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The Challenges of Prosecuting Cases of Trafficking in Persons

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RESUMO: O presente artigo é fruto de pesquisa, realizado no âmbito do mestrado em direito internacional criminal (LL.M pela UNICRI e Universidade de Turim), sobre os desafios relativos à investigação, acusação e instrução criminal de processos de tráfico humano.

São analisadas no presente estudo as obrigações positivas dos Estados decorrentes de diversos processos julgados pelos tribunais internacionais.

Existe um silêncio legislativo e uma brecha judicial que necessita ser discutida. O crime de tráfico humano, quer este seja através de exploração sexual, laboral, escravatura ou práticas similares tais como "crianças-soldados", casamentos forçados, ou tráfico de órgãos, deve ser uma prioridade do Tribunal Criminal Internacional.

É imprescindível assegurar que justiça será aplicável aqueles que se encontram escondidos à vista desarmada e que as vítimas de tráfico humano tenham oportunidade de contar a sua história.

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Quais os problemas e questões implícitas que continuam por responder e a conduzir a processos de instrução ineficazes? Quais os fatores que, não obstante a devida transposição para os sistemas jurídicos nacionais de disposições internacionais, justificam a inobservância dos preceitos legais por parte dos agentes de autoridade em diversas partes do mundo?

Quais são os condicionalismos inerentes a obstrução de justiça interligado com crime organizado e tráfico humano?

O Protocolo de Palermo é considerado a nível internacional como a convenção de referência para a comunidade internacional na matéria de combate ao tráfico humano. O intuito dos 128 estados contraentes ao ratificar a referida convenção foi suprimir o flagelo do tráfico humano através da implementação de medidas preventivas, nomeadamente, a abertura de processos de investigação e, inter alia, instrução criminal.

São analisadas no presente estudo as obrigações positivas dos Estados decorrentes de diversos processos julgados pelos tribunais internacionais.

De facto, existe um silêncio legislativo e uma brecha judicial que necessita ser discutida.

O crime de tráfico humano, quer este seja através de exploração sexual, laboral, escravatura ou práticas similares tais como "crianças-soldados",

(*) Trabalho apresentado em 04-07-2016 no âmbito do *Master of Laws* (LL MM) 2015-2016 in international crime and justice do Department of Law da Universidade de Turim e do United Nations International Crime and Justice Research Institute (Supervisor: Dr. Cindy Smith). O presente texto é publicado na língua original em que foi apresentado (inglês).

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Afinal, a lei serve o seu propósito quando aplicável e aplicada.

O presente artigo apresenta soluções que deverão ser equacionadas pelos Estados para combater a ineficaz investigação, acusação e instrução processual de crimes de tráfico humano.

Foreword and Acknowledgements

“Speak up for the people who have no voice, for the rights of all the down-and-outers. Speak out for justice! Stand up for the poor and destitute!” Proverbs 31:8-9

To the persons trafficked who have been hidden in plain sight without justice being served.

To my family and friends for your (always) steadfast support.

Introduction

“Trafficking in human beings, with the entrapment of its victims, is the modern form of the old worldwide slave trade. It treats human beings as a commodity to be bought and sold, and to be put to forced labor, usually in the sex industry but also, for example, in the agricultural sector, declared or undeclared sweatshops, for a pittance or nothing at all. Most identified victims of trafficking are women but men also are sometimes victims of trafficking in human beings. Furthermore, many of the victims are young, sometimes children. All are desperate to make a meager living, only to have their lives ruined by exploitation and rapacity.”¹

Trafficking in human beings is a violation of human rights as it violates human dignity and personal integrity. It takes place at a national and transnational environment, linked or not to organized crime for purposes of exploitation.

