazioni di grave pericolo, avuto riguardo alle caratteristiche delle prestazioni da svolgere e delle condizioni di lavoro".

[443] Ibid, paragraph 3.

The new provision solves the deficiency of the previous legislation (which only focused on the recruiter) by criminalizing, along with the conduct of the "*caporale*", also the one of the employer who subjects workers to exploitative conditions and takes advantage of their "state of need" ("*approfittandosi del loro stato di bisogno*"). The legislator eliminated the references to violence, threats, or intimidation as constitute elements of the crime (even though violence and/or threats, being considered aggravating circumstances, trigger the application of greater criminal sanctions); the only constitutive element remaining in these regards is the state of need of the worker.

The concept of the taking advantage of the workers' state of need can be associated (if not identified) with the abuse of a position of vulnerability. In fact, it could be argued that the core – or better, the qualifying element – [444] of Article 603-*bis* is precisely the abuse of the position of vulnerability by the employer (and/or by the recruiter). And, considering the observations made above, [445] this formulation of the provision is much more suitable to address the variety of different situations (and degrees) of labour exploitation which occur daily. Indeed, the sociologist and researcher Marco Omizzolo argues that the state of need doesn't necessarily have to consist in exceptional circumstances, it doesn't necessarily have to amount to the exploitation of migrants escaping from the war. [446]

The world of labour exploitation (and of sexual exploitation, as seen above) is much more complex, encompassing a variety of factors that might still amount to the state of need (or position of vulnerability, as we prefer to call it) even if they are not "extreme". The state of need could be defined as a condition in which the will of the worker is a manifestation of his/her primary necessities of livelihood and survival, along with the ones of his/her family.[447] For instance, someone could be considered to be in "a state of need" if they struggle to find a job after losing theirs (in particular if they are not of young age and without a specialization) and therefore they feel bound to accept a condition of poverty and social marginalization. [448]

At paragraph 3, the formulation of the indicators of exploitation was modified, but they maintained the function of evidential orientation of the judge. Violating the rules on safety and hygiene in the workplace and subjecting the worker to working conditions, methods of

[444] Marco Omizzolo, *Sotto padrone. Uomini, donne e caporali nell'agromafia italiana* (2019): 232.
[445] *See* paragraph 0.
[446] Marco Omizzolo, *Sotto padrone. Uomini, donne e caporali nell'agromafia italiana* (2019): 232.
[447] Ibid.
[448] Ibid.

surveillance or housing situations which are degrading are two indicators of forced labour exploitation that we often find also as indicators of human trafficking in general. [449] Also, the previous Article 603-*bis* required the *systematicity* of the indicators at number 1) (the discrepancy between the wages that the workers received and the wages which should have been paid according to the national collective agreements) and at number 2) (the violation of the regulations relating to the time of work, rest periods, weekly rest, mandatory leave of absence, or vacation days). The new 603-*bis*, instead, considers sufficient that the said violations are *repeated*, not necessarily *systematic.*

The expression "unless the fact constitutes a more serious crime" refers to the possibility of configuration of the offences of human trafficking (Article 601) and slavery/slavery-like practices (Article 600), which – oversimplifying – correspond to "greater" manifestations of victim exploitation. Compared to the crime of illicit intermediation and labor exploitation, human trafficking and slavery are characterized by a greater deprivation of the victim's freedom of self-determination: the victim is forced or induced to provide exploitative services, through violence, threats, deception, abuse of authority or taking advantage of a situation of vulnerability, physical or mental inferiority or a situation of necessity.

Article 3 of Law 199/2016 introduces useful and innovative tools. Paragraph 3 provides that the judicial administrator has to support the entrepreneur in the management of the company and has to authorize the carrying out of the acts of administration useful to the company, reporting to the judge every three months, and in any case whenever irregularities emerge about the company's activity progress.[450] Also, in order to prevent situations of serious labor exploitation from continuing, the judicial administrator checks the compliance with the rules of the working conditions the violation of which constitutes, pursuant to article 603-*bis* of the Criminal Code, index of labour exploitation; the administrator also proceeds to the regularization of workers who, when the procedure for the envisaged offenses started, were working in absence of a regular contract and, in order to prevent the violations to repeat, the judicial administrator adopts adequate measures, even if in discrepancy with the ones originally proposed by the entrepreneur or manager. [451] In this way, the judge doesn't have to choose between preserving the company's activity and safeguarding the various employment levels.

[449] *See* paragraph 2.1.
[450] Article 3, Paragraph 3, Law 199/2016, unofficial translation.
[451] Ibid.

In conclusion, Law 199/2016 introduces innovative tools to combat against labour exploitation in Italy (and indirectly, human trafficking for forced labour purposes). The structure of the provision, insofar as it hinges on the importance of the set of factual circumstances involved in it (as indicators of exploitation), gives particular value precisely to these contextual elements, almost giving a stand-alone value to the indicators. [452] Therefore, the indicators are extremely useful, as also underlined in paragraph 0, for the correct analysis, in a courtroom, of whether a scenario actually consists in a human trafficking case for the purpose of labour exploitation or not; they are the *key* to recognize a trafficking victim. Their introduction in the Italian legislation was an important step towards the correct framing of the complex phenomenon of human trafficking: if the adequate interpretative tools (such as the trafficking indicators) are lacking, the result has proved to be that of cultural difficulties in recognizing the trafficking phenomenon. [453] Besides, as already mentioned, [454] also GRETA has called for the use of indicators of exploitation in the definition of the concept by drawing a list of indicators that could be used by the relevant authorities to detect cases of trafficking for the purposes of labour exploitation, and invited the Austrian authorities, in 2011, "to clarify what would constitute exploitation in the field of labour, for instance by drawing a list of indicators that could be used by the relevant authorities to detect cases of [trafficking in human beings] for the purposes of labour exploitation". [455] The trafficking indicators are therefore internationally recognized as a relevant interpretative tool in the fight against human trafficking.

An ulterior positive step could be providing capillary checks by the administrative authorities (such as the labour inspectors and the local health authorities) and of the police; [456] in general, inter-agency cooperation is desirable in the battle against human trafficking and labour exploitation. [457]

[452] Alberto di Martino, *Sfruttamento del lavoro. Il valore del contesto nella definizione del reato* (2019): 60.
[453] Ibid, at 102.
[454] *See* paragraph 2.1.
[455] *See* GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Austria. First evaluation round* (August 2011), at paragraph 155.
[456] Marco Omizzolo, *Sotto padrone. Uomini, donne e caporali nell'agromafia italiana* (2019): 234.
[457] In these regards, *see* Chapter III.

2.3.3 Forced begging

Forced begging could be defined as a mode of labour exploitation, consisting in obliging someone to ask for alms in order to obtain a benefit for a third party. Victims of this kind of exploitation are usually children and adolescences, especially, as studies found, of indigenous communities. For instance, it was estimated that 28% of the cases reported into two regions of Columbia, Antioquia and the *Eje Cafetero*, consists in indigenous victims, and the 44% of those cases correspond to trafficking for forced begging purposes.[458]

Forced child begging is a major issue in India: the 2011 census estimated a total of 3 lakh [459] children (300.000 children) who were exploited into forced begging. [460] Another country particularly affected by this form of exploitation is Albania, were in general 43% of the trafficking victims are children

Studies show that forced child begging can take different forms. Children may be forced to beg by their parents or guardians. [461] Others are exploited by third parties: children are trafficked into begging by informal networks or organized criminal gangs, and in India forced child begging is often linked to drug addiction. [462]

However, it must be noted that it's hard to determine the real extent of child trafficking for begging, as research and studies don't often disaggregate by the type of exploitation into which children are trafficked (thus, the data reported is linked to trafficking for purposes of forced labour in general, or child labour exploitation).

The reason why victims of trafficking for forced begging are usually children or adolescents lies in their particular position of vulnerability (which is even more relevant if children come from a minority, such as an indigenous group): the greater danger of abuse of such vulnerabilities should probably suggest the need for special measures to address forced begging.

---

[458] Álvarez, Laura Melissa, Laura Daniela Buitrago Calvo and Gerson Fajardo Guevara, "Mendicidad ajena como modalidad del delito de trata de personas. Caso embera-chamí", 14 *Revista Virtual Via Inveniendi et Iudicand*, No. 1 (2018): 133.

[459] The "lakh" is an Indian unit of measurement.

[460] Save the Children, concerning the Indian National Human Rights Commission Report, *How children are forced into begging by cartels* (2016). Available at: https://www.savethechildren.in/child-protection/how-children-are-forced-into-begging-by-cartels/.

[461] Emily Delap for Anti-Slavery International, *Begging for change. Research findings and recommendations on forced child begging in Albania/Greece, India and Senegal* (2009): 1, 8.

[462] Ibid, at 1, 6.

In Italy, Article 600-*octies* (as amended by Law 132/2018) punishes both the exploitation of minors in forced begging (paragraph 1) and the organization of begging of others for personal profits in general, regardless of the age of the beggar (paragraph 2).

> Unless the fact constitutes a more serious offense, whoever makes use of a person under the age of fourteen to beg, in any case, not attributable, or allows that person, if subject to his authority or entrusted to his custody or supervision, to beg, or that others use it to beg, is punished with imprisonment for up to three years.
>
> Anyone who organizes the begging of others, makes use of it or in any case favors it for profit purposes is punished with imprisonment from one to three years. [463]

In India, as well, there are specific laws on forced begging. In 1959 the Indian Penal Code was amended to criminalize the exploitation of children for begging and specifically, Section 363A "prohibits kidnapping or maiming a minor for the purposes of begging and if any person who is *not the lawful guardian* of a minor employs or uses a minor for the purposes of begging, he/she will have committed an offence". [464] The law is not effective, however, because especially in India it is common for parents or guardians to force their own children into begging.

Moreover, Section 76 of the Juvenile Justice (Care & Protection of Children) Act, 2015 creates the offence of employment of a juvenile or child for begging, punishable with imprisonment for a term of up to five years or a fine of 100,000 rupees. [465]

In terms of International instruments addressing on the crime of forced begging, the ILO Convention No. 182, namely the "Worst Forms of Child Labour Convention, 1999", [466] obliges ratifying Parties to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour.

For the purposes of the Convention, the term "the worst forms of child labour" comprises:

---

[463] Italian Criminal Code, Article 600-*octies*, as amended by Legislative Decree 113/2018, converted with Law 132/2018. Unofficial translation. In its Italian version: "*Salvo che il fatto costituisca più grave reato, chiunque si avvale per mendicare di una persona minore degli anni quattordici, comunque, non imputabile, ovvero permette che tale persona, ove sottoposta alla sua autorità o affidata alla sua custodia o vigilanza, mendichi, o che altri se ne avvalga per mendicare, è punito con la reclusione fino a tre anni.*
Chiunque organizzi l'altrui accattonaggio, se ne avvalga o comunque lo favorisca a fini di profitto è punito con la reclusione da uno a tre anni".

[464] Consortium for Street Children, *India. Law and Policy on Child Beggars* (2019). Available at: https://www.streetchildren.org/legal-atlas/map/india/status-offences/is-it-illegal-for-children-to-beg/#:~:text=Law%20and%20Policy%20on%20Child%20Beggars&text=Section%2076%20of%20the%20Juvenile,a%20fine%20of%20100%2C000%20rupees.

[465] Ibid.

[466] It's interesting to note that the ILO Convention No. 182 is the first ILO Convention to achieve universal ratification. Italy ratified the Convention in 2000, India in 2017.

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children. [467]

Forced begging is not explicitly cited among the worst form of forced labour in the Convention, although it is considered to be under the scope of the Convention, as a form of child forced or compulsory labour (Article 3(a)).

2.4 Slavery and slavery-like practices: Debt bondage and forced marriage

Article 1 of the 1926 Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".[468] The Italian legislation mirrors this widely accepted definition in Article 600, "whoever exercises on someone powers correspondent to the ones associated with the right of ownership" is punishable for the crime of slavery. [469]

Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) [470] addressed the slavery-like practices, or practices similar to slavery, such as: debt bondage (also called bonded labour), at letter (a);

---

[467] International Labour Organization, "Worst Forms of Child Labour Convention, 1999 (No. 182)", Article 3. Adopted in Geneva, 87th ILC session (17 Jun 1999). Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312327:NO.

[468] "Slavery Convention", signed in Geneva on September 25, 1926, *United Nations Treaty Series,* vol. 212, p. 17, Article 1.

[469] Italian Criminal Code, Article 600, "*Riduzione o mantenimento in schiavitù o in servitù*". Unofficial translation. In its original version: "*Chiunque esercita su una persona poteri corrispondenti a quelli del diritto di proprietà* […] *è punito* […]".

[470] UN General Assembly, "Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery", Geneva, 7 September 1956, *United Nations Treaty Series,* vol. 266, p. 3.

serfdom, at letter (b); forced marriage, at letter (c); exploitation of minors, at letter (d) – in particular, when a parent or a guardian delivers the minor to another person with a view to exploit that child or young person. Article 1 defines the said slavery-like practices as follows:

(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

The Italian legislation echoes Article 1 of the Supplementary Convention (except for the introduction of the removal of organs as a slavery-like practice).

Indeed, Article 600 of the Italian Criminal Code punishes, for the crime of slavery-like practices, whoever

reduces or maintains a person in a state of continuous *subjection*, forcing him to work or sexual services or to beg or in any case to the performance of illegal activities involving the exploitation or that person, or to submit that person to the removal of organs. [471]

[471] Italian Criminal Code, Article 600, "*Riduzione o mantenimento in schiavitù o in servitù*". Unofficial translation. Emphasis added. In its original version: "*chiunque riduce o mantiene una persona in uno stato di soggezione continuativa, costringendola a prestazioni lavorative o sessuali ovvero all'accattonaggio o comunque al compimento di attività illecite che ne comportino lo sfruttamento ovvero a sottoporsi al prelievo di organi*".

The core element of slavery and slavery-like practices is this protracted "claim" to dominion over the victim, a continuous subjection to the powers of the abuser, who acts as if the victim was the object of the right of ownership; as if the victim was, indeed, a dominion. [472]

The second paragraph of Article 600 states:

> The reduction or maintenance in the state of subjection takes place when the conduct is carried out through violence, threat, deception, abuse of authority or taking advantage of a situation of vulnerability, physical or mental inferiority or a situation of need, or through the promise or the giving of sums of money or other benefits to those in authority over the person. [473]

Therefore, a necessary element in regards to the crimes of slavery or slavery-like practices is the condition of weakness or material or moral deficiency of the passive subject, a condition suitable to influence the victim's personal will: a vulnerability capable of radically impairing the freedom of choice of the victim, who has no choice but to submit to the abuse. [474]

Article 602 criminalizes the purchase or sale of slaves.

One of the most common slavery-like practices is debt bondage (often called also bonded labour), the condition arising from a pledge by a debtor of his or her personal services (or of those of a person under his control as security for a debt), when the value of those services is not reasonably assessed, in terms of the amount of the debt or its liquidation, or when the length and nature of those services are not respectively limited and defined.

An example of debt bondage is the following: a laborer may begin with an initial debt of $400 (the debt might even be, as often occurs, passed down from generation to generation). While working and unable to leave, this worker needs a shelter, food and water and the employer tacks on $30 per day to the initial debt to cover those expenses. The result is that the employee only grows his debt while continuing to labor for his debtor: the *repayment is impossible.* [475]

---

[472] In the same way, Italian Court of Cassation, Criminal Division, Section V, 1st April 2015 (ud. 13th February 2015).

[473] Italian Criminal Code, Article 600,"*Riduzione o mantenimento in schiavitù o in servitù*", second paragraph. Unofficial translation. In its original version: "*La riduzione o il mantenimento nello stato di soggezione ha luogo quando la condotta è attuata mediante violenza, minaccia, inganno, abuso di autorità o approfittamento di una situazione di vulnerabilità, di inferiorità fisica o psichica o di una situazione di necessità, o mediante la promessa o la dazione di somme di denaro o di altri vantaggi a chi ha autorità sulla persona*".

[474] In the same direction, Italian Court of Cassation No. 31647/2016, referenced in Marco Omizzolo, *Sotto padrone. Uomini, donne e caporali nell'agromafia italiana* (2019): 223.

[475] *See* End Slavery Now, *Bonded Labour.* Available at: http://www.endslaverynow.org/learn/slavery-today/bonded-labor. Accessed on 19th July, 2021.

Bonded labour is considered a slavery-like practice because the debt bondage places the victims is a state of subjection such that it influences their will and freedom of choice: a condition in which the victims perceive they have no choice but to submit to the abuse and work to try to repay the debt. A misperception, unfortunately, because the more the employees work, the more their debt grows (as displayed in the scheme above) and the repayment is impossible.

Another common slavery-like practice is forced marriage, a marriage in which one and/or both parties, without personally expressing their full and free consent, and without the right to refuse, are promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group.

A child marriage (where at least one of the parties is under 18 years of age) "is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent". [476]

"Marriage shall be entered into only with the free and full consent of the intending spouses".[477] Forced marriage is considered to be a practice similar to slavery as the abuser is claiming dominion over the victim (namely, the party in the marriage who doesn't have the right to refuse to the union), "conceding" him or her in marriage on payment of a consideration in money or in kind. In the same way, when the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received, [478] or when a woman on the death of her husband is liable to be inherited by another person, [479] the victim has been treated as an object, suitable to be "owned" by someone.

In Italy, the crime of forced marriage was introduced only two years ago, in 2019: Law 69/2019 introduced Article 558-*bis*. [480] It addresses the conduct of forcing someone into

---

[476] UN Human Rights Office of the High Commissioner, *Child and forced marriage, including in humanitarian settings*. Available at: https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/ChildMarriage.aspx. Accessed on 20th July, 2021.

[477] UN General Assembly, "Universal Declaration of Human Rights", proclaimed by the United Nations General Assembly in Paris on 10 December 1948, General Assembly Resolution 217 (III) A: Article 16(2).

[478] This is the situation described by Article 1(c)(ii) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

[479] *See* Article 1(c)(iii) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

[480] Italian Criminal Code, Article 558-*bis*, introduced by Article 7 of Law 69, 19 July 2019. Unofficial translation. In its original version: "*Chiunque, con violenza o minaccia, costringe una persona a contrarre matrimonio o unione civile è punito con la reclusione da uno a cinque anni.*
La stessa pena si applica a chiunque, approfittando delle condizioni di vulnerabilità o di inferiorità psichica o di necessità di una persona, con abuso delle relazioni familiari, domestiche, lavorative o dell'autorità derivante dall'affidamento della persona per ragioni di cura, istruzione o educazione, vigilanza o custodia, la induce a

marriage, punishing "anyone who, with violence or threat, forces a person into a marriage or a civil union". [481]

Also, the crime of inducement into marriage is punished as is criminally liable

> anyone who, taking advantage of the conditions of vulnerability or mental inferiority or need of a person, by abusing of family, domestic, labor relations or the authority arising from the custody of the person for reasons of care, education or education, supervision or custody, induces the person to contract marriage or civil union. [482]

The provision also prescribes aggravating circumstances if the facts are committed to the detriment of a minor of eighteen years old, [483] and it provides another edictal frame if the crime is committed against a minor of fourteen years old (in that case, the punishment is from two to seven years' imprisonment). [484]

The provisions of Article 558-*bis* are also applied when the fact is committed abroad by an Italian citizen or a foreigner residing in Italy, or to the detriment of an Italian citizen or foreigner residing in Italy. [485]

2.5 Removal of organs

The illicit removal of organs is an incredibly common phenomenon: the World Health Organisation (WHO) estimates that up to 10% of all transplants worldwide are performed using an organ from the black market;[486] also the no-profit organization Global Financial Integrity

---

contrarre matrimonio o unione civile. La pena è aumentata se i fatti sono commessi in danno di un minore di anni diciotto.
La pena è da due a sette anni di reclusione se i fatti sono commessi in danno di un minore di anni quattordici.
Le disposizioni del presente articolo si applicano anche quando il fatto è commesso all'estero da cittadino italiano o da straniero residente in Italia ovvero in danno di cittadino italiano o di straniero residente in Italia".