¹ Council of Europe, *Convention on action against trafficking in human beings and its explanatory report*, American Society of International Law, *International Legal Materials*, Vol. 45, No. 1 (January 2006), at 28

Prof. William Schabas, quoting Jean-Jacques Rousseau, further acknowledges the inhumanity of trafficking in persons: “*Dire qu’un homme se donne gratuitement, c’est dire une chose absurde et inconcevable; un tel acte est illégitime et nul, parce que celui qui le fait n’est pas dans son bon sens. Dire la même-chose de tout un peuple, c’est supposer un peuple de fou : la folie ne fait pas droit.*”²

Over the last decade, the issue of human trafficking has moved from the margins to the mainstream of international legal and political discourse. “*The donor community and local and international NGOs also have aggressively worked on the problem. The media has increasingly focused on trafficking throughout the world, drawing attention to the horror of this human rights abuse. Nonetheless, trafficking remains ill-defined and efforts to combat it have floundered.*”³

Experience has shown that international cooperation and cooperation with civil society together with regional legal instruments valuably reinforces action at world level.

There is an utmost added value of understanding the importance of prosecuting cases of trafficking in persons as a form of prevention and attending to what we mean when we talk about human trafficking, sexual exploitation, forced labor or services, slavery or practices similar to slavery as it is the case of child soldiers, debt bondage or forced marriages, servitude or removal of organs.

The purpose of this research paper is to highlight the overall challenges of prosecuting cases of trafficking in persons, in particular, identify barriers to successful prosecution whilst attempting to suggest appropriate methods to overcome it. In order to do that, this essay will begin by identifying the definitional, sociological, judicial and legal obstacles that hinder the development of an efficient prosecution of “modern slavery”.

This paper will then describe the basic features of the *modus operandi* of trafficking in persons, in particular the trends, patterns and flows, as well as

2 Prof. William A Schabas, “*The European Convention on human Rights, A commentary*”, First Edition, Oxford University Press (2015), at 201

3 David E Guinn, *Defining the Problem of Trafficking: The Interplay of US Law, Donor, and NGO, Engagement and the Local Context in Latin America*, Human Rights Quarterly, Vol. 30, No. 1, (Feb., 2008), at 121

other associated crimes used and identify efforts to address the problem, highlighting, in particular, the role played by the duty of care on States to prosecute.

This study aims at providing an insight into what is known regarding prosecution of trafficking in persons.

The current criminal justice responses do not seem to be given in an adequate and timely manner.

To further tailor the criminal justice responses, knowledge on the obstacles and challenges to an accurate prosecution of cases of trafficking in persons needs to be refined.

There is an important role reserved for both domestic courts and local law enforcement, which must be embedded with a simultaneous increase of international cooperation and the implementation of specialized investigation as well as judicial and prosecutorial specialists.

I. BACK TO BASICS

I.1. Defining trafficking in persons. The relevant legal framework

Despite the fact that slavery has been officially abolished for more than 150 years, people are still treated in a degrading and inhumane manner, being trafficked for exploitation purposes, treated as objects for an easy profit, humiliated and abused, forced to work through mental, physical, economic or social coercion with no or little financial compensation.⁴

The United Nations Convention against Transnational Organized Crime (“UNTOC”), adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. UNTOC is further enhanced by three Protocols, which target specific crimes: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“Palermo Protocol”); the Protocol against the smuggling of Migrants by Land, Sea and Air (“Smuggling Protocol”); and the Protocol against the Illicit

⁴ Parliamentary Assembly of the Council of Europe, *“Domestic slavery: servitude, au pairs and ‘mail-order brides’; Recommendation 1663”*, (2004), cited in ECtHR *“Siliadin v. France”*, of 26 July 2005, No 7331/01, para 49

Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

Trafficking in persons is defined in international law by the Palermo Protocol.

Article 3(a) of the Palermo Protocol defines trafficking in persons as the combination of three cumulative essential elements:

1. the action of: "*recruitment, transportation, transfer, harboring or receipt of persons*";

2. 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*";

3. for the purpose of exploitation, which includes "*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*".