[481] Italian Criminal Code, Article 558-*bis*, paragraph 1.
[482] Ibid, at paragraph 2.
[483] Ibid, at paragraph 3.
[484] Ibid, at paragraph 4.
[485] Ibid, at paragraph 5.
[486] Sylwia Gawronska, "Organ trafficking and human trafficking for the purpose of organ removal, two international legal frameworks against illicit organ removal", 10 *New Journal of European Criminal Law*, No. 3 (2019): 269. DOI: 10.1177/2032284419862387.

stated that about 10 percent of the 180,000 transplants performed every year are illegal, bringing as much as $1.4 billion to the black market. [487]

In most cases, illegal transplants tend to be disguised as donations. However, even if it is specifically mentioned in the definition of human trafficking in the Palermo Protocol, trafficking for the purpose of the removal of organs "remains one of the most unknown and least addressed forms of human trafficking globally". [488] The absence of an internationally recognized definition of the crime of trafficking for purposes of removal of organs hinders the efforts to combat it, as the illicit organ removal is approached from two different perspectives: the criminal law framework of human trafficking and the organ trafficking approach.

In accordance with the framework of human trafficking, and in particular with Article 3 of the Palermo Protocol, "organ removal is illicit when coercive, fraudulent or deceptive means have been used to make the donor give up the organ". [489]

Instead, the framework of organ trafficking, which was recently codified by the "Council of Europe Convention against Trafficking in Human Organs", builds on the definition of illicit organ removal as expressed in transplant law, as it can be observed by Article 4, paragraph 1 of the said Convention:

> Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the removal of human organs from living or deceased donors:
>
> where the removal is performed without the free, informed and specific consent of the living or deceased donor, or, in the case of the deceased donor, without the removal being authorised under its domestic law;
>
> where, in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain or a comparable advantage;
>
> where in exchange for the removal of organs from a deceased donor, a third party has been offered or has received a financial gain or comparable advantage. [490]

---

[487] Channing May for Global Financial Integrity, *Transnational Crime and the Developing World* (2017): 33. Available at: https://www.gfintegrity.org/wp-content/uploads/2017/03/Transnational_Crime-final.pdf.

[488] Organization for Security and Cooperation in Europe, *Trafficking in human beings for the removal of organs.* Available at: https://www.osce.org/cthb/removal-of-organs (accessed 20 July 2021).

[489] Sylwia Gawronska, "Organ trafficking and human trafficking for the purpose of organ removal, two international legal frameworks against illicit organ removal" (2019): 270.

[490] Council of Europe, "Council of Europe Convention against Trafficking in Human Organs", Santiago de Compostela, 25.III.2015, adopted on 9 July 2014, opened for signature on 25 March 2015, *Council of Europe Treaty Series* No. 216. Available at: https://rm.coe.int/16806dca3a.

The Convention requires State Parties to establish as a criminal offence the "illicit removal of human organs", defined as "organ removal from a living or a deceased donor that takes place without valid consent or in exchange for financial gain or comparable advantage". [491]

Some scholars [492] argue that during the Palermo Protocol negotiations, there wasn't a clear understanding of how organ removal actually occurred, and since the term "exploitation through organ removal" was not legally defined, the meaning of the concept was to be drawn from the context of the crime of human trafficking itself. [493]

Professor Gawronska stresses that human trafficking for the purpose of organ removal, as defined in the Palermo Protocol, does not cover: "(1) commercial dealings with human organs independent from coercive financial offers to a living donor; (2) illicit organ removal from deceased persons; and (3) use (which will normally be implantation) of an organ that was illicitly removed". [494]

The Council of Europe Convention against Trafficking in Human Organs covers these additional facts. For instance, "illicit organ removal from deceased donors is covered under organ trafficking but not under human trafficking, unless a living donor was trafficked first and subsequently died as a result of the organ removal". [495] Also, the Convention against Trafficking in Human Organs "also covers transplant activities that are performed outside the domestic transplant systems or in breach of essential principles of transplant law". [496]

In general, the Convention breaks down the definition of human trafficking and addresses the following illicit conduct as stand-alone offences:

> (1) the recruitment and solicitation (cf. the act element in human trafficking) of a person with a view to illicit organ removal, to the extent that recruitment and solicitation were carried out for financial gain; and (2) organ removal where abuse is made of a person's position of vulnerability by offering financial gain, or where consent is invalidated by other means (cf. the means element in human trafficking). [497]

At a domestic level, there are different approaches towards illicit organ removal and human trafficking. In Italy, organ removal is included as a possible form of exploitation, as an end-

---

[491] Sylwia Gawronska, "Organ trafficking and human trafficking for the purpose of organ removal, two international legal frameworks against illicit organ removal" (2019): 270.
[492] Ibid, at 276.
[493] Ibid.
[494] Ibid.
[495] Ibid, at 278-279.
[496] Ibid, at 279.
[497] Ibid, at 280.

purpose of human trafficking (Article 601 of the Criminal Code) and as a mode of exploitation in slavery-like practices (Article 600 of the Criminal Code).

In a few countries, however, such as the United States, this is not the case. [498]

In Hungary, organ removal is included in the criminal law provisions on human trafficking, but as an aggravating circumstance. [499]

In other countries, if human trafficking results in serious health consequences (which may occur if the organ has indeed been removed) the maximum penalty is increased: for instance, in Belgium is raised from 5 years to 15 years of imprisonment. [500]

Also for what concerns the implementation of the Council of Europe Convention against Trafficking in Human Organs, there are various approaches in the different legislations. Some countries, such as Italy, have introduced in the criminal code one general article on organ trafficking that follows the one on human trafficking. Indeed, Article 601-*bis* of the Italian Criminal Code, introduced in 2016, criminalizes the trafficking in human organs taken from a living person, punishing whoever unlawfully trades, sells, buys or, in any way and for any reason, procures or deals with organs or parts of organs taken from a living person and whoever mediates the donation of organs from a living person in order to obtain an economic advantage.[501]

Other countries, such as Belgium, "have opted for an exhaustive list of new criminal law provisions closely resembling the different provisions of the Convention". [502]

As observed, the human trafficking legal framework and the organ trafficking one may overlap. So, as Professor Gawronska notes, "the question arises as how to effectively prosecute illicit organ removal without violating the human rights of the person whose organ has been

---

[498] *See* United States legislation, Title 22 of the US Code §7101.
[499] Hungary, Criminal Code, Article 192.
[500] Belgium, Criminal Code, Article 433-*quinquies*.
[501] Italian Criminal Code, Article 601-*bis,* introduced by Article 1 of Law 236 of 11 December 2016, entered into force on 7 January 2017. Unofficial translation. As follows, it its original language: "*Chiunque, illecitamente, commercia, vende, acquista ovvero, in qualsiasi modo e a qualsiasi titolo, procura o tratta organi o parti di organi prelevati da persona vivente è punito con la reclusione da tre a dodici anni e con la multa da euro 50.000 ad euro 300.000.*
Chiunque svolge opera di mediazione nella donazione di organi da vivente al fine di trarne un vantaggio economico è punito con la reclusione da tre a otto anni e con la multa da euro 50.000 a euro 300.000. Se i fatti previsti dai precedenti commi sono commessi da persona che esercita una professione sanitaria, alla condanna consegue l'interdizione perpetua dall'esercizio della professione.
Salvo che il fatto costituisca più grave reato, è punito con la reclusione da tre a sette anni e con la multa da euro 50.000 ad euro 300.000 chiunque organizza o propaganda viaggi ovvero pubblicizza o diffonde, con qualsiasi mezzo, anche per via informatica o telematica, annunci finalizzati al traffico di organi o parti di organi di cui al primo comma.
[502] *See* Belgium, Criminal Code, Articles 433-*novies*/1 to 433-*novies*/10.

removed". [503] The Professor argues that "if illicit organ removal can be established as a human trafficking offence, that framework should be used as the primary tool"; [504] and this is because the human trafficking framework generally carries a more severe punishment for offenders (and in general it provides a more complete system to protect and assist victims).

Also, "the application of human trafficking law fits within the purpose of the Convention to supplement and not to replace that framework". [505]

Then, if it's possible under the domestic legal system considered, secondary charges can be brought under the organ trafficking framework, so that both frameworks can be applied in a harmonized way. [506]

2.6 Child trafficking and child soldiers

Child trafficking has to be addressed as a separate issue because, in general, children are more vulnerable than adults to be subject to trafficking. The vulnerability of children, that traffickers can exploit "concerns their reduced capacity to assess risk, to articulate and voice their worries (about being exposed to danger) and to look after themselves". [507] Thus, the general anti-trafficking international and national discipline applies to trafficking in addition to specific rules which concern only children.

Child trafficking is the act of recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation regardless of the use of illicit means, either within or outside a country. The United Nations International Children's Emergency Fund (UNICEF), taking into consideration numerous definitions of child trafficking (Article 3 of the Palermo Protocol, Article 34 of the Convention on the Rights of the Child, and Article 3 of the ILO's Worst Forms of Child Labour Convention), specified that all the different forms of exploitation should be considered the definition of child trafficking, including:

---

[503] Sylwia Gawronska, "Organ trafficking and human trafficking for the purpose of organ removal, two international legal frameworks against illicit organ removal" (2019): 284.
[504] Ibid.
[505] Ibid.
[506] Ibid.
[507] Mike Dottridge, *Kids as Commodities? Child trafficking and what to do about it* (International Federation *Terre des Hommes*, May 2004): 15. Available at: https://www.terredeshommes.org/wp-content/uploads/2013/06/commodities.pdf.

exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery or servitude, the removal of organs, use of children associated with armed groups or forces, begging, illegal activities, sport and related activities2, illicit adoption, early marriage or any other forms of exploitation. [508]

The relevant international instruments which have specific provisions concerning the trafficking of children are the Convention on the Rights of the Child (1989), and the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (2000), which prohibit trafficking in children for any purpose, including for sexual purposes.

Article 39 of the Convention of the Rights of the Child requires State Parties to "take all the appropriate measures to promote the physical and psychological recovery and social integration" [509] of a child victim of trafficking. The CRC also addresses directly trafficking, by prohibiting the trafficking in children for any purpose and the sexual exploitation of children and the forced labour committed by children, at Article 32. [510] Indeed, the provision requires governments to take action to protect children against economic exploitation, defined as "any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development". [511] Article 34 prohibits "the exploitative use of children in prostitution or other unlawful sexual practices".[512]

Also, the ILO's Worst Forms of Child Labour Convention prohibits perpetrators from using children under 18 years of age for all forms of slavery or practices similar to slavery, trafficking, debt bondage, serfdom, forced or compulsory labour, and prostitution.

Moreover, the Palermo Protocol doesn't require the "means" element for the configuration of the crime of human trafficking for the purposes of sexual exploitation when the victims are minors, because the consent is presumed non-existent.

Several UN agencies explained the techniques and procedures which are necessary to ensure that the rights of children who find themselves alone in a foreign country are respected, in relation to both trafficked children and unaccompanied minors more generally. [513]

---

[508] United Nations International Children's Emergency Fund (UNICEF), *Guidelines on the Protection of Child Victims of Trafficking*, September 2006, at point 1. Available at: https://ec.europa.eu/anti-trafficking/publications/unicef-guidelines-protection-rights-child-victims-trafficking_en.
[509] United Nations General Assembly, "Convention on the Rights of the Child", adopted by resolution 44/252 of 20 November 1989, entered into force on 2 September 1990, *United Nations Treaty Series*, vol. 1577, p. 3. Article 39.
[510] Ibid, Article 32.
[511] Ibid.
[512] Ibid, Article 34.
[513] Mike Dottridge, *Kids as Commodities? Child trafficking and what to do about it* (2004): 44.

For instance, the United Nations agency dedicated to children, the United Nations International Children's Emergency Fund (UNICEF), developed a list of "Guidelines for Protection of the Rights of Children Victims of Trafficking". [514] They cover eleven issues, among which the identification of the children; appointing a guardian for each trafficked child; the referral to appropriate services and interagency coordination; the regularization of a child's status in a country other than their own; the training for government and other agencies dealing with child victims. When a child victim is identified, "a guardian shall be appointed by a competent authority to accompany the child throughout the entire process until a durable solution that is in his or her best interests has been identified and implemented". [515] In cases where children are involved in asylum procedures or administrative or judicial proceedings, they shall, in addition to the appointment of a guardian, be provided with legal representation. The Guidelines indicate the necessity of a recovery and reflection period, like the one assured by the Council of Europe Convention on Action against Trafficking in Human Beings for all trafficking victims (adults and children): "States shall grant to child victims of trafficking a reflection period to recover and escape the influence of traffickers and/or to make an informed decision on cooperating with the competent authorities". [516] [517] Also, the competent authority in each State shall establish procedures to ensure that child victims of trafficking, who are not residents of the country in which they find themselves, "are automatically granted a temporary residence permit which entitles them to stay in the country on a legal basis until a best interests assessment is conducted and a durable solution is found". [518]

The ILO operational indicators differentiate between indicators of child trafficking for sexual exploitation and for labour exploitation. In particular in relation to indicators for children sexual exploitation, is specified that "exploitation is *inherent* to the situation of children under 18 used or offered for prostitution or pornography and there *is no need* for indicators to prove it". [519] Also, as mentioned above, the Palermo Protocol, at Article 3, specifically states that, in the case of children, there is no need to prove "the threat or use of

---

[514] United Nations International Children's Emergency Fund (UNICEF), *Guidelines on the Protection of Child Victims of Trafficking* (2006).
[515] Ibid, point 4.1.
[516] Ibid, point 6.
[517] On the recovery and reflection period and a more detailed approach regarding operational measures, also during proceedings, *see* below the case "V.C.L. and A.N. v. the United Kingdom".
[518] United Nations International Children's Emergency Fund (UNICEF), *Guidelines on the Protection of Child Victims of Trafficking* (2006), point 6.
[519] International Labour Office, *Operational indicators of trafficking in human beings. Results from a Delphi survey implemented by the ILO and the European Commission* (2009): 7.

force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability" in order to establish the crime of trafficking. Nevertheless, the ILO included indicators of "deception, coercion and abuse of vulnerability in order to analyse trafficking in children with harmonised tools within Europe". [520]

Examples of indicators of child trafficking are the deceptive recruitment with the excuse of family reunification or through promises of marriage or adoption; with regards to the abuse of the position of vulnerability, indicators are for instance the abuse of the children illegal status or the abuse of their lack of information.

It is precisely on the matter of child trafficking that the European Court of Human Rights, has been asked, for the first time, to consider the relationship between Article 4 of the European Convention on Human Rights and the prosecution of victims (and potential victims) of trafficking. In the recent case, "V.C.L. and A.N. v. the United Kingdom" [521] (hereinafter, V.C.L. v. the U.K.), the Court stated that the United Kingdom, and in particular the Crown Prosecution Service, failed to adequately protect two potential child trafficking victims, who were discovered by the police while working on cannabis farms and were then charged with drug-related offences. The two Vietnamese minors were prosecuted and convicted for drug production, despite the credible suspicion that they were trafficking victims.

Particularly interesting are the declaration submitted by the third-party interveners, Group of Experts in Action Against Trafficking in Human Beings (GRETA) and Anti-Slavery International. GRETA highlighted that "in order to protect and assist trafficking victims, it was of the utmost importance to identify them correctly"; [522] instead, it appeared that, in the UK, "duty solicitors often advised children involved in cannabis cultivation to plead guilty as a way of spending less time in detention". [523] GRETA further indicated that the aim of Article 26 of the Anti-Trafficking Convention (which states that each Party shall, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, *to the extent that they have been compelled to do so)* was to safeguard the human rights of victims and avoid further victimisation. [524] Indeed, the "criminalization of victims contravened the State's obligation to provide services and assistance to them, and discouraged them from coming

[520] Ibid.
[521] European Court of Human Rights, *V.C.L. and A.N. v. the United Kingdom* (Applications nos. 77587/12 and 74603/12), judgment of 16 February 2021.
[522] Ibid, at para. 142.
[523] Ibid.
[524] Ibid, at para. 143.

forward and cooperating with the investigation into those responsible for their trafficking". [525] Anti-Slavery International argued that Article 4 of the Convention had to be interpreted not only in light of the respondent State's obligations under the Council of Europe Anti-Trafficking Convention, but considering also the EU Anti-Trafficking Directive and the Convention on the Rights of the Child. [526] And here lies the very interesting insight, because the coordination with the Convention of the Rights of the Child implicated that

> there were special and *enhanced obligations towards trafficked children*, whose best interests should be determinative in any decision-making procedure. In this regard, child trafficking victims should be given enhanced protection against punishment, since it was difficult to conceive of a case where it would be in the best interests of a trafficked child to be punished. [527]

The Court found a violation of Articles 4 (prohibition of slavery and forced labour) and Article 6 (right to a fair trial) of the Convention "on account of the failure of the respondent State to fulfil its positive obligations under Article 4 to take operational measures to protect the victims of trafficking". [528]

Indeed, "the member States' positive obligations under Article 4 of the Convention must be construed in light of the Council of Europe's Anti-Trafficking Convention and be *seen as requiring not only prevention but also victim protection and investigation*". [529] In order to comply with these obligations, "member States are required to put in place a legislative and administrative framework to prevent and punish trafficking and to protect victims". [530] In the European Court of Human Rights' view, "the duty to take operational measures under Article 4 of the Convention has two principal aims: to protect the victim of trafficking from further harm; and to facilitate his or her recovery", [531] especially when the victim is a minor. Indeed, the Court acknowledged that as children are particularly vulnerable, the measures applied by the State to protect them against acts of violence falling within the scope of Articles 3 (prohibition of torture) and 8 (right to respect private and family life) "should be effective and include both reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge, and effective deterrence against such serious breaches of personal

[525] Ibid.
[526] Ibid, at para. 144.
[527] Ibid.
[528] Ibid, at para. 122.
[529] Ibid, at para. 150.
[530] Ibid, at para. 151.
[531] Ibid, at para. 159.

integrity". [532] These measures "must be aimed at ensuring respect for human dignity and protecting the best interests of the child". [533] The Court then specifies that "[s]ince *trafficking threatens the human dignity* and *fundamental freedoms of its victims* [534] the same is also true of measures to protect against acts falling within the scope of Article 4 of the Convention". [535] The United Kingdom failed to do so, thus it failed to fulfil its duty under Article 4 of the Convention to take operational measures to protect the minors.

In terms of the Italian legislation, as already observed, Articles 600 and 601 criminalize respectively the slavery-like practices of minors, also to sexual purposes, and the trafficking of minors for purposes of sexual exploitation.

Articles from 600-*bis* to 600- *septies.2* address and criminalizes the minors' sexual exploitation in prostitution and pornography.

In particular, Article 600-*bis*, addressing minors' prostitution, punishes both the recruiter (or in general, whoever recruits, induces to prostitution, exploits, manages, organizes or controls the prostitution of a minor, at paragraph 1) and the purchaser of the sexual services at paragraph 2). [536]

Articles 600-*ter* [537] and 600-*quater* [538] criminalize respectively the production, distribution, sale or recruitment to the purpose of child pornography and the detention of child pornography.

A particular manifestation of child trafficking can be child soldiery, intended as children exploitation during armed conflict, when it involves the unlawful recruitment or use of children as combatants, for labor, or for sexual exploitation by armed forces.