The definition of trafficking in persons encompasses both the bringing of a person into exploitation and the maintenance of that persons in a situation of exploitation, hence, it is equally difficult to identify a trafficker who would not fall within its scope.⁵

The *travaux préparatoires* contain a curious interpretative note to the effect that illegal adoption will fall within the scope of the Palermo Protocol where it amounts to a "*practice similar to slavery*" under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 ("Supplementary Slavery Convention"). In the opinion of Dr. Anne Gallagher⁶, the stealing, buying and selling of children for adoption is even more readily identifies with practices commonly associated with trafficking. Unfortunately, the legal aspects of that link have not been explored in any great depth. For example, the United Nations Office

⁵ Dr. Anne T Gallagher, "*The international law of human trafficking*", Cambridge University Press, (2010), at 47

⁶ *Ivi*, (2010), at 36 to 42

of Drugs and Crime (“UNODC”) states that *“illicit adoption practices (...) can be prosecuted under the umbrella of trafficking crimes”*⁷.

While the scope of the Protocol is limited to trafficking with a transnational element perpetrated in connection with organized criminal groups, the regional conventions apply equally to domestic trafficking and dispense the need for an organized crime element. Furthermore, the *travaux préparatoires* assert that States *“do not have to include in their criminalization (...) the elements of transnationality and involvement of an organized criminal group”*⁸

The Council of Europe Convention on Action against Trafficking in Human Beings (“Council of Europe Trafficking Convention”), as well as the South Asian Association for Regional Cooperation Convention on Combating Trafficking in Women and Children Prostitution (“SAARC Trafficking Convention”), extend the scope of its respective application to *“all forms of trafficking in human beings, whether national or transnational, whether or not connected with organized crime”*.

*“Furthermore, trafficking in human beings does not necessarily involve a transnational element; it can exist at national level.”*⁹ In fact, while the aim of smuggling of migrants is the unlawful cross-border transport in order to obtain, directly or indirectly, a financial or other material benefit, the purpose of trafficking in human beings is exploitation whether it is transnational or internal.

When comparing the definition above with others from earlier United Nations (“UN”) documents, one notices that in the Palermo Protocol opted for the recognition of trafficking for purposes beyond prostitution, stressing that other purposes should not be limited to forced labor.¹⁰

7 UNODC, *“Anti-Trafficking Practitioners Manual”*, Module 1, (2009), at 7

8 UNGA, *“Interpretative Notes of the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto”*, UN Doc A/55/383/Add. 1, (2000), para 59

9 Council of Europe, *supra* note 1, at 29

10 United Nations High Commissioner for Human Rights (“UNHCHR”), *“Informal note by the United Nations High Commissioner for Human Rights”*, UN DOC A/CN.254/4/1, (1999), at 12

As established by the Palermo Protocol, an offense would only be qualified as trafficking in persons in case all three elements are met: action, means and purpose.

Nonetheless, regarding children, meaning a person under 18 years of age as per Article 3(d) of the Palermo Protocol, it is to be regarded as trafficking in persons the action of recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation even if it does not involve any of the means listed in Article 3(a) of the Palermo Protocol.

The Palermo Protocol also clarified that the consent of the victim is irrelevant when obtained by a prohibited means as per Article 3(a).

Furthermore, as mentioned in the *travaux préparatoires* a position of vulnerability is any situation in which the person has no real and acceptable alternative.¹¹ In this respect it is important to precise that the abuse of a position of vulnerability may be considered as the exploitation of any situation in which the person has no real and acceptable alternative but to be subjugated to such abuse. The said vulnerability may be physical, psychological, emotional, family-related, social or economic and may, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. *“In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce.”*¹²

Based on my own experience as a volunteer for an NGO in India, I have found that the cast system in India is one of the causes of trafficking. Frequently in India someone would share with me life stories similar to Shyama's story:

“We are Bedni's and are expected to be available to all, anytime, day in and day out” is what Shyama (sexually exploited bedia women) told me, when I was discussing about their community in their village Salai of Rajgarh District in Madhya Pradesh. Bedia, a denotified tribe, now schedule caste, is known for

11 Sarah Krieg, *“Multilevel Regulation against Trafficking in Human Beings, A Critical Application Analysis of International, European and German Approaches”*, Nomos Verlagsgesellschaft, (2014), at 98

12 Council of Europe, *supra note 1*, at 40

*community-based prostitution, having history to justify as to how they got social sanction. The element of exploitation is loud in their community, which is accepted as norm in the stratified society*¹³

Similarly, in Nigeria, traffickers use Juju rites in the recruitment phase as a mean of coercion. *“The belief in the power of the juju ritual as well as threats to family members back home normally secure the loyalty of the victims”*.¹⁴

Juju is a traditional religious belief of the Yoruba people of Southwest Nigeria on the spirit world affecting the everyday life and it is predominantly practiced in the Edo state and the River Niger Delta region. Juju was originally created by the early Europeans and it has its origins in the French word *joujou*, meaning toy or plaything. Juju refers to a small object that is believed to contain energy that brings luck and protection. The early Europeans mistakenly understood these objects to be the focus of worship and named the religious belief as juju.¹⁵

The vulnerability of the victim is therefore a substantial push factor.

The Palermo Protocol obliges States Parties to enact legislation necessary to criminalize trafficking in persons as defined by the Protocol. Such domestic legislation has also been supplemented by the instruments of regional bodies.

When referring to the definition of trafficking in persons and its legal framework, we should be aware of the *“international instruments that have a contribution to make in combating trafficking in human beings and protecting its victims”*.¹⁶

Among UN instruments the following can be mentioned: the Forced Labor Convention (No. 29) of 28 June 1930; the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 2 December 1949; the Convention relating to the Status of Refugees of 28 July 1951 and its Protocol relating to the Status of Refugees; the Convention on the Elimination of All Forms of Discrimination

13 Veerendra Mishra, *Combating Human Trafficking: Gaps in Policy and Law*, SAGE Publications India, (July 2015), at 201

14 UNODC, *Global Report on Trafficking in Persons*, United Nations Publication, (November 2014), at 56

15 See Anti-Trafficking Consultants: <http://www.antitraffickingconsultants.co.uk/tactics/>, last accessed 12 June 2016

16 Council of Europe, *supra note 1*, at 29

against Women of 18 December 1979; the Convention on the Rights of the Child of 20 November 1989; the International Labor Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor of 17 June 1999; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 May 2000.

Article 7(1)(c) of the Rome Statute of the International Criminal Court (“ICC Statute”) identifies “*enslavement*” as a crime against humanity when committed as part of a widespread or systematic attack against any civilian population with knowledge of the attack. The ICC Elements of the Crime establish that “[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”. A footnote explains that such “*deprivation of liberty may, in some circumstances, include exacting forced labor or otherwise reducing a person to a servile status as defined in the [Supplementary Slavery Convention]. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.*”. Therefore, the ICC Elements of the Crime expand the enslavement scope of application to certain practices not intrinsic to slavery, under certain circumstances.¹⁷

A number of soft law instruments also operate in relation to trafficking in persons.

Considering the European framework, which is consistent with the Palermo Convention’s definition of trafficking, the European Union has released a number of guidance documents supporting European Union Directive 2011/36/EU including the EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, the EU Rights of Victims of Trafficking in Human Beings, the Stockholm Programme and the Ouagadougou Action Plan.

UN agencies have also published a number of guidance documents on the subject to assist states in the drafting and implementation of anti-trafficking legislation. The UNODC Compendium on Best Practices on Anti-Human Trafficking by Law Enforcement Agencies was produced in

¹⁷ Dr. Anne T Gallagher, *op. cit.*, (2010), at 185

collaboration with the Government of India and advocates a holistic approach to trafficking, incorporating the three “Ps” of prevention, protection and prosecution with the victim protection being central. The U.S. Secretary of State has added a fourth “P”: partnership.¹⁸

Finally, domestic trafficking laws play a crucial role in the accurate prosecution of trafficking in persons and vary widely on the conduct criminalized.