---

[532] Ibid, at para. 161.
[533] Ibid.
[534] *See* European Court of Human Rights, *Rantsev v. Cyprus and Russia,* at para. 282.
[535] European Court of Human Rights, *V.C.L. and A.N. v. the United Kingdom* (2021), at para. 161.
[536] Italian Criminal Code, Article 600-*bis*, introduced with Law 269 of 3 August 1998, amended with Law 172 of 1st October 2012. In its original language as it follows: "*È punito con la reclusione da sei a dodici anni e con la multa da euro 15.000 a euro 150.000 chiunque:*
1) recluta o induce alla prostituzione una persona di età inferiore agli anni diciotto;
2) favorisce, sfrutta, gestisce, organizza o controlla la prostituzione di una persona di età inferiore agli anni diciotto, ovvero altrimenti ne trae profitto.
Salvo che il fatto costituisca più grave reato, chiunque compie atti sessuali con un minore di età compresa tra i quattordici e i diciotto anni, in cambio di un corrispettivo in denaro o altra utilità, anche solo promessi, è punito con la reclusione da uno a sei anni e con la multa da euro 1.500 a euro 6.000".
[537] Italian Criminal Code, Article 600-*ter*, introduced with Law 269 of 3 August 1998, amended with Law 172 of 1st October 2012.
[538] Italian Criminal Code, Article 600-*quater*, introduced with Law 269 of 3 August 1998, amended with Law 172 of 1st October 2012.

Children are usually employed as messengers or spies because of their agility to penetrate enemy lines, and they may be forced to engage in combat and in direct hostilities as well. [539] In some cases, they exploited as cooks and sexual slaves for soldiers. "Child soldiers serve within militaries and armed groups in which complete cooperation and obedience is demanded, in contexts where moral and legal safeguards against their abuse may have broken down"; [540]in that context, sexual violence becomes sexual exploitation.

International instruments relevant to combating child soldiery are the Convention on the Rights of the Child, which ensures protection and care of children who are affected by armed conflict (Article 38); [541] the Rome Statute, which prescribes as a war crime the conscription, enlistment, or use of children under 15 in armed conflict by national armed forces or armed groups (Article 8(2)(xxvi)); [542] the Worst Forms of Child Labour Convention, where at Article 3 defines the term "worst forms of child labour" as: "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, *including forced or compulsory recruitment of children for use in armed conflict*", and it prohibits the forced/compulsory recruitment of children under 18 in armed conflict (Article 4). [543]

But the most relevant instrument to combat child soldiery is the "Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict", [544] where it states that Countries must provide technical cooperation and financial assistance to help prevent child soldier recruitment and that they must improve the rehabilitation and reintegration of former child soldiers (Article 7).

---

[539] Susan W. Tiefenbrun, "Child Soldiers, Slavery, and the Trafficking of Children", in *Thomas Jefferson School of Law Legal Studies Research Papers*, Research Paper No. 1020341 (October 2007): 53. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020341.

[540] Lisa Alfredson*, Sexual Exploitation of Child Soldiers: An Exploration and Analysis of Global Dimensions and Trends* cited in Susan W. Tiefenbrun, "Child Soldiers, Slavery, and the Trafficking of Children" (2007), at 4.

[541] United Nations General Assembly, "Convention on the Rights of the Child", adopted by resolution 44/252 of 20 November 1989, entered into force on 2 September 1990, *United Nations Treaty Series*, vol. 1577, p. 3. Article 38.

[542] United Nations General Assembly, "Rome Statute of the International Criminal Court", adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *United Nations Treaty Series* , vol. 2187, p. 3. Article 8.

[543] International Labour Organization, "Worst Forms of Child Labour Convention, 1999 (No. 182)", Article 3. Adopted in Geneva, 87th ILC session (17 Jun 1999). Articles 3 and 4.

[544] United Nations General Assembly, "Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict", adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002.

2.7 Migrant smuggling and human trafficking

For a complete analysis of human trafficking, a differentiation between the latter and smuggling of migrants must be made. The two are different phenomena, but this separation gradually lessens in certain practices.

The "Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime" (henceforth, the Protocol against Smuggling), defines "smuggling of migrants" as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident". [545] Therefore, *smuggling* can be defined as the act of procuring for a migrant an illegal journey and access to a State, in return for payment. One could argue that a commercial relationship [546] is established between those seeking to migrate, and therefore asking for a service (usually illegal), and their counterpart, who provides transportation for a considerable fee. A *sui generis* commercial relationship, one must say - since the parties are extremely unbalanced.

The idea of an agreement between the trafficker/smuggler and the migrant highlights another characteristic of the smuggling phenomenon: the *consent* of the migrant to the movement. When observing the trafficking phenomenon, on the other hand, there is normally no agreement – or better, the agreement is fictitious since the victim's consent is vitiated (as the trafficker used force or deception or abused of the victim's vulnerability).

Indeed, the same Coucil of Europe, in its Explanatory Report to the Council of Europe Action against Trafficking in Human Beings, explains that "trafficking means much more than mere organised movement of persons for profit" [547] and that the critical factors that distinguish trafficking from migrant smuggling are "the use of one of the means listed (force, deception,

---

[545] United Nations General Assembly, "Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime", adopted by the UN General Assembly with Resolution A/RES/55/25 of 15 November 2000, opened for signature in Palermo, 12 December 2000, entered into force on 28 January 2004, *United Nations Treaty Series*, vol. 2241, p. 507. Article

[546] *See* "Lotta alla tratta di esseri umani: la distinzione tra smuggling e traffiking", in the ebook *Diritto penale e processuale della Ue*, edited by Domenico Airoma, Giovanni Diotallevi, Calogero Ferrara, Sandra Recchione, Andrea Venegoni (Exeo Edizioni: 2012). file:///Users/chiara/Downloads/Articolo_2826.pdf.

[547] Council of Europe, *Explanatory Report on the Convention of Action against Trafficking in Human Beings* (Warsaw, 16 May 2005), at paragraph 77. Available at: https://rm.coe.int/16800d3812.

abuse of a situation of vulnerability and so on) throughout or at some stage in the process, and use of that means for the purpose of exploitation". [548]

With the formal differences explained, it is interesting to compare two typical scenarios, one regarding trafficking and the other on migrant smuggling.

In a typical debt bondage [549] case, the trafficker will employ the victim, knowing that their debt will more than likely reduce them into a state of continuous subjection.

However, a similar scenario often occurs also in the smuggling context. It often happens, as the magistrate Filippo Spiezia observed when reporting to the Supreme Judicial Council, [550] that the person wanting to expatriate does not possess the necessary capital to invest in the trip. If family members and acquaintances cannot intervene in support, the expatriating migrant contracts a debt with the organization that deals with their illegal transfer.

But then why, legally speaking, two situations which present, in practice, such similarities, are treated as two completely different phenomena? Because the statutory scheme differentiates regarding the phases considered and in terms of the legal interests protected.

With regards to smuggling, the law determines that the trafficker-migrant relationship is limited to the transfer of persons, albeit through illegal forms; ending upon arrival at their destination. In the case of trafficking of human beings, the relationship trafficker-victim continues in the country of destination, as the traffickers aim to exploit the trafficked person.[551]

The reason for the legislator's "neglect" of the subsequent phase in migrant smuggling can be found in the legal interests protected from the criminal behaviors. Pertaining to the migrant smuggling, the focus centers on national borders and on the proper implementation of migration policies. In human trafficking, the emphasis is on the person, whose dignity is severely damaged as a result of the perpetrators' illegal behavior. [552]

Indeed, the two crimes have contradicting aspects, as explains Maria Grazia Giammarinaro,[553] magistrate and one of the greatest experts on human trafficking, a subject on which she was also special rapporteur for the United Nations until the end of July 2020. "The distinction lies in this - summarizes Giammarinaro - smuggling is a crime against the protection

[548] Ibid.
[549] See paragraph 1.1.4.
[550] Filippo Spiezia, rapporteur for the Italian Supreme Judicial Council (*Consiglio Superiore della Magistratura*) in *La tratta di esseri umani: gli strumenti investigativi di cooperazione internazionale* (14 October 2008), at 3. Available at: http://briguglio.asgi.it/immigrazione-e-asilo/2009/agosto/art-spiezia-traff-ess-um.pdf.
[551] Ibid.
[552] Ibid, at 2.
[553] The interview with Maria Grazia Giammarinaro occurred on 15 September 2021.

of national borders, against the *State itself*. Trafficking, on the other hand, is conceived as a crime against *the person*, even if today it is almost always connected to smuggling". [554]

It is however evident that both migrant smuggling and (usually, but not necessarily) trafficking in persons involve cross-border movement. As the third-party interveners AIRE Center and ECRE specified in "Khlaifia and Others v. Italy", performing individualized procedures in terms of victim identification at the arrival of the smuggled/trafficked persons is vital to implement the UN Protocol against Smuggling of Migrants in order to identify the victims of human trafficking who wish to cooperate with the authorities. [555]

On this note, the UNHCR appeared concerned that the battle against smuggling and human trafficking, and the consequent border re-enforcement, could potentially lead to a neglection of the existing obligations under refugee law. [556] Indeed, the Protocol against Smuggling contains several provisions which may impact on smuggled asylum-seekers as they strengthen border controls, [557] authorize States to intercept vessels on the high seas, [558] and oblige the States to adopt sanctions for commercial carriers. [559]

The UNHCR describes how the "commitment to accept the return of smuggled migrants may indeed affect those who seek international protection". [560] But the High Commissioner for Refugees also specifies that "a number of comparable provisions of the Protocol against Trafficking may have a similar effect". [561] However, the potential negative implications of the anti-trafficking legal framework on asylum seekers are not as relevant as the one made by the

---

[554] Interview with Maria Grazia Giammarinaro.
[555] European Court of Human Rights (Grand Chamber), *Khlaifia and Others v. Italy* (Application no. 16483/12), judgment of 15 December 2016, at para. 235. In that case, Italy was found in violation of Article 5 ECHR ("Right to liberty and security") since the provisions applying to the detention of irregular migrants were lacking in precision, and of Article 13 ECHR ("Right to an effective remedy") in conjunction with Article 3 ECHR ("Prohibition of torture") since there weren't remedies by which the applicants could have complained about the conditions in which they were held in the Contrada Imbriacola or on the ships Vincent and Audace.
[556] The UNHCR emphasized "the need to reconcile measures to combat the smuggling of migrants and the trafficking of persons with existing obligations under international refugee law". United Nations High Commissioner for Refugees (UNHCR), *UNHCR Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime*, published on December 11, 2000. Available at: https://www.unhcr.org/protection/operations/43662b942/unhcr-summary-position-protocol-against-smuggling-migrants-land-sea-air.html.
[557] *See* Article 12 and Article 13 of the "Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime" (2000).
[558] Ibid, Article 7 and Article 8.
[559] Ibid, Article 11.
[560] United Nations High Commissioner for Refugees (UNHCR), *UNHCR Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime* (2000).
[561] Ibid.

anti-smuggling provisions. And this is precisely because the smuggling phenomenon, as mentioned above, is seen and repressed as an illicit act against the State, not against the person. This thereby gives the States various tools for border enforcement and shifts the focus further away from the potential victims of the smuggling phenomenon. In fact, the smuggled migrants are not even *perceived* as potential victims, but rather as actors – maybe as the "weakest" part in the trafficker-smuggled relationship, but still *actors*.

Evidence of this sentiment at both national and international level will be shown, beginning from the fact that the word "victim" is used only once in the Protocol against Smuggling, whereas the Trafficking Protocol consistently refers to trafficked persons as victims. Nor do the vague "protection and assistance measures" mentioned in Article 16 of the Protocol against Smuggling add relevant safeguards to afford migrants appropriate protection.

The sole disposition enhancing a specific protection is provided by Article 5, explaining that "[m]igrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol [the criminalization of smuggling]". [562]

However, in 2009 the so-called "crime of clandestinity" ("*reato di clandestinità*") was introduced by Law n.94/2009 in the Italian Legislation. The rule, merged in Article 10/bis of the Consolidated Act on Immigration ("*Testo Unico sull'immigrazione*"), incurs a fine ranging from 5.000 to 10.000 euro the non-European Union citizen who enters or remains in the national territory in violation of the provisions governing the entry and stay in Italy. A contravention ("*contravvenzione*"), without any prison sentence. But what sense does it make to fine irregular foreigners who cannot open a bank account, who cannot be hired regularly, who cannot register real estate – and precisely because they don't have a residence permit? It was immediately evident, as Savio points out, [563] that the Public Administration would have pocketed nothing from the fines imposed, and that on the contrary the judicial offices would have increased their stock of pending cases, accumulating new deficits. And it is not that those who put their lives at risk in the boats that reach the coasts of Sicily from Libya can be intimidated by the threat of this "phantom fine" with no realistic threat of being collected.

---

[562] United Nations General Assembly, "Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime" (2000), at Article 5.
[563] Guido Savio, *Le buone ragioni per abrogare il reato di clandestinità: un atto necessario e di onestà* (January 11, 2016), in ASGI's website (Associazione per gli Studi Giuridici sull'Immigrazione). Available at: https://www.asgi.it/notizie/buone-ragioni-abrogare-reato-clandestinita/.

This “clumsy” crime was the Italian response to the “Directive on common standards and procedures in Member States for returning illegally staying third-country nationals”, [564] (also called the Returns Directive) adopted in 2008 by the European Parliament and the European Council. The Directive provided for non-rigidly coercive rules for the repatriation, to non-European countries, of citizens illegally staying in Europe. The Bossi Fini Law of 2002, [565] on the other hand, enforced that all expulsions were implemented immediately by the Police, with the forced accompaniment to the border of the foreigner to be expelled. The pecuniary sanction decided by the law of 2009 had the objective of involving the expulsion for the defaulting foreigner, and to be able to apply the "strong measures" that the European Directive did not grant. But expulsions with accompaniment to the border have also proven costly and ineffective. In 2014, the Italian Parliament passed a delegated law [566] to decriminalize a number of crimes, including illegal entry, within 18 months. But as 2022 dawns, the mission is not yet accomplished. The "crime of illegal immigration" resists as an ideological bogeyman, beyond its total ineffectiveness.

Instead, it is necessary to focus on the analysis of the crime of migrant smuggling.

A focal point of the provisions of the Protocol against Smuggling is Article 6, which obliges the States to criminalize the conduct of migrant smuggling, as defined by the Protocol, and other related conducts, such as “producing a fraudulent travel or identity document” or “enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State” by illegal means, when such acts are committed for the purposes of enabling the smuggling of migrants. [567]

---

[564] European Parliament and European Council*, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, entered into force on January 13, 2009. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0115.

[565] Italian Parliament, Law No. 189, July 30, 2002, “*Modifica alla normativa in materia di immigrazione e di asilo”*.

[566]Italian Legislation, Law no. 67, April 28, 2014.

[567] United Nations General Assembly, “Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime” (2000), at Article 6, paragraph 1: “Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit: (a) The smuggling of migrants; (b) When committed for the purpose of enabling the smuggling of migrants: (i) Producing a fraudulent travel or identity document; (ii) Procuring, providing or possessing such a document; (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means”.

In Italy, the offence is contained in Article 12 of the Consolidated Act on Immigration, [568] and it encompasses the acts aimed at illegally obtaining the entry of the foreigner or obtaining an unfair profit from the illegal condition of the foreigner. [569] The Consolidated Act indeed punishes whoever promotes, directs, organizes, finances or transports foreigners into the territory of the State or carries out other acts aimed at illegally obtaining their entry into the territory of the State, or of another State of which the person is not a citizen or does not have the right of permanent residence.

The clash between the different legal regime of trafficking and migrant smuggling, on one side, and how similar the two scenarios usually are, can be proven with a judgment of July 11, 2017 by the Court of Naples.[570] The judgment convicted five defendants in conjunction with each other, for aiding and abetting illegal immigration, aiding and abetting illegal stay in Italian territory and labour exploitation (respectively, Article 12 of Legislative Decree 286/1998 and Article 603-*bis* of the Italian Criminal Code). The offenses were committed through a criminal association (Article 416 of the Italian Criminal Code) whose goal was to find low-cost workers to be employed, in conditions of exploitation, in the textile industry.

The remarks to the judgment, explained below, offers some "food for thought". If consent is an essential condition of smuggling (while it must be lacking in trafficking in human beings), then isn't it incoherent to refuse to consider flawed the consent of the migrant obtained through the use of methods of persuasion, even if not necessarily coercive, like the ones that occurs in this case? This is the point of view, expressed in less provocatory terms, of Chiara Stoppioni, a

---

[568] Italian Legislation, Legislative Degree No. 286, July 25, 1998. The most relevant part of Article 12 is here mentioned in its original language: "*Salvo che il fatto costituisca più grave reato, chiunque, in violazione delle disposizioni del presente testo unico, promuove, dirige, organizza, finanzia o effettua il trasporto di stranieri nel territorio dello Stato ovvero compie altri atti diretti a procurarne illegalmente l'ingresso nel territorio dello Stato, ovvero di altro Stato del quale la persona non è cittadina o non ha titolo di residenza permanente, è punito con la reclusione da uno a cinque anni e con la multa di 15.000 euro per ogni persona. 2. Fermo restando quanto previsto dall'articolo 54 del codice penale, non costituiscono reato le attività di soccorso e assistenza umanitaria prestate in Italia nei confronti degli stranieri in condizioni di bisogno comunque presenti nel territorio dello Stato. 3. Salvo che il fatto costituisca più grave reato, chiunque, in violazione delle disposizioni del presente testo unico, promuove, dirige, organizza, finanzia o effettua il trasporto di stranieri nel territorio dello Stato ovvero compie altri atti diretti a procurarne illegalmente l'ingresso nel territorio dello Stato, ovvero di altro Stato del quale la persona non è cittadina o non ha titolo di residenza permanente, è punito con la reclusione da cinque a quindici anni e con la multa di 15.000 euro per ogni persona nel caso in cui: a) il fatto riguarda l'ingresso o la permanenza illegale nel territorio dello Stato di cinque o più persone; b) la persona trasportata è stata esposta a pericolo per la sua vita o per la sua incolumità per procurarne l'ingresso o la permanenza illegale; c) la persona trasportata è stata sottoposta a trattamento inumano o degradante per procurarne l'ingresso o la permanenza illegale; d) il fatto è commesso da tre o più persone in concorso tra loro o utilizzando servizi internazionali di trasporto ovvero documenti contraffatti o alterati o comunque illegalmente ottenuti; e) gli autori del fatto hanno la disponibilità di armi o materie esplodenti*".

[569] The cases are aggravated if they are committed by three or more people in collaboration.

[570] The judgment is unpublished, the analysis has been conducted through the use of Chiara Stoppioni's article.

doctoral student in Philosophy of Law at the University of Florence, while commenting the judgment. [571]

The facts: some Bangladeshi citizens had been recruited in their country of origin with the promise, which turned out to be false, of a well-paid job in some Italian textile companies owned by one of their compatriots. The main defendant, with the help of his wife and father, obtained at great cost to the victims a permit for subordinate work. After receiving the documentation, the Bengali citizens independently organized their trip to Italy. At their arrival at the airport, they were picked up, stripped of their documents and taken to lodgings intended to accommodate other workers, employed in the same factories (some owned by the employer and others fictitiously registered to his family members). The work required and performed was different from the one they initially agreed upon: [572] daily shifts of 13 hours without any weekly rest and monthly pay of about 300 euros, instead of the initially agreed eight-hour shifts.

The judges considered the conduct of the defendants as a violation of the Consolidated Immigration Act, Article 12 (which, as explained above, punishes the acts aimed at illegally procuring entry, gaining an unfair profit from the illegal condition of the foreigner) and "illegal intermediation and labour exploitation" (Italian Criminal Code, Article 603-*bis*) [573] in the version not yet reformed, because the facts considered took place between 2012 and 2015. [574]

The reason why this case was not considered as a violation of Article 601 of the Italian Criminal Code (the disposition which punishes trafficking in human beings, including trafficking for forced labour) lies in the fact that, according to the judges, the position of vulnerability of the victims didn't take place when they were still in Bangladesh, but after their arrival in Italy. Hence, the judges distinguished two different conducts (or better, "broke" the conduct into two parts): illegal procurement of entry on one side and labour exploitation on the other.