As an example, while Portugal¹⁹ defines and prohibits trafficking in persons for both forced labor and commercial sexual exploitation and prescribes penalties of three to twelve years’ imprisonment – which are sufficiently stringent and commensurate with those for other serious crimes, India²⁰ limits the offence of trafficking in persons to the recruitment, transport, transfer, harboring or receipt of a person for the purpose of prostitution without defining trafficking in persons, and prescribes a maximum penalty of seven years’ imprisonment on the first offence.

I. 2. Modus operandi of trafficking in persons: trends, patterns and flows

“Trafficking is a fluid phenomenon responding to market demands, weakness in laws and penalties, and economic and development disparities”²¹.

Dr. Anne Gallagher recalls that trafficking in persons is present throughout the world and used with different exploitation purposes. She gives several examples such as: South Asia’s debt bondage system, African’s chattel slavery, the sale of children into prostitution by their parents, Australian’s sex industry (where Thai and Korean women are held in debt bondage), Russian’s construction sector (where thousands of workers from Tajikistan and Kyrgyzstan are abused and deceived), Thailand’s fishing boats (where Burmese and Cambodian men are isolated and exploited for long periods of time without being paid the wages they were led to expect), Bali’s brothels and Jakarta’s private homes (to which Indonesian girls and young women

18 U.S. Department of State, Diplomacy in Action, <http://www.state.gov/j/tip/4p/partner/>, last accessed 12 June 2016

19 Article 160 of Portuguese Criminal Code

20 Section 5A of India’s Immoral Traffic Prevention Act

21 Trafficking in Persons Report (10th Ed.), Diane Publishing, (2010), at 103

have been sent or lured with promises of a better life), Cote d'Ivoire's cocoa farms (where traffickers are profiting through the almost zero-cost labor of child workers from Mali), Thailand's beaches (where children are procured for sexual exploitation by foreign "tourists") and North America's private households (where Guatemalan maids sleep on the floor and are not allowed outside).²²

Very often women are deceived by false promises of employment as models, dancers, waitresses, nannies, but when they arrive in the destination country, the women are sold into either the commercial sex or labor industries, or even if they gave their consent to work in the sex or labor industry the factual working conditions would not be those promised by their recruiters, women are kidnapped and/or drugged or, in certain cultures, sold by their parents or husbands.²³

Based on a three-year global study of sex trafficking, researchers noted that "*Latin America is the traffic market of the world.*"²⁴ In fact, despite the fact that current estimations suggest that the largest sources of trafficking victims are from South and Southeast Asia and the former Soviet Union, trafficking appears to be increasing in Latin America and the Caribbean.²⁵

According to "*Traffic statistic project*", developed by UN Educational, Scientific and Cultural Organization ("UNESCO"), both for *trans* and *intra* borders trafficking, 2.44 million people are annually trafficked, of which 43% for sexual exploitation, 32% for labor exploitation, 25% for a mixture of both. Minors being trafficked are estimated around 1.2 million²⁶. Please also refer to Fig. 1 of Annex I regarding the trafficking in persons by region of detection (2010-2012).

With regard to distribution of domestic, regional and trans-regional flows, as share of the total number of trafficking flows, between 2007-2010, trans-continental victims trafficked across different regions are 24%,

22 Dr. Anne T Gallagher, *op. cit.*, (2010), at 48

23 Kelly Hyland, "*Protecting Human Victims of Trafficking: An American Framework*", 16 Berkeley's Women's L.J. 29, (2001), at 39

24 Wilson Harris, *Human Merchandise: A study of International Traffic in Women*, London, E. Benn, (1928), at 187

25 David E. Guinn, *op. cit.*, (Feb., 2008), at 120

26 See <http://www.unescobkk.org/culture/cultural-diversity/trafficking-and-hiv-aids-project/projects/trafficking-statistics-project/data-comparison-sheet/>

domestic victims trafficked within the same country 27%, and at a regional level the data are divided into a great majority of people being trafficked within the same sub-region (cross-border) (45%) and a residual 4% from the nearby sub-region.²⁷

Considering the above data, one could conclude that the phenomenon of transnational human trafficking occurs in a global market where “push factors” and “pull factors” operate on the actors.