But isn't the defendants' conduct ascribable under the crime of human trafficking? The Blangladeshi citizens were deceived in the perception of the job that they were going to perform

---

[571] Chiara Stoppioni, "Tratta sfruttamento e smuggling: un'ipotesi di *finium regundorum* a partire da una recente sentenza" in *Legislazione penale approfondimenti* (published on January 24, 2019), at 26. Available at: http://www.lalegislazionepenale.eu/tratta-sfruttamento-e-smuggling-unipotesi-di-finium-regundorum-a-partire-da-una-recente-sentenza-chiara-stoppioni/.

[572] Here it can be noted the use of deceptive methods, incredibly common in human trafficking cases, as explained in throughout this thesis.

[573] *See* paragraph 2.3.2 for a detailed exposition of the Italian legislation against forced labour.

[574] The previous version of the norm was centered solely on the figure of the so-called "*caporale*".

(means element); they were recruited by the defendants (action element) and, upon arrival, exploited for the purpose of labour exploitation (purpose element). [575]

Therefore, the case deserved the application of art 601 of the Criminal Code. The judges ignored the personal factors and external pressures (including the deception put in place by the defendants) which affected the victims' choice to leave Bangladesh.

The mistake in applying the relevant criminal disposition is not without consequences, in particular for the Bangladeshi citizens. Indeed, had the conduct been considered as human trafficking, it would have allowed the victims to activate a path of integration, as provided for by Legislative Decree 286/1998, Article 18, with the issuance of a renewable six-month permit and an integration program that guarantees food, housing, health care, inclusion in the employment lists, access to employment.

In conclusion, as Chiara Stoppioni also suggests, [576] in order to overcome these convergences, it is necessary to enhance the only real differential element which is the consent of the migrant to the cross-border movement. The question then becomes: was the consent truly informed or was it flawed?

The consent cannot be considered present and unflawed just because, for instance, the migrant/trafficked persons paid for the trip by themselves. The neutralization of the will of others can be accomplished with methods of persuasion that are not properly coercive, such as deception, used in the above-mentioned case. The confusion between human trafficking and migrant smuggling is too dangerous, for the consequences it has on the victims; thus, if the consent element is the real *discrimen,* the analysis about whether the will is flawed or not cannot be superficial. The same International Labour Office specifies that "it is not always easy to differentiate between people smuggling and trafficking, because 'voluntary' agreement may be a result of deception or may involve an individual or family entering into debt to pay for the travel, debt that puts them at the mercy of the lender". [577] Also, it may result "in physical confinement when the human cargo is locked into a vehicle or into a sending or reception centre", [578] or "in forced labour, where compliance is assured because documents have been

[575] For a detailed description of the three elements, *see* Chapter I.
[576] Chiara Stoppioni, "Tratta sfruttamento e smuggling: un'ipotesi di *finium regundorum* a partire da una recente sentenza" (2019): 26.
[577] International Labour Organization (ILO), *Trafficking in Human Beings. New Approaches to Combating the Problem* (May 2003), first edition, at 2. Available at: https://www.refworld.org/docid/40360bf34.html.
[578] Ibid.

confiscated, or by threats of disclosure to the authorities". [579] In all these cases, the "voluntary" agreement, the agreement concluded with "consent", has become a *ticket to trafficking*. [580]

In this perspective, the judges of the Court of Naples could well have enhanced the deception and the exploitation which *from the beginning* accompanied the agents' conduct.[581] They should have applied, in place of the two disputed provisions, only the crime referred to in Article 601 of the Italian Criminal Code, in conjunction with Article 416, given the structured nature of the criminal association. The possibility of subsuming the fact within the framework of a more serious crime allows the entity of the fact to be adequately considered, enhancing the unity of the criminal project and the peculiar operational characteristics of the event. [582]

To conclude, *from the legal perspective,* the *formal* differences between smuggling and trafficking are based on consent, with smuggled migrants being treated as mere clients and trafficked persons as victims; on the geographical entity of the movement, since smuggling in migrants takes place across national frontiers and this is not always the case for human trafficking; on the legal or illegal nature of entering into a country (smuggled persons are always illegal immigrants, trafficked persons may have entered into the State of destination legally or illegally). The most important discrimen is consent. But it has been proven that, in reality, the line between smuggling and trafficking is often blurred.

Professor Scarpa, indeed, highlights that "even if in theory the definitions of trafficking in persons and smuggling in migrants clearly distinguish between the two phenomena, in practice they may overlap, as there is a considerable grey area between them". [583] For instance, "illegal immigrants who bought a transportation ticket from unscrupulous smugglers may subsequently find themselves in difficulties leading to a condition of exploitation and abuse". [584]

Therefore, as also Professor Scarpa suggests, it would be better to consider the two phenomena, migrant smuggling and human trafficking, as a continuum. [585] It would avoid the heavy repercussions, on the victims, of an incorrect framing of the facts. And even more so, considering the purpose of this thesis is to shift the focus from border control and State security, and relocate in on victim protection and on defending the human rights of the trafficked persons,

---

[579] Ibid.
[580] Ibid.
[581] Chiara Stoppioni, "Tratta sfruttamento e smuggling: un'ipotesi di *finium regundorum* a partire da una recente sentenza" (2019): 26.
[582] Ibid.
[583] Silvia Scarpa, *Trafficking in human beings: Modern slavery* (New York: Oxford University Press, 2008), at 67.
[584] Ibid.
[585] Ibid.

intended as *exploitation* victims, so in the extensive application of the term. Again, it is highlighted the complex nature of trafficking, the dangers of a superficial framing and the incredible importance of evaluating the contextual elements in each scenario.

CHAPTER III

Challenges to the current legal framework and policies related to trafficking in human beings: the emergence of a human rights-based, victim centered approach. The potential of the due diligence in the supply chains in the battle against human trafficking

3.1 Human trafficking and article 4 ECHR. The integration between the criminal justice response and a human rights-based approach: "a proper balance between matters concerning human rights and prosecution"

As observed throughout the thesis, the Trafficking Protocol receives both harsh critics and enthusiastic praises.

It certainly was the first international instrument to recognize multiple varieties of trafficking end-purposes. The broad trafficking definition "laid the foundation for international and domestic laws to be created to address the problem". [586] One can measure its success through ratification as 178 States have ratified, accessed, or accepted the Protocol (as of September 2021).

However, often scholars claim that the major shortcoming of the Palermo Protocol revolves around State Parties being required to take action only in respect to transnational offenses. For instance, some claim [587] that since the Palermo Protocol is a supplement of the Convention against Transnational Organized Crime, the context consists in the involvement of organized criminal groups in the *movement* of people – thus, the offence of human trafficking as defined by the Protocol can only be cross-border. James Hathaway, for example, states: "slavery or

[586] Laura L. Shoaps, "Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act", *Lewis & Clark Law Review* 17, no. 3 (2013): 934. Available at: https://law.lclark.edu/live/files/15325-lcb173art6shoaps.pdf.

[587] *See* for instance Kathryn Kosanovich, "The Difference Between Trafficking And Forced Labor". Blog. *Research On Human Trafficking* (2 April 2021). http://www.kosanovich.net/essays/2017/04/the-difference-between-trafficking-and-forced-labor/.

other forms of exploitation that occur entirely within the borders of one country without the involvement of outside parties are beyond the scope of the Trafficking Protocol". [588] However, as Anne Gallagher notes in her response to Hathaway's article, although this interpretation holds up with respect to the interstate cooperation obligations of the Trafficking Protocol, "it fails to capture accurately the nature of State Party obligations under the instrument as a whole".[589] Indeed, the Palermo Protocol "mother" instrument, the Convention against Transnational Organized Crime at Article 34 paragraph 2 requires the offense of trafficking to be established in the domestic law of every State Party, "*independently of its transnational nature*" (or the involvement of an organized criminal group). [590]

Moreover, the term "harbouring", in the definition of Article 3 of the Protocol, indicates that human trafficking does not necessarily entail a movement from one country to another. Therefore, the critique focusing on human trafficking being necessarily a cross-border offense is, to this extent, ill-founded.

Rather, a critique more suitable for this topic is one that involves the central and mandatory obligation of all State Parties to the Protocol to criminalize trafficking in their domestic legal systems and not – or at least, not primarily – the protection of the victims' rights. It is indeed true that the Protocol "was designed to reflect the international community's political will to combat organized crime, *rather than* to combat human rights violations inherent within slavery". [591] Also, the Protocol fails to clearly specify certain rights, such as the right for the victims to access to an effective remedy or the right to immediate protection.

And it is, indeed "in relation to specific commitments of protection and support for victims that the Trafficking Protocol disappointed". [592] It is precisely in these regards that the Protocol's criminal justice approach *needs the integration* of the human rights apparatus and its powerful support. As shown in paragraphs 0, 0 and 0, international human rights law can provide substantial protections, and the subsequent developments, especially taking into account the ones at the regional level (in particular, the case-law of the European Court of Human Rights

---

[588] James C. Hathaway, "The Human Rights Quagmire of 'Human Trafficking'", *Virginia Journal of International Law* 49, no. 1 (2008): 11. https://core.ac.uk/download/pdf/232682194.pdf.
[589] Anne T. Gallagher, "Human Rights and Human Trafficking: Quagmire or Firm Ground - A Response to James Hathaway", *Virginia Journal of International Law* 49, no. 4 (Summer 2009): 812.
[590] United Nations General Assembly, "United Nations Convention against Transnational Organized Crime" (December 2000): Article 34(2). Emphasis added.
[591] Anne T. Gallagher, "Human Rights and Human Trafficking: Quagmire or Firm Ground - A Response to James Hathaway" (2009): 933. Emphasis added.
[592] Ibid, at 791.

and the Council of Europe Convention on Action against Trafficking in Human Beings), can provide the basis to fill any remaining gaps.

An example of such integration can be made using the case "Rantsev v. Cyprus and Russia", [593] in which the European Court of Human Rights specified, first of all, that "there can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society" [594] and with the values expounded in the European Convention of Human Rights. Also, the Court concluded that *trafficking itself*, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings (Anti-Trafficking Convention), falls within the scope of Article 4 of the European Convention of Human Rights, [595] which prohibits slavery and forced labour.

The same concept was reiterated by the Grand Chamber in S.M. v. Croatia. [596] There, the Court addressed the issue of how human trafficking falls within the scope of Article 4 ECHR, and in a more extensive way than it did in Ranstev v. Cyprus and Russia. The Grand Chamber clarified that, in line with the "*principle of harmonious interpretation* of the Convention and other instruments of international law",[597] and because the ECHR itself does not define the concept of human trafficking, "it is not possible to characterise conduct or a situation as an issue of human trafficking unless it fulfils the criteria established for that phenomenon in international law" [598] – namely, the constitutive elements: action, means, purpose.

Then, the Grand Chamber proceeded to state that the identified elements of trafficking – for instance, "the treatment of human beings as commodities", close surveillance, isolation, the use of violence and threats, poor living and working conditions, and little or no payment – "cut across the three categories set out in Article 4": [599] slavery, servitude and forced labour. And most importantly, the Court held that "the concept of human trafficking can properly be incorporated […] within the scope of Article 4". [600] Indeed, "given the Convention's special features as a human rights treaty and the fact that it is a *living instrument* which should be

[593] *See* also paragraph 1.4.1.
[594] European Court of Human Rights, *Rantsev v. Cyprus and Russia* (2010), at para. 282.
[595] Ibid.
[596] For the facts of the case, *see* paragraph 0.
[597] European Court of Human Rights (Grand Chamber), *S.M. v. Croatia* (Application no. 60561/14), judgment of June 25, 2020. Para. 290.
[598] Ibid.
[599] Ibid, at para. 291.
[600] Ibid.

interpreted in the light of present-day conditions" [601] there are strong grounds to confirm what already stated in Rantsev, that the phenomenon of human trafficking "runs counter to the spirit and purpose of Article 4 and thus *falls within the scope of the guarantees offered by that provision*". [602]

Secondly, the Grand Chamber affirms that this approach to the phenomenon of human trafficking "is convincingly set out in the ILO materials […] which have traditionally played a key role in informing the scope of guarantees under Article 4 of the Convention". [603] Indeed, the Committee of Experts which monitors the implementation of the ILO Conventions has considered as a crucial element of the definition of trafficking "its purpose, namely, *exploitation*, *which is specifically defined to include* forced labour or services, slavery or similar practices, servitude and various forms of sexual exploitation". [604] This is the link between human trafficking and trafficking-related conduct and forced or compulsory labour: the essence, the crucial element of trafficking is *exploitation;* forced labour, sexual exploitation, slavery, slavery-like practices, servitude are *forms of exploitation.*

Thus, from the perspective of Article 4 of the ECHR, "the concept of human trafficking covers trafficking in human beings, *whether national or transnational* […] in so far as the constituent elements of the international definition of trafficking in human beings, under the Anti-Trafficking Convention and the Palermo Protocol, are present". [605] And such conduct of human trafficking then falls within the scope of Article 4 of the Convention.

As explained, the Anti-Trafficking Convention and the Court's jurisprudence are a fundamental part, the leading elements in the process of integration between the Protocol's criminal justice response and a human rights-based approach. Indeed, the Anti-Trafficking Convention's aim is precisely the one of *integrating* the measures already granted by the Trafficking Protocol and of the others relevant global or regional instruments, not being in competition with them but rather "improving the protection afforded by them and developing the standards contained therein, in particular in relation to the *protection of the human rights of the victims of trafficking*". [606]

---

[601] Ibid. Emphasis added.
[602] Ibid. Emphasis added.
[603] Ibid, at 293.
[604] ILO, *Report of the ILO Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part IB), p. 41, as referenced in European Court of Human Rights (Grand Chamber), *S.M. v. Croatia* (2020), at para. 145.
[605] European Court of Human Rights (Grand Chamber), *S.M. v. Croatia* (2020), at para. 296.
[606] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings", Warsaw, 16.V.2005, *Council of Europe Treaty Series* No. 197, at para. 30. Emphasis added.

The Explanatory Report further specifies – and in this quote, it lies the essence of the "integration argument":

> The European public perception of the phenomenon of trafficking and the measures which need to be adopted to combat it efficiently have evolved, thus rendering necessary the elaboration of a legally binding instrument, *geared towards the protection of victims' rights and the respect for human rights*, and *aiming at a proper balance between matters concerning human rights and prosecution.* [607]

The status of the Anti-Trafficking Convention as a human rights instrument (and as a useful "bridge" between the two approaches) [608] is confirmed by its own preamble, when acknowledging that "trafficking in human beings constitutes a *violation of human rights* and an offence to the dignity and the integrity of the human being". [609]

The fact that the Anti-Trafficking Convention can balance "matters concerning human rights and prosecution" is reassured by the fact that the Convention positions itself as a supplement to the Trafficking Protocol, as "a means of adding value to a regime that is implicitly recognized as an international minimum standard". [610] This raises the question: what is the added value? The protections guaranteed to trafficking victims and the relative remedies.

Providing an example will provide further context and assist with clarifying the issue. The Trafficking Protocol, at Article 6(6), requires State Parties to ensure that the legal system contains measures that offer the victims the *possibility* of obtaining compensation for the damages suffered. [611] This is the focal point of the analysis: Article 6(6) does *not* require the States to *provide remedies*, but only to *offer* the *legal possibility* of compensation. Instead, as an established rule of international law, "the States have a duty to provide domestic legal remedy to victims of human rights violations […] committed in their territory". [612] Thus, is precisely there that the international human rights law (here, in the guise of the Anti-Trafficking Convention) can "come to the rescue" with obligations that consist in providing remedies and assuring protection. And indeed, the issue of appropriate remedies is critical when urging a

---

[607] Ibid, at para. 29.
[608] Namely, the criminal justice response and the human rights-based approach.
[609] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): preamble.
[610] Anne T. Gallagher, *The International Law of Human Trafficking* (2010), Chapter 2, Paragraph 2.3.2.
[611] United Nations General Assembly, "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 6(6).
[612] Anne T. Gallagher, *The International Law of Human Trafficking*, Chapter 6, Paragraph 6.2.1.

rights-based and victim-centered instrument. [613] Article 15(1) of the Anti-Trafficking Convention states that each State Party "shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand", [614] because the victims cannot claim their rights if they are not aware of them. [615] Moreover, Article 15(3) establishes the obligation, for each State Party, to "provide, in its internal law, for the right of victims to compensation from the perpetrators". [616] And the right to monetary compensation is calculated both in respect to material injury and suffering. [617] Not only the Convention requires the State to provide compensation, but it further obliges State Parties to take steps to *guarantee* the compensation of victims, for instance through the establishment of a fund dedicated to victim compensation or programs aimed at social integration of victims:

> Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23. [618]

Another keystone of the human rights-based approach, that the Anti-Trafficking Convention correctly addresses, is the issue of identification: "to protect and assist trafficking victims it is of paramount importance to identify them correctly". [619]

Indeed, "failure to identify a trafficking victim correctly will probably mean that victim's continuing to be denied his or her fundamental rights". [620] Therefore, Article 10(1) states:

> Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and *shall ensure that the different authorities collaborate with each other as well as with relevant support organisations*, so that

---

[613] Ibid, at 2.3.2.
[614] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): Article 15(1).
[615] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at para. 192.
[616] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): Article 15(3).
[617] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at paras. 197-198.
[618] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): Article 15(4).
[619] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at para. 127.
[620] Ibid.

victims can be identified in a procedure duly taking into account the special situation of women and child victims […] [621]

Both the issues of trained law enforcement and inter-agency cooperation will be identified further in this Chapter, as they are crucial parts in the protection and promotion of the victims' rights.

Article 10(2) prescribes the obligations of cooperation between States Parties:

Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2. [622]

The Convention affirms that victims of trafficking require physical and psychological assistance and support, which *should not* be conditional on the victim's cooperation with national authorities. [623] This passage is crucially related to the so called "recovery and reflection period": the Anti-Trafficking Convention also states that victims of trafficking require time and space to recover and escape from the influence of the traffickers before deciding on if they will cooperate with the authorities:

Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory. [624]

The importance of the recovery and reflection period will be analyzed in a separate section.

---

[621] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): Article 10(1).
[622] Ibid, at Article 10(2).
[623] Ibid, Article 12 (emphasis added).
[624] Ibid, Article 13.

The Anti-Trafficking Convention also provides a clear set of obligations regarding the prevention of trafficking. [625] States parties are required to take legislative, administrative, educational, social, cultural, or other measures to "discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking". [626]

Thus, prevention and protection are not, in the Anti-Trafficking Convention, "ancillary" to prosecution, as they are in the Palermo Protocol. This is not to say that the Anti-Trafficking Convention is perfectly comprehensive; for instance, it does not provide for the possibility of other forms of reparation for the victims apart from compensation. But it was, and it still is, an incredibly relevant step in the balance between human rights and prosecution in the trafficking field.

Therefore, in this chapter, the analysis of the potential new approaches in the battle against trafficking will be carried out starting from the most relevant principles contained in the Anti-Trafficking Convention. The enhancement of such measures could be the relevant step to achieve the integration between the current criminal justice response and the desired human rights based and victim-centered approach.

3.2 Prevention: awareness campaigns and gender mainstreaming

Article 5 of the Anti-Trafficking Convention imposes the obligation on each State Party to:

> establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, *awareness raising and education campaigns* […] in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings.[627]

Awareness campaigns are an interesting tool to prevent human trafficking and the Convention specifies that they are intended to reach both the potential victims ("persons vulnerable to trafficking") and the professionals. The Explanatory Report to the Convention indicates the professional concerned as "anyone coming into contact with victims of trafficking in the course of their work (police, social workers, doctors, etc.)". [628] Regarding in particular

[625] Ibid, Article 5.
[626] Ibid, Article 6.
[627] Ibid, Article 5(2).
[628] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at para. 103.

the police force, the necessity of specific training in recognizing trafficking indicators for the law enforcement authorities will be analyzed further. [629]

As the Explanatory Report states, awareness-raising campaigns are "important short-term prevention measures particularly in the countries of origin". [630] The Convention further specifies that the State Parties must promote a "Human Rights-based approach" [631] and that, in the development, implementation and evaluation of the awareness campaigns, "they shall use gender mainstreaming and a child-sensitive approach".