Scholars and legislators frequently utilize a set of explanations for trafficking, which contain an interlink set of “push and pull” factors: economic, social and political. These factors have been identified not only for potential victims but also for criminal networks, as shown in Fig. 4 and Fig. 5 of Annex I, respectively.

“Push factors” are the conditions of life that exert pressure on individuals, frustrating their ability to pursue fundamental goals. The cause of social vulnerability and the demand for sexual services and cheap labor can be seen as the kind of attempt to address the root causes of trafficking in persons such as poverty, social status, gender discrimination and family dysfunction.²⁸ These “push factors” are acutely interrelated and a single individual may be subject to multiple “push factors”, which make them to be vulnerable to traffickers.

Trafficking in persons has, indeed, a stronger gender element that has a bearing on the issues arising herein. As Fig. 1 of Annex I demonstrates, the victimization profile for trafficking in persons is comprised of: 49% of women and 70% of women and girls together.

As mentioned earlier, some women have accepted to work voluntarily, seeking to improve their situation or escaping poverty and hardship, but deceived regarding the working conditions, or even lured by their employers, agencies or other intermediaries, or have been debt-bonded or abducted, raped and trafficked. Once working (or married to a ‘consumer husband’),

27 UNODC, Global report on trafficking in persons, New York, 2012, see https://www.unodc.org/documents/data-and-analysis/glotip/GLOTIP_2014_full_report.pdf

28 Dally Cameron and Edward Newman, “*Trafficking in Humans: Structural Factors*”, in Sally Cameron and Edward Newman (eds), “*Trafficking in Humans: Social, Cultural and Political Dimensions*”, United Nations UP (2008), at 21-57

however, they are vulnerable and isolated. This creates ample opportunity for abusive employers or husbands to force them into domestic slavery.²⁹

“Pull factors” are those conditions which encourage intra or inter-state movement, such as an attractive economic disparity in another state.

Recruiters are usually extremely skilled at gaining the trust of victims in order to manipulate them. Often, recruiters are selected to perform this function because of their potential appeal to potential victims. *“There is no concrete image of who or what is behind modern trafficking networks. Potential candidates could be organized crime or dual role of the affected persons as victims and perpetrators.”*³⁰

Poverty can also be read as an assumption about migration as a ration economic action in the classic push-pull migration model, which sidelines non-economic and systematic factors.³¹ As explained by the Commission to the Proposal for the Short-Term Residence Permit Directive, trafficking in persons and smuggling of migrants are *“two odious forms of [the]more general problem”* of illegal migration, and addressing both at the same time promises to be more effective.³² It is also understood that factors influencing migration are more complex than poverty and that many people are willing to accept trafficking as a transitional period to better social conditions.³³ *“Empirical research has shown that migration processes often include the active engagement of the migrant as well as coercive elements. Although a migrant has actively engaged in crossing a border undocumented, he or she can end up in exploitative working conditions.”*³⁴

I.3. UNODC and the Palermo Protocol: role and responsibilities

29 Parliamentary Assembly of the Council of Europe, *supra* note 4, cited in ECtHR *“Siliadin v. France”*, of 26 July 2005, No 7331/01, para 49

30 Sarah Krieg, *op. cit.*, (2014), at 344

31 *Ivi*, at 194

32 Commission, *“Explanatory Memorandum to the Proposal for the Short-Term Residence Permit Directive”* COM (2002) 71 final, at 6