Indeed, a gender mainstreaming approach is necessary in all the stages of the prevention policies and programmes because it is "[o]ne of the main strategies for bringing about proper equality between women and men". [632] But what does it mean, in practice, "gender mainstreaming"? It is a strategy to realize gender equality and it "involves the integration of a gender perspective into the preparation, design, implementation, monitoring and evaluation of policies, regulatory measures and spending programmes, with a view to promoting equality between women and men, and combating discrimination". [633]

The reference to gender mainstreaming is particularly relevant, but a clarification is necessary. As described in both Chapter I and Chapter II, historically the narrative has been focused on the trafficking of women, and in particular on female victims of trafficking for purposes of sexual exploitation. It is indeed true that statistically women are trafficked more than men. In 2018, 65% of trafficking victims were female (46% women and 19% girls), while 20% of trafficking victims were men, and 15% boys. [634] When it comes to trafficking for the purposes of sexual exploitation, the numbers significantly tilt the scale towards women: over the years 2017 and 2018, in the European Union Member States, women were the vast majority (92%) of the victims of trafficking for sexual exploitation, while men represented 6% of victims for this form of exploitation. [635]

---

[629] *See* paragraph 3.3.
[630] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at para. 103.
[631] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): Article 5(3).
[632] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at para. 104.
[633] European Institute for Gender Equality, *What is gender mainstreaming?* (2021). Available at: https://eige.europa.eu/gender-mainstreaming/what-is-gender-mainstreaming.
[634] Sources: UNODC elaboration of national data. *See* United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons – 2020,* United Nations publication, Sales No. E.20.IV.3 (January 2021): 16, figure 8. https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf.
[635] *See* European Commission, *Data collection on trafficking in human beings in the EU,* Luxembourg: Publications Office of the European Union (September 2020): 22.

Also, as explained in Chapter 2, the trafficking narrative has been significantly influenced by different feminist groups' positions in the debate over sex trafficking and prostitution. However, on many occasions this led to a lack of adequate protections of other vulnerable groups. For instance, transgender persons are trafficked for the purpose of sexual exploitation, but this aspect is not sufficiently taken into account in the assistance projects and in the normative regimes in general. [636] The reference to gender mainstreaming, therefore, does not have to be intended as an incentive to over-focus on women victims of trafficking. Rather, it must be seen as an effort "to promote gender equality, combat gender-based violence and stereotypes, and support specific policies for the empowerment of women as a means of combating the root causes of trafficking in human beings". [637]

Therefore, while, due to the gendered nature of trafficking, anti-trafficking policy and practice has focused on women, assistance and protection measures should also be provided to male and to transgender victims of trafficking. [638] At the same time, educational programmes for children and young people need to address human trafficking through the prism of gender equality. [639]

The importance of awareness campaigns in an efficient anti-trafficking strategy is highlighted by the U.S. Department of State: "with the dissemination of accurate and targeted information, communities will be better prepared to respond to the threat of human trafficking". [640] However, the events and anti-trafficking awareness raising campaigns often promote a skewed perspective of the nature and scope of the trafficking problem, adopting a "one size fits all" approach. For this reason, is important to avoid common misconceptions [641]and to recognize that not all victims may self-identify as such. [642] Indeed, the awareness campaign and public outreach should be cognizant "of when to use more person-centered language that

---

[636] *See* Council of Europe, *Gender mainstreaming in thematic areas: Gender equality and trafficking in human beings* (2021): 3. Available at: https://rm.coe.int/gender-mainstreaming-toolkit-21-gender-equality-and-trafficking-in-hum/168092e9ed.
[637] Ibid.
[638] Ibid.
[639] Ibid, at 4.
[640] U.S. Department of State, Office to monitor and combat trafficking in persons, *Senior Policy Operating Group Public Awareness and Outreach Committee Guide For Public Awareness Materials (non-binding)*. Available at: https://www.state.gov/senior-policy-operating-group-public-awareness-and-outreach-committee-guide-for-public-awareness-materials-non-binding/ (accessed: September 2021).
[641] Some examples of common misconceptions about human trafficking, which need to be eradicated through the use of effective informative campaigns: only women and girls can be victims of sex trafficking; all commercial sex is human trafficking; human trafficking involves moving a person across national borders. The mentioned misconceptions have been proven to be wrong throughout the thesis.
[642] U.S. Department of State, Office to monitor and combat trafficking in persons, *Senior Policy Operating Group Public Awareness and Outreach Committee Guide For Public Awareness Materials (non-binding)*.

identifies them first and foremost as people rather than labeling them solely as 'victims'". [643] Many trafficked persons prefer the term "survivors" because the latter confers the idea of being active leaders in the process of eradicating human trafficking, instead of passive victims. [644]

The essence of a victim-centered – or rather, survivor-centered – approach is the engagement of the survivors themselves in the development of new strategies to prevent and combat human trafficking. Survivors should be consulted throughout the development of the campaigns "to ensure the message can be effective in reaching victims or potential victims and in delivering an accurate depiction of the reality of human trafficking to the broader community"; [645] the message should incorporate diverse perspectives (in terms of gender, ethnicity, form of exploitation).

An example of an anti-trafficking awareness campaign is the "Blue Heart Campaign", which "works to raise awareness of the plight of victims and to build political support to fight the criminals behind trafficking". [646] All proceeds to the Blue Heart Campaign go to the United Nations Voluntary Trust Fund for Victims of Trafficking in Persons, Especially Women and Children. The Trust Fund was created in August 2010 as an integral component of a global effort to address trafficking in persons by the Member States of the United Nations General Assembly. It was established "to provide the opportunity for people from all walks of life including Governments, the private sector, international organizations, NGOs and individuals to work together to help victims of human trafficking in a practical and tangible manner". [647] The United Nations Office on Drugs and Crime was tasked with the management of the Trust Fund.

In conclusion, effective and inclusive campaigns and outreach efforts can constitute a victim-centered strategy to increase awareness and prevent human trafficking.

---

[643] Ibid.
[644] A very interesting insight on the matter has been given during the event On My Side Awards 2020, organized by the Human Trafficking Center (November 18, 2020). To watch again the full program: https://www.htlegalcenter.org/events/on-my-side-awards/.
[645] U.S. Department of State, Office to monitor and combat trafficking in persons, *Senior Policy Operating Group Public Awareness and Outreach Committee Guide For Public Awareness Materials (non-binding)*.
[646] United Nations Office on Drugs and Crime (UNODC), *About the Blue Heart Campaign* (2021). Available at: https://www.unodc.org/blueheart/en/-about-the-blue-heart.html.
[647] United Nations Office on Drugs and Crime (UNODC), *United Nations Voluntary Trust Fund for Victims of Trafficking in Persons: Basic Facts* (December 2017). Available at: https://www.unodc.org/pdf/human_trafficking/UN_Victims_Trust_Fund_Basic_Facts_Dec2017.pdf.

3.3 Protection: victims' identification. The necessity for a new training for the law enforcement authorities and the relevant cases before the ECtHR: Rantsev v. Cyprus and Russia, V.C.L. and A.N. v. the United Kingdom, Chowdury and others v. Greece, J. & Others v. Austria

Article 10(1) of the Anti-Trafficking Convention states

[e]ach Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and *shall ensure that the different authorities collaborate with each other as well as with relevant support organisations*, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims […] [648]

The provision requires training for the "competent authorities", namely "the public authorities which may have contact with trafficking victims, such as the police, the labour inspectorate, customs, the immigration authorities and embassies or consulates". [649] An adequate training for such authorities is of vital importance in the process of identification and protection of trafficked persons. The failure to identify a victim "will probably mean that victim's continuing to be denied his or her fundamental rights". [650] Also, if the trafficked person is not recognized as such "the prosecution to be denied the necessary witness in criminal proceedings to gain a conviction of the perpetrator for trafficking in human beings". [651] The provision requires the collaboration between public authorities and organisations that have a support-providing role, as for instance NGOs that are specialized in providing support to trafficking survivors.

Article 10 of the Trafficking Protocol ("information exchange and training") contains the same obligation, stating that "States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in

[648] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): Article 10(1). Emphasis added.
[649] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at para. 129.
[650] Ibid, at para. 127.
[651] Ibid.

persons" [652] and the training "should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers". Moreover, the provision specifies that "[t]he training should also take into account the need to consider *human rights* and child- and *gender-sensitive* issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society".

Both provisions address the national authorities' common insufficient awareness of the problem of trafficking in human beings. The European Court of Human Rights recognized the compliance with the duty to protect (potential) trafficking victims and with the specific training of law enforcement authorities in "J. & Others v. Austria", while it reiterated the necessity of the implementation of Article 10 of the Anti-Trafficking Convention in Rantsev v. Cyprus and Russia, in Chowdury v. Greece and in V.C.L. and A.N. v. the United Kingdom.

In J. & Others v. Austria, the Court held that there had been no violation of Article 4 ("Prohibition of slavery and forced labour") and no violation of Article 3 ("Prohibition of inhuman or degrading treatment") of the European Convention on Human Rights (ECHR) because the Austrian authorities complied with their duty to protect trafficked persons. The case was about three Filipino nationals who worked as *au pairs* in the United Arab Emirates and alleged that they were subjected to ill-treatment and exploitation by their employers, who took away their passports, failed to pay them their agreed wages and forced them to work extremely long hours. The applicants claimed that this treatment had continued during a short stay in Vienna where their employers had taken them and where they had managed to escape. The applicants filed a criminal complaint against their employers in Austria, but the Austrian authorities found that they did not have jurisdiction over the alleged offences committed abroad and did not went through with the investigations. Therefore, the applicants maintained that the State violated Article 4 and Article 3 ECHR, since they had been subjected to human trafficking and forced labour and the Austrian authorities had failed to carry out an effective investigation. However, the Court held that the Austrian authorities complied with their positive obligations under Article 4 and Article 3 ECHR: from the point when the applicants turned to the police, they were immediately treated as potential victims of human trafficking, they were interviewed by specially trained police officers and were supported by the NGO LEFÖ, which was funded

[652] UN General Assembly, "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 10(2).

by the Government especially to provide assistance to victims of human trafficking. [653] They were also granted residence and work permits in order to regularize their stay in Austria, and a personal data disclosure ban was imposed on the Central Register (so that their whereabouts were untraceable by the general public). [654] Austria complied with Article 10 of the Anti-Trafficking Convention; hence, there was no violation of Article 4 or 3 ECHR.

In Rantsev, the Court held that the failure of Russia and Cyprus to adopt a legislation implementing Article 10 of the Anti-Trafficking Convention was indicative of the negligence on the part of those states in fulfilling their "positive" obligations under Article 4 ("Prohibition of slavery and forced labour") in conjunctive application with Article 1 ("Obligation to respect Human Rights") of the ECHR. By enhancing the principle of systemic integration, [655] the Court has been able to condemn the failure to comply with the obligations under the international conventions on trafficking in human beings, without exceeding the powers assigned to the Court by Article 19 of the Convention. [656]

Indeed, as mentioned in Chapter 1, [657] this case dealt with trafficking for the purpose of sexual exploitation and the failure of the public authorities to protect the victim. The appeal to the Court had been filed by a Russian citizen, the father of a young woman (Ms. Rantseva) who died, apparently by suicide, some days after moving to Cyprus to work in a cabaret (where she was sexually exploited), after being deceived about the nature of job. The Court upheld Cyprus' responsibility for failing to take the necessary measures to protect Ms. Rantseva from the traffickers, due to the failure to comply with the obligation to provide training to the police forces in order to properly address the phenomenon of trafficking. The Court stated that "there were sufficient indicators available to the police authorities […] for them to have been aware of circumstances giving rise to a credible suspicion that Ms Rantseva was, or was at real and immediate risk of being, a victim of trafficking or exploitation". [658] Indeed, the police did not even question her when she arrived at the police station about whether she has been trafficked. "They simply checked whether Ms Rantseva's name was on a list of persons wanted by the

---

[653] European Court of Human Rights, *J. & Others v. Austria* (Application no. 58216/12), judgment of 17 January 2017, at para. 110.
[654] Ibid, at 118.
[655] *See* also paragraphs 1.3 and 1.4.
[656] Article 19: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis". Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms" (European Convention on Human Rights), opened for signature in Rome on 4 November 1950, entered into force on 3 September 1953, *Council of Europe Treaty Series,* No. 5.
[657] *See* paragraph 1.4.1.
[658] European Court of Human Rights, *Rantsev v. Cyprus and Russia* (2010), at para. 296.

police and, on finding that it was not, called her employer and asked him to return and collect her". [659] The judgment included an extract of the report of 26 March 2006 by the Council of Europe Commissioner for Human Rights on the progress made in implementing his recommendations, which urged the Cypriot authorities to continue with the training of police officers in victim identification and referral and encouraged the authorities to include women police officers in this area. [660]

Therefore, in Rantsev v. Cyprus and Russia the Court highlighted the importance of proper law enforcement training, to ensure that identification of victims of trafficking takes place efficiently and effectively.

Also in Chowdury v. Greece, the Court highlighted the importance of the States' obligations to prevent human trafficking and to protect the victims: "member States are required to adopt a comprehensive approach and to put in place, in addition to the measures aimed at punishing the traffickers, measures to prevent trafficking and to protect the victims". [661] In that case, the applicants (Bangladeshi nationals) were trafficked for the purpose of forced labour: they worked in strawberry fields but they were not paid by the employees/traffickers and they were obliged to work in complicated physical conditions. The Court acknowledged that not only the law enforcement authorities were aware of the general situation in the strawberry fields of Manolada, [662] but that they also knew that the employer was not corresponding a salary to the migrants. [663]

A third case in which the Court stressed the relevance of complying with the obligations put forward by Article 10 of the Palermo Protocol and Article 10 of the Anti-Trafficking Convention was V.C.L. v. the U.K., [664] where the United Kingdom Crown Prosecution Service failed to adequately protect two potential child trafficking victims. Indeed, the two Vietnamese minors were prosecuted and convicted for drug production, despite the credible suspicion that they were trafficking victims.

V.C.L. v. the U.K., the Court stated that the United Kingdom, and in particular the Crown Prosecution Service, failed to adequately protect two potential child trafficking victims, who

---

[659] Ibid, at para. 297.
[660] Council of Europe Commissioner for Human Rights, Extracts of follow-up report of 26 March 2006 by the Council of Europe Commissioner for Human Rights on the progress made in implementing his recommendations (CommDH(2006)12), para. 60 as referenced by *Rantsev v. Cyprus and Russia,* para. 100.
[661] European Court of Human Rights, *Chowdury and Others v. Greece*, Application no. 21884/15 (2017), at para. 87.
[662] Ibid, at para. 112.
[663] Ibid, at para. 114.
[664] *See* also paragraph 2.6.

were discovered by the police while working on cannabis farms and were then charged with drug-related offences, despite the credible suspicion that they were trafficking victims. The public authorities did not perform the adequate background checks, which is particularly concerning if we observe that in December 2007 the Crown Prosecution Service published guidance on the "Prosecution of young defendants charged with offences who might be trafficked victims". The Guide "highlighted the cultivation of cannabis plants as an offence likely to be committed by child victims of trafficking". [665]

But the guidelines, in this case, were not respected by the competent authorities. This only echoes the loud sentiment that it is not enough to provide *in theory* guidance to law enforcement actors, labour inspectorate, customs, the immigration authorities, etc. What is relevant for an adequate protection of victims (or potential victims) of trafficking, of their human rights and fundamental freedoms, is to train the authorities to *actually put in practice* such guidance.

And how can this be achieved? One effective tool would be the use of operational indicators to help law enforcement to identify victims of trafficking. As evident in the analysis provided throughout this thesis, identification is the foremost step in ensuring assistance to trafficked persons. The same GRETA in its intervention in V.C.L. v. the U.K. specifies that "in order to protect and assist trafficking victims, it was of the *utmost importance* to *identify* them correctly". [666]

The ILO and the European Commission elaborated an extensive list of trafficking indicators: the "operational indicators of trafficking in human beings", [667] and the potential of such tools was emphasized in Chapter 2. [668] The operational indicators not only help the judges to analyze whether a scenario actually consists in a human trafficking case or not; they can be used to enhance the capacity of the police to recognize a trafficking victim, so that the correct procedure can be applied.

For what concerns the Italian legislation, the indicators concerning trafficking for purposes of labour exploitation are referenced in the new version of Article 603-*bis* of the Italian Criminal Code, and it can be shown how they could be successfully used by the law enforcement authorities. For instance, if during a background check the worker reports the existence of violations of the rules on safety and hygiene in the workplace or the absence of

---

[665] European Court of Human Rights, *V.C.L. and A.N. v. the United Kingdom* (2021), at para. 72.
[666] Ibid, at para. 142. Emphasis added.
[667] International Labour Office, *Operational indicators of trafficking in human beings. Results from a Delphi survey implemented by the ILO and the European Commission* (2009).
[668] *See* paragraph 2.1.

rest periods, or the subjection to a degrading housing situation, the police should suspect a potential trafficking scenario and further investigate. Other indicators pointed out in the ILO Guide (and ascribable to the broad category of "the repeated payment of wages in a manner clearly different from national collective agreements", in Article 603-*bis*) are the absence of social protection, such as social insurance, and wage manipulation.

Moreover, in terms of implementation of Article 10 of the Anti-Trafficking Convention, it is important to note that one of the points developed by the Three-year Plan (2020-2022) to combat labor exploitation in the agricultural sector ("*Piano Triennale di contrasto allo sfruttamento lavorativo e al caporalato")*, [669] is precisely aimed at carrying out training activities common to all inspection agencies and public authorities in accordance with the guidelines formulated by the National Labour Inspectorate ("*Ispettorato Nazionale del Lavoro, INL*"). [670]

3.4 Protection and monitoring systems: inter-agency cooperation

According to the Anti-Trafficking Convention, both in the prevention and in the protection of victims, States Parties should ensure that the different authorities collaborate with each other, as well as with the relevant organizations such as NGOs, which can provide some "on the field" expertise.

Indeed, in terms of prevention and identification, each Party "shall ensure that the different authorities collaborate with each other as well as with relevant support organisations". [671] In terms of assistance to victims, each Party "shall take measures, where appropriate and under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims". [672]

---

[669] Ministero del Lavoro e delle politiche sociali, *Piano Triennale di contrasto allo sfruttamento lavorativo e al caporalato* (2020-2022), approved on 21 May 2020. Available at (in Italian): https://www.lavoro.gov.it/temi-e-priorita/immigrazione/focus-on/Tavolo-caporalato/Pagine/Piano-triennale-2020-2022.aspx.
[670] Ibid, at 29.
[671] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): Article 10(1).
[672] Ibid, at Article 13(5).

An example of inter-agency coordination (in this case, leaning towards the policy side) in the human trafficking field is the Inter-Agency Coordination Group against Trafficking in Persons (ICAT). This policy forum mandated by the UN General Assembly was established to improve coordination among the United Nations agencies (and other relevant international organizations) while facilitating a comprehensive approach to preventing and combating trafficking in persons, including protection and support for victims of trafficking. For instance, ICAT provides a platform for exchange of information, experiences and good practices on anti-trafficking activities and it support the activities of the UN and other international organizations with the aim of ensuring a full and comprehensive implementation of all international instruments and standards of relevance for the prevention and combating of trafficking in persons and protection of and support for victims of trafficking. [673]

In terms of Italian national legislation, one of the pillars of the Action Plan 2020-2022 of the Italian Ministry of Labour is precisely the enhancement of inter-agency cooperation, aiming at realizing a capillary monitoring system. The Action Plan was approved by the National Table ("*Tavolo nazionale"*), chaired by the Minister of Labor and Social Policies. It is a programmatic document, elaborated with the support of the International Labor Organization and thanks to the support program for structural reforms of the European Commission.

The approach of the Ministry of Labor and Social Policies in the battle against labor exploitation is aimed at improving the system of labor services and the transparency of labor recruitment, the socio-labor integration of people, and the quality of the supply chain of enterprises operating in agriculture; furthermore, it sought to *expand collaboration with the competent inspection bodies to combat and prevent illegality*. [674]

Indeed, it is considered to be of fundamental importance, in order to provide the necessary tools for inspection activities, a structured collaboration between the National Inspectorate of Labour with two of the main law enforcement authorities, the departments of *Carabinieri* and *Guardia di Finanza.* [675]

Also, the priorities of intervention are focused on the improvement of the efficiency and effectiveness of the services of the employment offices ("*Centri per l'impiego*") for workers and employers in the agricultural sector, through the activation of a platform for the meeting of

[673] More information available at: https://icat.un.org/.
[674] Ministero del Lavoro e delle politiche sociali, *Piano Triennale di contrasto allo sfruttamento lavorativo e al caporalato* (2020-2022): 12.
[675] Ibid, at 15-16.

supply and demand alongside with the strengthening of the monitoring of private intermediation services. [676]

Therefore, inter-agency cooperation in combating human trafficking is encourage both at a national and at an international level. And rightly so, because, as explained throughout the thesis, human trafficking is a complex phenomenon: the only successful method to eradicate it and to protect and assist trafficked persons consists in a comprehensive approach.

3.5 Victims' assistance and the importance of the recovery and reflection period. The case of S.M. v Croatia before the ECtHR

The Anti-Trafficking Convention sets out various provisions that oblige the States to ensure "the physical, psychological and social recovery of victims of trafficking in persons". [677] For instance, each State Party "shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons […] [a]ssistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence". [678]

Articles 11 to 16 of the Convention provide for further measures of assistance and protection of victims, such as the protection of their private life and the psychological, social and legal assistance to victims. One of the most important of these provisions is the one concerning the recovery and reflection period.

The *recovery and reflection period* is now recognized as an effective best practice aimed at protecting the human rights of trafficked persons [679] and, in the view of assisting victims of trafficking, it is a vital instrument to ensure that the trafficking survivors are enabled to recover from the influence of their persecutors. It consists in a period, of at least thirty days, during which the suspected or identified victims of trafficking are entitled to receive assistance from

[676] Ibid, at 18.
[677] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): Article 6(3).
[678] Ibid, Article 6(1).
[679] UNODC, *Toolkit to Combat Trafficking in Persons: reflection period and residence permit* (New York: 2008): 326. ISBN 978-92-1-133789-1. Available at: https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_7-1.pdf.

the institutions regardless of their decision to cooperate with the authorities and they cannot be subjected to an expulsion order.

The Anti-Trafficking Convention, at Article 13, establishes that each State Party:

"shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.

During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2.

The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly". [680]

This provision is intended to apply to trafficked persons who are illegally present in a Party's territory (or who are legally resident, but with a short-term residence permit). [681] Therefore, for the trafficking victims "who have irregular immigration status, the reflection period ensures that they can be provided with appropriate assistance and support, such as secure housing, psychological counselling, medical and social services and legal consultation". [682]

The recovery and reflection period has two main purposes.

First, it allows the victims to recover and escape the influence of the trafficker. Doing so allows for a healing of their emotional and physical wounds.

Second, it allows the victims to make an informed decision on whether they are willing to cooperate with the enforcement authorities in a prosecution proceeding against the trafficker or the traffickers. The term "informed decision" indicates that the victim "must be in a reasonably calm frame of mind and know about the protection and assistance measures available and the possible judicial proceedings against the traffickers". [683]

---

[680] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings" (2005): Article 13.
[681] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at para. 172.
[682] UNODC, *Toolkit to Combat Trafficking in Persons: reflection period and residence permit* (2008): 326.
[683] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at para. 174.

Indeed, as the Explanatory Report observes, from this point of view the recovery period "is likely to make the victim a better witness", [684] as the statements from victims "wishing to give evidence to the authorities may well be unreliable if they are still in a state of shock from their ordeal". [685]

The victims of such violent, annihilating and deeply humiliating crimes often experience terrible traumas. These traumas leave a lasting impact on the mental health of the victims and unfortunately, they could also affect the perceived reliability of their testimony while being witnesses in a criminal proceeding – this is precisely what the recovery and reflection period sought to avoid.

To properly convey the relevance of the psychological healing of the victims from the abuses they suffered, it will be analyzed the case S.M. v. Croatia, [686] where the impact of the traumas on the victim was underestimated by the authorities. In 2012 S.M., a Croatian national, filed a criminal complaint against T.M, who allegedly had forced the victim into prostitution in 2011. He deceived her with a false job offer and he later forced her to perform sexual services in an apartment rented by him. T.M. was indicted and brought to trial, S.M. was officially given the status of trafficking victim. The Municipal Criminal Court acquitted T.M. on the basis that there was no concludable evidence that he had forced or pressured S.M. into prostitution because the victim's testimony was incoherent and appeared to be unreliable. The appeal was dismissed.

S.M. filed an application lodged with the Croatian Constitutional Court, which was declared inadmissible. She later filed an application, lodged with the European Court of Human Rights, in August 2014, relying on Article 3 ("Prohibition of torture"), and Article 8 ("Right to respect for private and family life") of the ECHR. She alleged that "the domestic authorities had failed to elucidate all the circumstances of the case, had not secured her adequate participation in the proceedings and had not properly qualified the offence".[687]

The European Court of Human Right noticed that "the national authorities did not make any assessment of the possible impact of psychological trauma on the applicant's ability to consistently and relate the circumstances of her exploitation". [688] Instead, "the national courts dismissed the applicant's testimony as unreliable because they deemed her statement as being

[684] Ibid.
[685] Ibid.
[686] *See* also paragraph 1.4.1.
[687] European Court of Human Rights, *S.M. v. Croatia* (2018), at para. 36
[688] Ibid, para. 80.

incoherent" [689] and because she was unsure and she hesitated when speaking. The courts didn't even consider the presence of T.M. in the courtroom as disturbing. The European Court of Human Rights, instead "given the vulnerability of the victims of sexually-related offences" recognized that "the encounter with T.M. in the courtroom could have had an adverse effect on the applicant, regardless of T.M. being subsequently removed from the courtroom".

The Court stated that S.M. had been psychologically and physically forced by T.M. into prostitution; thus, there had been a violation of Article 4 of the ECHR ("Prohibition of slavery and forced labour"). "These circumstances entailed the State's obligation under the procedural aspect of Article 4 to properly investigate the applicant's allegations". [690] Ultimately, the Court confirmed that the dismissal of the victim's testimony in the national courts proceedings resulted in the State's failure to provide the adequate psychological, social and legal assistance to the victim therefore in the violation of Croatia's procedural obligations under Article 4 of the ECHR.

However, in her application to the Court, S.M. did not invoke Article 4; this gave the basis for Croatia to raise a preliminary objection, requesting referral to the Grand Chamber. The Grand Chamber dismissed the objection: "[h]er complaints undoubtedly raised an issue which the Court, by virtue of the *jura novit curia* principle and in view of its case-law […] could seek to determine whether it fell to be characterized under Article 4 of the Convention". [691] The Grand Chamber noted that the applicant's complaint raised issues of "alleged impunity for human trafficking, forced or alternatively non-forced prostitution relating to a deficient application of the relevant criminal-law mechanisms" and it was, thus, "essentially of a procedural nature". [692]

Moreover, the Grand Chamber explained that these issues were to be examined under Article 4 of the ECHR for two reasons: first, the case law "tended to apply Article 4 to issues related to human trafficking"; [693] second, this allowed the Court "to put the possible issues of ill-treatment (under Article 3) and abuse of the applicant's physical and psychological integrity (under Article 8) into their general context, namely that of trafficking in human beings and sexual exploitation". [694]

---

[689] Ibid.
[690] Ibid, para. 86.
[691] European Court of Human Rights (Grand Chamber), *S.M. v. Croatia* (2020), at para. 224.
[692] Ibid, at para. 229.
[693] Ibid, at para. 241.
[694] Ibid, at para 242.

In conclusion, even if the Anti-Trafficking Convention pays more attention to the rights of victims than the Palermo Protocol, "this is not done at the expense of the criminal justice and immigration aspects of trafficking". [695] Indeed, "the victim protection provisions are clearly geared toward making sure that criminal justice authorities are given the best possible chance to secure prosecutions and convictions through the cooperation of victims", [696] without prejudice to the generosity of the dispositions.

3.6 Assistance: victims' right to remedies and to social reintegration

The access to remedies and the right to social reintegration are fundamental principles in the perspective of developing a survivor-centered approach.

Article 15(1) of the Anti-Trafficking Convention imposes on State parties the obligation to "ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand", [697] because the victims cannot claim their rights if they are not aware of them. [698]

The term "court and administrative proceedings" is general so as to take into account the various judicial structures of national systems. For instance, compensation of victims is usually a matter for the civil or criminal courts, but it could also be for administrative authorities with special responsibility for compensating victims of offences. [699] It is of utmost relevance that the victims are informed of the relevant procedures as from their first contact with the competent authorities. [700]

In paragraph 2 of Article 15, the Anti-Trafficking Convention specifies that each Party must provide, with national provisions, both for the right to legal assistance and to free legal aid for victims (in the cases provided by its internal law). Effective access to a court may necessitate free legal assistance; however, the mentioned provision does not give the victim an automatic right to free legal aid for itself, as "it is for each Party to decide the requirements for obtaining

---

[695] Anne T. Gallagher, *The International Law of Human Trafficking*, Chapter 2, Paragraph 2.3.2.
[696] Ibid.
[697] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): Article 15(1).
[698] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at para. 192.
[699] Ibid, at 193.
[700] Ibid, at 194.

such aid". [701] Often, free legal aid is included, under certain conditions, in programmes for protection of victims of human trafficking implemented by NGOs.

For what concerns legal assistance, parties must have regard not only to Article 15, but also to Article 6 of the ECHR, paragraph 3, which states that: "Everyone charged with a criminal offence has the following minimum rights: […] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". The disposition provides for free assistance from an officially appointed lawyer only in criminal proceedings, but the European Court of Human Rights case-law also recognises, in certain circumstances, "the right to free legal assistance in a civil matter on the basis of Article 6, paragraph 1, of the ECHR, interpreted as establishing the right to a court for determination of civil rights and obligations". [702] [703]

Regarding reparations, Article 6(6) of the Trafficking Protocol does *not* require the States to *provide remedies*, but only to *offer* the *legal possibility* of compensation: "[e]ach State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered".[704]

Instead, the Anti-Trafficking Convention, at Article 15(3) establishes the obligation, for each State Party, to "provide, in its internal law, for the right of victims to compensation from the perpetrators". [705] And the right to monetary compensation is calculated both in respect to material injury (material damage, for instance in respect to the cost of medical treatment) and non-material damage (the suffering experienced). [706]

It is important to specify that normally it is the traffickers who bear the burden of compensating the victims, non the State: "victims' right to compensation consists in a claim *against* the *perpetrators* of the trafficking". [707]

---

[701] Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at para. 196.
[702] For instance, *see* European Court of Human Rights, *Golder v. the United Kingdom*, judgment of 21 February 1975.
[703] Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at para. 196.
[704] UN General Assembly, "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (2000): Article 6(6).
[705] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): Article 15(3).
[706] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings" (2005), at paras. 197-198.
[707] Ibid. Emphasis added. Moreover, if in the proceedings against the traffickers, the criminal courts are not empowered to determine civil liability towards the victims, "it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest". Ibid.

However, this practice is better on paper than in theory since there is rarely full compensation from the perpetrator for various reasons including the traffickers disappearing or declaring themselves bankrupt. Therefore, the Anti-Trafficking Convention further obliges State Parties to take steps to *guarantee* the compensation of victims, for instance through the establishment of a fund dedicated to victim compensation or programs aimed at social integration of victims:

> Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23. [708]

Besides, as an established rule of international law, "the States have a duty to provide domestic legal remedy to victims of human rights violations […] committed in their territory". [709] The means of guaranteeing compensation are left to the States Parties. However, in deciding the compensation arrangements, the Parties may use as a model the principles contained in the *European Convention on the Compensation of Victims of Violent Crimes*, [710] which, at Article 4, specifies as minimum requirements items for which reasonable compensation shall be paid, as loss of earnings (for example, as a result of immobilization through injury); medical expenses (which may include prescription charges and the cost of dental treatment); hospital fees; funeral expenses; (although is not considered among the minimum requirements) pain and suffering.[711]

Compensation is extremely important. However, other reparations are often neglected. In particular, the rehabilitation and social reintegration of the trafficking survivors are crucial to avoid the persistence of the position of vulnerability.

And not only because it should be the right of the survivor to be rehabilitated, and to be able to leave behind the abuses suffered. But also because the survivor's position of vulnerability *itself* needs to be eradicated in order to prevent *further* abuses. And this is only possible if an effective plan of victims' social reintegration is put in place. Italy's Three-year Action Plan 2020-2022 is a good starting point (even if it is aimed at eradicating not all forms

---

[708] Council of Europe, "Council of Europe Convention on Action against Trafficking in Human Beings", (2005): Article 15(4).
[709] Anne T. Gallagher, *The International Law of Human Trafficking*, Chapter 6, Paragraph 6.2.1.
[710] Council of Europe, *European Convention on the Compensation of Victims of Violent Crimes,* Strasbourg, 24 November 1983, *European Council treaty series* No. 116.
[711] Council of Europe, *Explanatory Report to the European Convention on the Compensation of Victims of Violent Crimes*, Strasbourg, 24 November 1983, at para. 28.

of exploitation, but specifically labor exploitation in the agricultural sector). One of the principles in the Action Plan is aimed at developing a national framework with pathways for the socio-occupational reintegration of victims of labor exploitation; implementing reintegration programs on the basis of guidelines formulated at the national level in consultation with regional authorities, including specific measures for the labor insertion of victims of exploitation; and setting up continuing education activities aimed at employees of the relevant services. [712] Particularly interesting is the plan to design and implement long-term reintegration paths through the integrated action of the various services. [713]

The type and sequence of services to which victims will have access will be determined on the basis of guidelines for the elaboration of personalized reintegration plans. In this phase, the Employment Centers will have a key role in taking charge and supporting victims through vocational training, job placement and access to other active labor policy measures. [714] These initiatives will be activated through collaboration with social partners, also in order to ensure a rapid transition of victims of exploitation to decent work. [715]

For now, only a statement of intent, maybe – but one in the direction of a more victim-centered approach.

3.7 Business and Human Rights: alternative monitoring methods and new trends [716]

The international community has increasingly recognized the responsibility of the multinational corporations to ensure human rights in their supply chains through the *due diligence* [717] and in general through mandatory non-financial reporting to prevent and combat

[712] Ministero del Lavoro e delle politiche sociali, *Piano Triennale di contrasto allo sfruttamento lavorativo e al caporalato* (2020-2022): 31.
[713] Ibid.
[714] Ibid.
[715] Ibid.
[716] This paragraph, dealing with the field of Business and Human Rights, proceeds from the assumption, as proved in the three Chapters and as highlighted in particular by the European Court of Human Rights, that it exists a human right "not to be trafficked" and not to be exploited. Also, *see* the preamble of the Council of Europe Convention on Action against Trafficking in Human Beings: "Considering that *trafficking in human beings constitutes a violation of human rights* and an offence to the dignity and the integrity of the human being". Emphasis added.
[717] Cindy S. Woods, "European Approaches to Promoting Responsible Supply Chains", at 98, in *Business and Human Rights in Europe*, edited by Angelica Bonfanti (New York: Routledge, 2019). Series Editor: Paolo Davide Farah, Glawcal. ISBN: 978-1-138-48467-3.

human trafficking. Due diligence is the process that encompasses the identification of possible human rights harms, the prevention of such harms and the report "on how any adverse human rights impacts are addressed". [718]

The private sector could play a relevant role in the battle against human trafficking (especially trafficking for forced labour purposes) due to its position in relation to streams of commerce and its access to resources. [719]

The first significant law intended to boost private sector efforts to stop trafficking in human beings was the California Transparency in Supply Chains Act [720] (henceforth, the CA-TSCA), which became effective in 2012 and which later inspired the development of transparency laws in other parts of the world.

The CA-TSCA obliges large retailers and manufacturers to provide consumers with critical information regarding their efforts to eradicate international trafficking "from their direct supply chains for tangible goods offered for sale". [721] The term "large retailers" refers to retail sellers or manufacturers that have more than $100 million in annual worldwide gross receipts and that "do business" in California.

The Act imposes the duty to provide certain information on the retailers' and manufacturers' websites, in order to allow consumers to make an informed purchasing decision. The companies must disclose, at a minimum "to what extent, if any, the retail seller or manufacturer... [e]ngages in verification of product supply chains to evaluate and address risks of human trafficking and slavery". [722]

The company must also confirm whether it "audits suppliers in evaluating compliance with its standards for trafficking and slavery in its supply chains" [723] and "state whether the audits are independent and unannounced". [724] The large retailer must disclose which internal procedures it uses for determining if employees or contractors are complying with company standards regarding slavery and human trafficking; [725] information has to be provided also on

---

[718] Ibid.
[719] Jonathan Todres, "The Private Sector's Pivotal Role in Combating Human Trafficking", 3 *California Law Review Circuit* 80 (2012): 86. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2002957.
[720] California, *California Transparency in Supply Chains Act* of 2010, S.B. 657, 2010 Reg. Sess., 2010 Cal. Legis. Serv. Ch 556 (West 2010) (codified at CAL. CIV. CODE § 1714.43).
[721] Ibid (Legislative Counsel's Digest).
[722] Ibid, codified in Cal. Civ. Code, § 1714.43, subd. (b).
[723] Kamala D. Harris, Attorney General California Department of Justice, *The California Transparency in Supply Chains Act: A Resource Guide* (2015): executive summary (iii). Available at: https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.
[724] Ibid.
[725] Ibid.

whether the company engages in the specified training with respect to mitigating trafficking risks within the supply chains of products. [726] The company has to disclose who has direct responsibility for supply chain management. [727] All the mentioned information must be published on the company's website, linked in a prominent way on the homepage.

The CA-TSCA is definitely a step forward in the involvement of the private sector in the battle against trafficking. However, it presents some flows, the most relevant one being that the Act doesn't carry specific criminal or civil penalties relating to incorrect transparency statements. Also, litigation by victims of forced labor "is off the table", since the CA-TSCA is fundamentally a consumer protection statute. [728]

However, the California Transparency in Supply Chains Act signifies a departure from the prevailing approach to combating human trafficking, involving the private sector.

Another Act seeking to increase transparency in supply chains is the UK Modern Slavery Act (MSA), passed by the UK Parliament in March 2015. The MSA applies to commercial organizations that supply goods or services (including a trade or profession), carry on business in the United Kingdom and have a total annual turnover of not less than £36 million (an estimated 12.000 companies). Section 54 of the Modern Slavery Act obliges commercial organizations to prepare and publish every year a "slavery and human trafficking statement".[729] Each affected organization must publish a statement on its website that either states the steps the organization has taken (during that financial year) to ensure that human trafficking is not taking place in any of its supply chains, *or* it must state that the organization has not taken any such steps. Like for the California Transparency in Supply Chains Act, the Modern Slavery Act does not carry specific criminal or civil penalties in case of non-compliance.

In both cases, the law only imposes on large companies the obligation to make "a statement of purpose", one could say; plus, the Acts mentioned contain weak enforcement mechanisms. In this sense, more than as a protection for potential trafficking victims, the laws presented can act as an "empowerment tool" [730] for consumers.

---

[726] Cal. Civ. Code, § 1714.43, subd. (c)(5).
[727] Ibid.
[728] Emma Cusumano and Charity Ryerson, "Is the California Transparency in Supply Chains Act doing more harm than good?" in *Corporate Accountability Lab* (July 25, 2017). Available at: https://corpaccountabilitylab.org/calblog/2017/7/25/is-the-california-transparency-in-supply-chains-act-doing-more-harm-than-good.
[729] UK, *Modern Slavery Act*, Eliz. 2, c. 30 (2015), Section 54.
[730] Olga Martin-Ortega, "Due Diligence, Reporting and Transparency in Supply Chains. The United Kingdom Modern Slavery Act", at 111, in *Business and Human Rights in Europe* edited by Angelica Bonfanti (2019).

However, both Acts can be seen as an implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs) for the realization of responsible supply chains. The UNGPs highlight that "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises". [731] In meeting their duty, the States should enforce laws that are aimed at "requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps" [732] (Article 3(a)), that "provide effective guidance to business enterprises on how to respect human rights throughout their operations" [733] (Article 3(c)) and that "encourage, and where appropriate require, business enterprises to *communicate* how they address their human rights impacts" [734] (Article 3(d)).

But how can the UNGPs be implemented effectively? A step forward in this direction was recently made by the German legislation, with the "Law on corporate due diligence in supply chains" (henceforth, Supply Chains Law).

Indeed, in order to implement the UNGPs, the German government had relied on voluntary engagement for many years, adopting the National Action Plan on Business and Human Rights. However, "surveys had revealed that the target of 50% of companies fulfilling the obligations set forth in the UN Guiding Principles was clearly missed". [735] In response, the German government proposed a draft bill in March 2021; in June 2021, the German parliament passed the Supply Chains Law ("*Lieferkettensorgfaltspflichtengesetz*"), [736] which will enter into force in January 2023.

First of all, it is interesting to note that the German Supply Chain Law does not individuate the obliged companies in terms of annual turnover, but in terms of number of persons employed. Indeed, companies with more than 3,000 employees will have to meet the new due diligence

---

[731] United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011) annexed to the Special Representative's final report to the Human Rights Council (A/HRC/17/31). The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011. Available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf. Here, it is referenced Article 1.

[732] Ibid, Article 3(a).

[733] Ibid, Article 3(c).

[734] Ibid, Article 3(d).

[735] Sam Eastwood , Armineh Gharibian, James Ford, Nadine Pieper and Johannes Weichbrodt, *Germany: Business And Human Rights – Germany Passes Mandatory Human Rights Due Diligence Law* (22 June 2021). Available at: https://www.mondaq.com/germany/human-rights/1081300/business-and-human-rights-germany-passes-mandatory-human-rights-due-diligence-law.

[736] Germany, Law on corporate due diligence in supply chains ("*Lieferkettensorgfaltspflichtengesetz*"). Draft approved in June 2021. The Law will enter into force in January 2023. Available here in German: https://dserver.bundestag.de/btd/19/305/1930505.pdf.

obligations as of 1 January 2023; companies with more than 1,000 employees as of 2024. [737] According to the Supply Chains Law such companies will have to ensure that human rights are being respected throughout their entire supply chain and establish complaint mechanisms, while also reporting on their due diligence activities. [738] While the violations of these obligations will not give rise to the company's civil liability, they could lead to a fine, up to 2% of the average annual turnover for companies with more than EUR 400 million annual turnover. [739]

Italy is considering mandatory due diligence legislation: the government committed to reviewing commercial and civil law to "assess and evaluate legislative reform introducing provisions such as 'the duty of care' or due diligence for companies". [740]

In conclusion, considering that the laws providing mandatory due diligence and mandatory non-financial reporting are relatively recent, an actual evaluation of efficacy cannot be made. However, the mentioned legislation is considered to be a step forward in mandating corporate respect for human rights and in enhancing the private sector involvement in the fight against human trafficking.

3.8 Conclusion: a human rights-based approach

In conclusion, the peculiarities and the complexity of trafficking call for a comprehensive approach. One that does not neglect the security issues and prosecutorial needs in terms of criminal justice, but is primarily aimed at preventing the phenomenon and assisting the victims.

Although the Trafficking Protocol had the merit of being the first international instrument to recognize multiple varieties of trafficking end-purposes and to raise an incredible consensus among the States (as of September 2021, it was ratified by 180 Parties), an approach based primarily on prosecution is not enough – not anymore. The same European Court of Human Rights, in S.M. v. Croatia, explains why the more victim-centered approach under the Anti-

[737] Ibid.
[738] Ibid.
[739] Ibid.
[740] Italian Inter-Ministerial Committee for Human Rights (CIDU), *Italian National Action Plan on Business and Human Rights 2016-2021,* 1 December 2016. Available at (in English) http://cidu.esteri.it/comitatodirittiumani/resource/doc/2020/02/cidu_napbhreng_2018def.pdf. In Italian: http://www.cidu.esteri.it/resource/2016/12/49118_f_PANBHRITAFINALE15122016.pdf.

Trafficking Convention should be followed. Firstly, it ensures that internal trafficking is covered; [741] [742] in particular in consideration of the fact that internal trafficking is currently the most common form of trafficking. [743]

Secondly, the Court has already held that the member States' positive obligations under Article 4 of the ECHR "must be construed in the light of the Council of Europe's Anti-Trafficking Convention". [744]

Thirdly, "the limited definitional scope of the Palermo Protocol is relative as, when read in conjunction with its parent instrument (UNCTOC), the Protocol in fact proscribes trafficking irrespective of a transnational element or the involvement of an organised criminal group". [745] [746]

Therefore, the Grand Chamber concluded that

> from the perspective of Article 4 of the Convention the concept of human trafficking covers trafficking in human beings, whether national or transnational, whether or not connected with organised crime, in so far as the constituent elements of the international definition of trafficking in human beings, under the Anti-Trafficking Convention and the Palermo Protocol, are present. [747]

Thus, is through the focal principles of the Anti-Trafficking Convention, and their enhancement them both in an international setting and in national scenarios, along with tools that transcend from formal international law, that a *comprehensive* approach can be reached, closer to grasping the complexity of the trafficking phenomenon, as explained in the following conclusive paragraph.

---

[741] *See* at paragraph 3.1 the allegations, sustained by many actors in the field, that the Trafficking Protocol definition does not encompass internal trafficking, but only cross-border movement.
[742] European Court of Human Rights (Grand Chamber), *S.M. v. Croatia* (2020), at para. 295: "excluding a group of victims of conduct characterised as human trafficking under the Anti-Trafficking Convention from the scope of protection under the Convention would run counter to the object and purpose of the Convention as an instrument for the protection of individual human beings, which requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, for instance, Güzelyurtlu and Others v. Cyprus and Turkey [GC], no. 36925/07, § 234, 29 January 2019). In this connection it should be noted, as follows from the international material and as pointed out by one of the third-party interveners (see paragraph 269 above), that internal trafficking is currently the most common form of trafficking".
[743] Ibid.
[744] Ibid.
[745] Ibid.
[746] *See* also paragraph 3.1.
[747] Ibid.

CONCLUSION: A COMPREHENSIVE APPROACH

The general purposes of this thesis were the following: first of all, to define and analyze the complex phenomenon of human trafficking and the various forms of exploitation; secondly, to assess the shortcomings and the advantages of the current legal framework, with regards to its impact in the battle against human trafficking; thirdly, to propose an alternative approach, more suitable to the peculiarities of the phenomenon.

It was shown how the core element of human trafficking, its defining criterion, is the exploitation of the victims (for whichever purpose), rather than the movement across the borders. The same Court of Human Rights affirms how "internal trafficking is currently the most common form of trafficking". [748] Hence, it is anachronistic, and counterproductive, to face this phenomenon only as a border control issue.

At the same time, it is self-defeating to combat human trafficking only by implementing the obligations which concern the criminalization of the conduct, and even more so if the conduct has a rigid definition, not suitable to the complexity of the phenomenon.

This is not to say that prosecuting the perpetrators cannot constitute a valid ally in the battle against trafficking – but that it cannot be the *only* one. If a trafficker is convicted, but the victims/survivors are not protected and socially reintegrated, aren't they more likely to be subjected to the same abuses soon afterwards, just from a different perpetrator? The reason why victims become such is often connected to their position of vulnerability – rather, it *consists in* their position of vulnerability, if we give the latter an extensive meaning. Therefore, an approach that could have a positive impact is the one aimed at the rehabilitation of the victim, that deletes the position of vulnerability through the assistance of State authorities in cooperation with private actors (the potential positive role of the latter, especially companies, is accentuated by their power to monitor the supply chains and to prevent exploitative abuses).

At the same time, it is important to bear in mind that because trafficking can assume many forms, a rigid definition will not serve the purpose of combating it. Here, the operational trafficking indicators come to the rescue, and give value to the contextual elements that enable the interpreter to grasp the complex nature of the phenomenon and serve as a valid ally for the law enforcement authorities to identify potential trafficking victims.

---

[748] European Court of Human Rights (Grand Chamber), *S.M. v. Croatia* (2020), at para. 295.

An example of the perfect integration between the criminal justice response and a human rights based approach: the recovery and reflection period (Article 13 of the Council of Europe Anti-Trafficking Convention), that, as analyzed above, has two main purposes: not only it allows the victims to recover and escape the influence of the trafficker, but it also enables them to make an informed decision on whether they are willing to cooperate with the enforcement authorities in a prosecution proceeding against the traffickers. This is the "magic" of the approach of the Anti-Trafficking Convention. The obligations which concern victim protection do not affect negatively the prosecutorial stage; on the contrary, they are designed to make sure that criminal justice authorities are given the best possible chance to secure prosecutions and convictions through the cooperation of victims". [749] This is the essence of a comprehensive approach, and the same Explanatory Report to the Anti-Trafficking Convention recognizes it as such, when it defines the approach of the Convention as *geared towards the protection of victims' rights and the respect for human rights*, and *aiming at a proper balance between matters concerning human rights and prosecution.* [750]

The European Court of Human Rights has an incredibly relevant role in the further development of this comprehensive approach, performed with the method of systemic integration, applying the provisions of the Palermo Protocol and of the Anti-Trafficking Convention (and of the other relevant international instruments) [751] in conjunction with the ones enshrined in the European Convention of Human Rights, such as Article 3 ("Prohibition of torture and inhuman or degrading treatment") and Article 4 ("Prohibition of slavery and forced labour").

Indeed, the method of systemic integration, an interpretative approach laid down in Article 31, para. 3, lit c. of the Vienna Convention on the Law of the Treaties and which views the international legal order as one single system, [752] has the great potential of mitigating the fragmentation of international law with regards to human trafficking and exploitative practices.

---

[749] Anne T. Gallagher, *The International Law of Human Trafficking*, Chapter 2, Paragraph 2.3.2.
[750] Council of Europe, "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings", at para. 29.
[751] For instance, as mentioned, in *Siliadin v. France* the Court reminded that the "striking similarity" between paragraph 3 of Article 4 of the Anti-Trafficking Convention and paragraph 2 of Article 2 of the ILO Convention No. 29 was "not accidental". *See* European Court of Human Rights, *Siliadin v. France* (2005), at para. 116.
[752] Oliver Dörr and Kirsten Schmalenbach (edited by), *Vienna Convention on the Law of Treaties - A Commentary*, second edition (2018): 604.

Thus, the systemic integration approach (or integrative method) enables the European Court of Human Rights to embrace a leading role in the definition of a human rights-based method to combat trafficking, without exceeding its powers under Article 19 ECHR.

In conclusion, the only chance we have against this hideous crime, that violates human rights and constitutes an offence to human dignity, is to give voice to the survivors – or rather, to give them *back* their voce – and to build a comprehensive approach, that entails *both* the prosecution of perpetrators (with the aid of the useful operational indicators) and the protection and social reintegration of the trafficking survivors.

Bibliography

Books and eBooks

Airoma, Domenico; Diotallevi, Giovanni; Ferrara, Calogero; Recchione, Sandra and Venegoni, Andrea (edited by). "Lotta alla tratta di esseri umani: la distinzione tra smuggling e trafficking", in the *Diritto penale e processuale della Ue*. Exeo Edizioni: 2012.

Antolisei, Francesco. *Manuale di Diritto Penale, Parte Speciale – I*. Sixteenth edition, edited by Carlo Federico Grosso. Milano: Dott. A. Giuffrè Editore, 2016.

Chuang, Janie, Gallagher, Anne T. and Haynes, Dina. *Human Trafficking: The Law, Policy, and Practice of Responding to Human Trafficking*. Forthcoming.

di Martino, Alberto. *Sfruttamento del lavoro. Il valore del contesto nella definizione del reato.* Bologna: il Mulino, 2019.

Dörr, Oliver and Schmalenbach, Kirsten (edited by). *Vienna Convention on the Law of Treaties - A Commentary*. Second edition. Berlin: Springer-Verlag GmbH Germany, 2018. ISBN 978-3-662-55160-8 (eBook).

Gallagher, Anne. *The International Law of Human Trafficking.* New York: Cambridge University Press, 2010. https://doi.org/10.1017/CBO9780511761065 (eBook).

Omizzolo, Marco. *Sotto padrone. Uomini, donne e caporali nell'agromafia italiana*. Milano: Fondazione Giangiacomo Feltrinelli, 2019. ISBN: 978-88-6835-360-5.

Pustorino, Pietro. *Lezioni di tutela internazionale dei diritti umani*. Bari: Cacucci Editore, 2019.

Scarpa, Silvia. *Trafficking in human beings: Modern slavery.* New York: Oxford University Press, 2008.

Journal articles, chapters, blogposts, other releases

Cadoppi, Alberto. "Dignità, prostituzione e diritto penale. Per una riaffermazione del bene giuridico della libertà di autodeterminazione sessuale nei reati della legge Merlin". *Archivio Penale* 1 (January-April 2019): 1-43.

Center for the Study of Language and Information, Stanford University. *Stanford Encyclopedia of Philosophy*, "Feminist Political Philosophy", section: "Radical Feminism". First published March 1, 2009, revised October 12, 2018. https://plato.stanford.edu/entries/feminism-political/#RadFem.

Chaumont, Jean-Michel. "L'affaire De La Traite Des Blanches (1880-1881): Un scandale bruxellois?". *Brussels Studies* no. 46 (2011): 1-10.

Chuang, Janie. "Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy". *University of Pennsylvania Law Review* 158 (2010): 1655- 1728.

Cusumano, Emma, and Ryerson, Charity. "Is the California Transparency in Supply Chains Act doing more harm than good?" in *Corporate Accountability Lab* (July 25, 2017). Available at: https://corpaccountabilitylab.org/calblog/2017/7/25/is-the-california-transparency-in-supply-chains-act-doing-more-harm-than-good.

Ditmore, Melissa and Wijers, Marjan. "The negotiations on the UN Protocol on Trafficking in Persons". *Nemesis* no. 4 (2003): 79-88.

Doezema, Jo. "Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiations". *Social & Legal Studies* 14 (2005): 61-89. DOI: 10.1177/0964663905049526.

Eastwood, Sam; Gharibian, Armineh; Ford, James; Pieper, Nadine and Weichbrodt, Johannes. *Germany: Business And Human Rights – Germany Passes Mandatory Human Rights Due Diligence Law* (22 June 2021). Available at: https://www.mondaq.com/germany/human-

rights/1081300/business-and-human-rights-germany-passes-mandatory-human-rights-due-diligence-law.

European Institute for Gender Equality. *What is gender mainstreaming?* (2021). Available at: https://eige.europa.eu/gender-mainstreaming/what-is-gender-mainstreaming.

Gallagher, Anne. "Human Rights and Human Trafficking: Quagmire or Firm Ground - A Response to James Hathaway". *Virginia Journal of International Law* 49, no. 4 (Summer 2009): 790-848. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1409816.

Gawronska, Sylwia. "Organ trafficking and human trafficking for the purpose of organ removal, two international legal frameworks against illicit organ removal". *New Journal of European Criminal Law* 10, No. 3 (2019): 268-286. DOI: 10.1177/2032284419862387.

Halley, Janet, Prabha Kotiswaran, Hila Shamir and Chantal Thomas. "From the International to the local in feminist legal responses to rape, prostitution/sex work, and sex trafficking: four studies in contemporary governance feminism". *Harvard Journal of Law & Gender* 29 (June 2006): 336-423.

Hathaway, James. "The Human Rights Quagmire of 'Human Trafficking'". *Virginia Journal of International Law* 49, no. 1 (2008): 1-59. Available at: https://core.ac.uk/download/pdf/232682194.pdf.

Higgins, Tracy. "Democracy and Feminism". *Harvard Law Review* 110, no. 8 (June 1997): 1657- 1703.

Kosanovich, Kathryn. "The Difference Between Trafficking And Forced Labor". Blog. *Research On Human Trafficking*, 2 April 2021. http://www.kosanovich.net/essays/2017/04/the-difference-between-trafficking-and-forced-labor/.

Kosanovich, Kathryn. "The Difference Between Trafficking And Forced Labour". Blog. *Research On Human Trafficking* (2 April 2021). Available at:

http://www.kosanovich.net/essays/2017/04/the-difference-between-trafficking-and-forced-labor/.

Lammasniemi, Laura. "International Legislation on White Slavery and Anti-Trafficking in the Early Twentieth Century". *The Palgrave International Handbook of Human Trafficking,* Springer International Publishing AG (2020): 67-78. https://doi.org/10.1007/978-3-319-63058-8_112.

Laura Melissa Álvarez, Buitrago Calvo, Laura Daniela, and Guevara, Gerson Fajardo. "Mendicidad ajena como modalidad del delito de trata de personas. Caso embera-chamí". *Revista Virtual Via Inveniendi et Iudicand* 14, No. 1 (2018): 129-156.

LeBaron, Genevieve. "Reconceptualizing Debt Bondage: Debt as a Class-Based Form of Labor Discipline". *Critical Sociology* 40, no. 5 (2014): 763-780. https://doi.org/10.1177/0896920513512695.

MacKinnon, Catharine. "Trafficking, Prostitution, and Inequality". *Harvard Civil Rights - Civil Liberties Law Review* 46 (2011): 271-309.

Martin-Ortega, Olga. "Due Diligence, Reporting and Transparency in Supply Chains. The United Kingdom Modern Slavery Act" in *Business and Human Rights in Europe* edited by Angelica Bonfanti (New York: Routledge, 2019). Series Editor: Paolo Davide Farah, Glawcal. ISBN: 978-1-138-48467-3.

Napier-Moore, Rebecca, Piper, Nicola, and Segrave, Marie. "Editorial: What's in a Name? Distinguishing forced labour, trafficking and slavery". *Anti-Trafficking Review*, issue 5, (2015): 1–9. www.antitraffickingreview.org.

OnuItalia. *UNODC: rapporto su traffico persone punta riflettori su bambini* (2 February 2021). Available at: https://www.onuitalia.com/unodc-rapporto-su-traffico-persone-punta-riflettori-su-bambini/.

Pollastrini, Chiara. *Tratta di esseri umani e sfruttamento lavorativo* (2018): 1-165. Available at: www.altrodiritto.unifi.it.

Renzetti, Claire and Edleson, Jeffrey. *Encyclopedia of Interpersonal Violence*. "Abolitionist Approach to Prostitution". Thousand Oaks: SAGE Publications, 2008. http://dx.doi.org/10.4135/9781412963923.n2.

Savio, Guido. *Le buone ragioni per abrogare il reato di clandestinità: un atto necessario e di onestà* (11 January 2016), in ASGI's website ("*Associazione per gli Studi Giuridici sull'Immigrazione*"). Available at: https://www.asgi.it/notizie/buone-ragioni-abrogare-reato-clandestinita/.

Shoaps, Laura L. "Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act". *Lewis & Clark Law Review* 17, no. 3 (2013): 931-972. Available at: https://law.lclark.edu/live/files/15325-lcb173art6shoaps.pdf.

Shoaps, Laura L. "Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act". *Lewis & Clark Law Review* 17, no. 3 (2013): 931-972. Available at: https://law.lclark.edu/live/files/15325-lcb173art6shoaps.pdf.

Simm, Gabrielle. "Negotiating the United Nations Trafficking Protocol: Feminist Debates". *Australian Year Book of International Law* 23 (2004): 135-160.

Soderlund, Gretchen. "Running from the Rescuers: New U.S. Crusades against Sex Trafficking and the Rhetoric of Abolition". *NWSA Journal*, Autumn, 2005, vol. 17, no. 3, *States of Insecurity and the Gendered Politics of Fear* (Autumn, 2005): 64-87.

Spiezia, Filippo, here as the rapporteur for the Italian Supreme Judicial Council (*Consiglio Superiore della Magistratura*). *La tratta di esseri umani: gli strumenti investigativi di cooperazione internazionale.* Rome: 14 October 2008. Available at: http://briguglio.asgi.it/immigrazione-e-asilo/2009/agosto/art-spiezia-traff-ess-um.pdf.

Stoppioni, Chiara. "Tratta sfruttamento e smuggling: un'ipotesi di *finium regundorum* a partire da una recente sentenza". *Legislazione penale approfondimenti* (24 January 2019).

Tiefenbrun, Susan. “Child Soldiers, Slavery, and the Trafficking of Children”, in *Thomas Jefferson School of Law Legal Studies Research Papers*, Research Paper No. 1020341 (October 2007): 1-86.

Todres, Jonathan. “The Private Sector’s Pivotal Role in Combating Human Trafficking”, 3 *California Law Review Circuit* 80 (2012).

Weitzer, Ronald. “Legal Prostitution: The German and Dutch Models”. *Dual Markets: Comparative Approaches to Regulation* (Springer International Publishing AG, 2017): 365-385. DOI 10.1007/978-3-319-65361-7_24.

Woods, Cindy, “European Approaches to Promoting Responsible Supply Chains”, in *Business and Human Rights in Europe*, edited by Angelica Bonfanti (New York: Routledge, 2019). Series Editor: Paolo Davide Farah, Glawcal. ISBN: 978-1-138-48467-3.

Publications, reports, guidelines, position papers - International Organizations (and relative bodies)

Andrees, Beate. *Forced labour and human trafficking: a handbook for labour inspectors*. International Labour Office (Geneva: International Labour Organization Publications, 2008): 1-61. ISBN: 978-92-2-121321-5; 978-92-2-121322-2 (web pdf).

Council of Europe. *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*. Council of Europe Treaty Series No. 197. Warsaw, 16 May 2005.

Council of Europe. *Gender mainstreaming in thematic areas: Gender equality and trafficking in human beings.* Strasbourg: Council of Europe Publications (2021).

European Commission. *Data collection on trafficking in human beings in the EU*. Luxembourg: Publications Office of the European Union (September 2020).

European Commission. *Data collection on trafficking in human beings in the EU.* Luxembourg: Publications Office of the European Union (September 2020): 1- 243.

Group of Experts on Action against Trafficking in Human Beings. *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Austria - First evaluation round.* Strasbourg, 15 August 2011.

Human Rights Committee – International Covenant on Civil and Political rights, Eighty-ninth session, "Consideration of Reports submitted by State Parties under Article 40 of the Covenant" for Barbados, 12-30 March 2007 (CCPR/C/BRB/CO/3).

International Labour Office. *Explanations for indicators of trafficking for labour exploitation.* Geneva: International Labour Organization Publications, issued on 21 April 2009.

International Labour Office. *Operational indicators of trafficking in human beings. Results from a Delphi survey implemented by the ILO and the European Commission*. Geneva: International Labour Organization Publications, first published in March 2009, revised version of September 2009.

International Labour Organization (ILO). *Trafficking in Human Beings. New Approaches to Combating the Problem* (May 2003), first edition.

International Labour Organization, "What is forced labour, modern slavery and human trafficking", International Labour Organization's website, accessed June 17, 2021. https://www.ilo.org/.

International Labour Organization, *Report of the ILO Committee of Experts on the Application of Conventions and Recommendations,* Report III, Part IB (2020).

Malpani, Rohit. "Legal Aspects of Trafficking for Forced Labour Purposes in Europe", *ILO Special Action Programme to Combat Forced Labour Working Paper* No. 48. (2006).

United Nations High Commissioner for Refugees (UNHCR), *Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime*. Geneva, 11 December 2000.

United Nations High Commissioner for Refugees (UNHCR), United Nations Human Rights Office of the High Commissioner. *Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework.* New York and Geneva: United Nations Publications (2011). Annexed to the Special Representative's final report to the Human Rights Council (A/HRC/17/31).

United Nations International Children's Emergency Fund (UNICEF). *Guidelines on the Protection of Child Victims of Trafficking* (September 2006): 1-48.

United Nations Office of Drugs and Crime, "Abuse of a position of vulnerability and other 'means' within the definition of trafficking in persons", *Issue Paper*, Vienna (2013): 1-95. https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf.

United Nations Office of Drugs and Crime, "Model Law against Trafficking in Persons" (2009): 1-73.

United Nations Office of Drugs and Crime. "Indicators of trafficking" in *Defining the Concept of Trafficking in Persons.* Available at: https://www.unodc.org/e4j/en/tip-and-som/module-6/key-issues/indicators-of-trafficking-in-persons.html (accessed 12 July 2021).

United Nations Office of Drugs and Crime. "The Concept of 'Exploitation' in the Trafficking in Persons Protocol". *Issue Paper*, Vienna (2015): 1-132.

United Nations Office of Drugs and Crime. "The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised". *Issue Paper*. Vienna (2019): 1-43.

United Nations Office of Drugs and Crime. "The role of 'Consent' in the Trafficking in Persons Protocol". *Issue Paper*. Vienna (2014): 1-107.

United Nations Office of Drugs and Crime. *Toolkit to Combat Trafficking in Persons: reflection period and residence permit.* New York: United Nations publications (2008). ISBN 978-92-1-133789-1.

United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons – 2020,* United Nations publication, Sales No. E.20.IV.3 (Vienna, January 2021): 1- 173.

United Nations Office on Drugs and Crime. *About the Blue Heart Campaign* (2021). Available at: https://www.unodc.org/blueheart/en/-about-the-blue-heart.html.

United Nations Office on Drugs and Crime. *Global Report on Trafficking in Persons – 2020*. New York: United Nations publications, Sales No. E.20.IV.3 (January 2021).

United Nations Office on Drugs and Crime. *United Nations Voluntary Trust Fund for Victims of Trafficking in Persons: Basic Facts* (December 2017). Available at: https://www.unodc.org/pdf/human_trafficking/UN_Victims_Trust_Fund_Basic_Facts_Dec2017.pdf.

United Nations, Office of the High Commissioner for Human Rights, *Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2010): 1-255.

Publications and reports – Non-Governmental Organizations

Dottridge, Mike. *Kids as Commodities? Child trafficking and what to do about it.* International Federation *Terre des Hommes* (May 2004): 1-98.

Global Network of Sex Work Projects. *The real impact of the Swedish Model on sex workers*: *Sweden's Abolitionist Understanding, and Modes of Silencing Opposition* (December 2014): 1-10.

May, Channing, for Global Financial Integrity. *Transnational Crime and the Developing World* (2017): 1-148.

Raymond, Janice, and Coalition Against Trafficking in Women et al. *Guide to the New U.N. Trafficking Protocol* (2001). https://catwinternational.org/wp-content/uploads/2019/09/Guide-to-the-New-UN-Trafficking-Protocol.pdf.

Save the Children, concerning the Indian National Human Rights Commission Report, *How children are forced into begging by cartels* (2016). Available at: https://www.savethechildren.in/child-protection/how-children-are-forced-into-begging-by-cartels/.

Releases, reports and blogposts – National Governments

Bellamy, Paul, Research Services Analyst for the New Zealand Parliament's website. *Prostitution law reform in New Zealand* (July 2012). Available at: https://www.parliament.nz/en/pb/research-papers/document/00PLSocRP12051/prostitution-law-reform-in-new-zealand/#footnote_32_ref.

Germany, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth. *Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)* (June 2007): 1- 80.

Italy, Italian Inter-Ministerial Committee for Human Rights (CIDU). *Italian National Action Plan on Business and Human Rights 2016-2021,* approved on 1 December 2016.

Italy, Ministero del Lavoro e delle politiche sociali. *Piano Triennale di contrasto allo sfruttamento lavorativo e al caporalato (2020-2022).* Approved on 21 May 2020.

New Zealand Ministry of Justice. "Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003". New Zealand Government. May 2008.

Swedish Institute. Selected extracts of the Swedish government report SOU 2010/49. *The Ban against the Purchase of Sexual Services*. *An evaluation 1999-2008* (November 2010): 1-56.

U.S. Department of Health and Human Services, Administration for Children and Families, Office on Trafficking in Persons. *Certification for adult victims of human trafficking – fact sheet* (2016).

U.S. Department of Justice, Kamala D. Harris, Attorney General California Department of Justice. *The California Transparency in Supply Chains Act: A Resource Guide* (2015): executive summary (iii).

U.S. Department of State, Office to Monitor and Combat Trafficking in Persons. *Legal Building Blocks to Combat Trafficking in Persons,* §§ 100, 206(a) (2004).

U.S. Department of State, Office to monitor and combat trafficking in persons. *Senior Policy Operating Group Public Awareness and Outreach Committee Guide For Public Awareness Materials (non-binding)*. Available at: https://www.state.gov/senior-policy-operating-group-public-awareness-and-outreach-committee-guide-for-public-awareness-materials-non-binding/. Accessed: September 2021.

Domestic legislation

California, *California Transparency in Supply Chains Act* of 2010. S.B. 657, 2010 Reg. Sess., 2010 Cal. Legis. Serv. Ch 556 (West 2010) (codified at CAL. CIV. CODE § 1714.43).

Germany, *Law on Corporate Due Diligence in Supply Chains* ("*Lieferkettensorgfaltspflichtengesetz*"). Draft approved on 9 June 2021. The Law will enter into force in January 2023.

Italy, Law No. 75, 20 February 1958, "*Abolizione della regolamentazione della prostituzione e lotta contro lo sfruttamento della prostituzione altrui*". In *Gazzetta Ufficiale*, Series No. 55, 4 March 1958.

Italy, Legislative Decree No. 286 of 1998, *Testo Unico sull'Immigrazione*, 25 July 1998.

Italy, Legislative Decree No.228 of 2003, *Misure contro la tratta di persone,* 11 August 2003.

Italy, Law No. 189, July 30, 2002, "*Modifica alla normativa in materia di immigrazione e di asilo*".

Italy, Law No. 67, April 28, 2014, "*Deleghe al Governo in materia di pene detentive non carcerarie e di riforma del sistema sanzionatorio. Disposizioni in materia di sospensione del procedimento con messa alla prova e nei confronti degli irreperibili".*

Italy, Law No. 199 of 29 October 2016, *"Disposizioni in materia di contrasto ai fenomeni del lavoro nero, dello sfruttamento del lavoro in agricoltura e di riallineamento retributivo nel settore agricolo"*.

New Zealand, Crimes Act 1961, Section 98D.

New Zealand, Prostitution Reform Act 2003.

United Kingdom, *Modern Slavery Act*. Eliz. 2, c. 30 (2015), Section 54.

United States of America, National Security Presidential Directive/NSPD-22, *Combating trafficking in persons* (Dec. 16, 2002).
United States of America, Congress of the United States of America, Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

International and regional instruments, agreements, conventions and *travaux préparatoire*s

Procès-Verbaux des Séances, Troisième Séance, Ministère des Affaires Étrangères. *Conférence Internationale pour la Répression de la Traite des Blanches*, Documents Diplomatiques, p. 111 (1902).

"International Agreement for the Suppression of the White Slave Traffic". *United Nations Treaty Series*, vol. 92, p. 19. Signed in Paris, 18 May 1904.

"International Convention for the Suppression of the White Slave Traffic". *United Nations Treaty Series*, vol. 98, p. 101. Signed in Paris, 4 May 1910.

League of Nations, "Slavery Convention". *United Nations Treaty Series,* vol. 212, p. 17. Signed in Geneva, 25 September 1926.

International Labour Organization, "Forced Labour Convention". ILO Convention No. 29. Geneva, 14th ILC session (28 Jun 1930). Entry into force: 1 May 1932.

International Labour Organization, "Abolition of Forced Labour Convention". ILO Convention No. 125. Geneva, 40th ILC session (25 Jun 1957). Entry into force: 17 January 1959.

Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms" (European Convention on Human Rights), *Council of Europe Treaty Series,* No. 5. Opened for signature in Rome on 4 November 1950, entered into force on 3 September 1953.

"Vienna Convention on the Law of Treaties". Concluded at Vienna on 23 May 1969. *United Nations Treaty Series*, vol. 1155, p. 331. Entered into force on 27 January 1980.

Council of Europe, "Council of Europe Convention against Trafficking in Human Organs". *Council of Europe Treaty Series,* No. 216. Santiago de Compostela, 25.III.2015, adopted on 9 July 2014, opened for signature on 25 March 2015.

Council of Europe, “Council of Europe Convention on Action against Trafficking in Human Beings”. *Council of Europe Treaty Series*, no. 197. Signed in Warsaw, 16 May 2005. Entered into force February 1, 2008.

International Labour Organization, “Worst Forms of Child Labour Convention, 1999 (No. 182)”. Adopted in Geneva, 87th ILC session (17 Jun 1999).

League of Nations, “International Convention for the Suppression of Traffic in Women and Children”. *League of Nations Treaty Series*, vol. 9, p. 415. Signed in Geneva, 30 September 1921.

League of Nations. “International Convention for the Suppression of the Traffic in Women of Full Age”. *League of Nations Treaty Series*, vol. 150, p. 431. Signed in Geneva, 11 October 1933.

United Nations General Assembly. “Universal Declaration of Human Rights”. General Assembly Resolution 217 (III) A. Proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

United Nations General Assembly. “Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others”. *United Nations Treaty Series*, vol. 96, p. 271. Approved by the General Assembly of the United Nations in Resolution 317 of 2 December 1949.

United Nations General Assembly. “Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery”. *United Nations Treaty Series,* vol. 266, p. 3. Signed in Geneva, 7 September 1956.

The Hague Conference on Private International Law, “Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters”, concluded 15 November 1965.

United Nations General Assembly. "International Covenant on Civil and Political Rights". *United Nations Treaty Series*, vol. 999, p. 171. Adopted by the United Nations General Assembly on 16 December 1966, Resolution 2200A (XXI).

United Nations General Assembly, "International Covenant on Economic, Social and Cultural Rights". *United Nations Treaty Series*, vol. 993, p. 3. Adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976.

United Nations General Assembly. "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment". *United Nations Treaty Series*, vol. 1465, p. 85. Adopted by Resolution 39/462 of 10 December 1984. Entered into force on 26 June 1987.

United Nations General Assembly. "Convention on the Elimination of All Forms of Discrimination against Women". *United Nations Treaty Series*, vol. 1249, p. 13. Adopted with Resolution 34/180. Opened for signature at the United Nations Headquarters on 1 March 1980. Entered into force on 3 September 1981.

United Nations General Assembly. "Convention on the Rights of the Child". *United Nations Treaty Series*, vol. 1577, p. 3. Adopted by Resolution 44/252 of 20 November 1989. Entered into force on 2 September 1990.

United Nations General Assembly. "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime". *United Nations Treaty Series*, vol. 2237, p. 319. Signed in New York, 15 November 2000.

United Nations General Assembly. "Interpretative notes for the official records (*travaux préparatoire*s) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols". A/55/383/Add.1 (2001): 1-21.

United Nations General Assembly. "Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict". Adopted and opened for signature,

ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002.

United Nations General Assembly. "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families". *United Nations Treaty Series*, vol. 2220, p. 3. Adopted by Resolution A/RES/45/1581 of 18 December 1990. Entered into force on 1 July 2003.

United Nations General Assembly. "United Nations Convention against Transnational Organized Crime". *United Nations Treaty Series*, vol. 2225, p. 209. Adopted by the UN General Assembly with Resolution A/RES/55/25 of 15 November 2000. Opened for signature in Palermo, 12 December 2000. Entered into force on 23 September 2003.

United Nations General Assembly. "Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime". *United Nations Treaty Series*, vol. 2241, p. 507. Adopted by the UN General Assembly with Resolution A/RES/55/25 of 15 November 2000. Opened for signature in Palermo, 12 December 2000. Entered into force on 28 January 2004.

United Nations General Assembly. "Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime". *United Nations Treaty Series*, vol. 2326, p. 208. Adopted by the UN General Assembly with Resolution 55/255 of 31 May 2001. Opened for signature in New York, 2 July 2001. Entered into force on 3 July 2005.

European Parliament and European Council. *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-country Nationals* (16 December 2008).

European Parliament and European Council. *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims and replacing Council Framework Decision 2002/629/JHA* (5 April 2011).

Association of Southeast Asian Nations. “Convention Against Trafficking in Persons, Especially Women and Children”. Entered into force on 23 November 2015.

Jurisprudence

European Court of Human Rights, *Golder v. the United Kingdom*, Application no. 4451/70, 21 February 1975.

European Court of Human Rights, *Siliadin v. France*, Application no. 73316/01, 26 October 2005.

European Court of Human Rights, *Rantsev v. Cyprus and Russia*, Application no. 25965/04, 7 January 2010.

European Court of Human Rights, *C.N. and V. v. France,* Application no. 67724/09, 11 October 2012.

European Court of Human Rights, *L.E. v. Greece,* Application no. 71545/12, 21 January 2016.

European Court of Human Rights (Grand Chamber), *Khlaifia and Others v. Italy,* Application no. 16483/12, 15 December 2016.

European Court of Human Rights, *J. & Others v. Austria*, Application no. 58216/12, 17 January 2017.

European Court of Human Rights, *Chowdury and Others v. Greece*, Application no. 21884/15, 30 March 2017.

European Court of Human Rights, *Güzelyurtlu and Others v. Cyprus and Turkey*, Application no. 36925/07, 29 January 2019.

European Court of Human Rights (Grand Chamber), *S.M. v. Croatia,* Application no. 60561/14, 25 June 2020.

European Court of Human Rights, *V.C.L. and A.N. v. the United Kingdom,* Applications nos. 77587/12 and 74603/12, 16 February 2021.

Italian Constitutional Court, ruling no. 214/2019, of 2 July 2019.

Italian Court of Cassation, Criminal Division, Section III, ruling no. 35776 of 2 September 2004.

Italian Court of Cassation, Criminal Division, Section III, ruling no. 49643 of 22 September 2015.

Italian Court of Cassation, Criminal Division, Section III, ruling no. 14593 of 30 March 2018.

Acknowledgments

In *primis*, vorrei ringraziare il Professor Pustorino, per essere stato un mentore, oltre che un insegnante.
Ringrazio molto anche il Dottor Insolia, per la sua immensa pazienza e per la sua disponibilità.
Un ringraziamento speciale va alla Professoressa Chuang e al sociologo Marco Omizzolo, che, con la loro continua lotta contro il *trafficking* e lo sfruttamento, mi hanno ispirata a dare il mio piccolissimo contributo.
Ringrazio la mia famiglia, alla quale devo veramente tutto, e i miei amici, che sono stati la mia luce in questi mesi molto intensi.
Infine, un grazie a tutti coloro che ho avuto la fortuna di incontrare nel mio percorso e che, consapevolmente o meno, mi hanno insegnato qualcosa.