33 John Davies and Benjamin Davies, *“So if You are Not “Natasha”, Who are You?: Revealing the Other Trafficked Women and their Uses”*, in Tiantian Zheng (ed), *“Sex Trafficking, Human Rights and Social Justice”*, Routledge (2010), at 215-232

34 Sarah Krieg, *op. cit.*, (2014), at 221

The Palermo Protocol is often criticized by the so-called human rights approaches for taking a law enforcement approach that prioritize the state's interest. However, the Palermo approach addresses multiple aspects of the representation of trafficking in persons: using criminal law to treat the problem, defining organized crime as the cause and promoting international cooperation.³⁵

The obligation to criminalize trafficking in persons when committed intentionally is established by Article 5 of the Palermo Protocol and is an essential and binding legal provision. Under certain conditions, State Parties are also obliged to criminalize attempt to commit such an offence as well as participation as an accomplice or even obstruction of justice.³⁶

An accurate domestic prosecution depends on the legal nature and binding force of the instrument. Therefore, States Parties have to adequate their criminal codes by introducing appropriate criminal penalties for trafficking in persons to the criminal offences established by the Palermo Protocol as well as by the Council of Europe: Convention on action against trafficking in human beings. *“This was necessary because the principle of nulla poena sine lege and the lack of horizontal effects of either directive or framework decisions, placed limits on introducing new crimes through interpretation alone.”*³⁷

Article 9(4) of the Palermo Protocol attributes States Parties with the responsibility to *take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.*

The Impact Assessment demonstrates that one of the reasons for ineffective prosecution and investigation is the fact that Member States do not make use of investigative tools typically applied in organized crime cases (such as phone tapping, electronic surveillance and financial investigation).³⁸

35 Ivi, at 130

36 Dr. Anne T Gallagher, *op. cit.*, (2010), at 79

37 Sarah Krieg, *op. cit.*, (2014), at 152

38 Commission, *“Staff Working Document, Accompanying document to the Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA”* (Impact Assessment) SEC (2009) 358, at 10

The assessment urges law enforcement authorities not to treat trafficking cases as illegal migration or prostitution, but as serious and organized crime.³⁹

It is usual that the same factual situation of trafficking in persons can lead to criminal investigations and prosecutions in multiple jurisdictions.⁴⁰ Article 10 of the Palermo Protocol encourages States Parties to cooperate with one another, “*as appropriate*”. It is widely accepted that informal cooperation mechanisms as well as more traditional legal instruments are important tools to eliminate “safe havens” for traffickers, thus, allowing States to meet their obligations with respect to criminalization, investigation, and prosecution of trafficking cases.⁴¹

When it comes to violations of *jus cogens* norms (including those related to trafficking in persons), it is acknowledged that the obligation to extradite or prosecute (*aut dedere aut judicare* or *aut dedere aut prosequi*) applies to all States as a matter of international customary law.

Article 11 of the Palermo Protocol directly imposes border control measures in order to prevent and detect trafficking in persons. However, such imperative measures (which should be adequate to international commitments in relation to free movement of people) do not shift the core concern of trafficking in persons from serious criminal infringement of human rights to a problem of illegal immigration.⁴²

Mr. Yury Fedotov⁴³ notes that UNODC has an important role to accomplish regarding the fight against trafficking in persons by providing an overview of patterns and flows of human trafficking at the global, regional and national levels, consequently compelling countries to respond more effectively to this crime.⁴⁴

In fact, UNODC has helped to develop legislation in many countries. As mentioned above, without specialized human trafficking laws, which include the full definition of trafficking in persons under Article 3(a) of the Palermo

39 *Ivi*, at 26

40 Dr. Anne T Gallagher, *op. cit.*, (2010), at 404

41 Dr. Anne T Gallagher, *op. cit.*, (2010), at 404

42 Sarah Krieg, *op. cit.*, (2014), at 178

43 Executive Director of United Nations Offices on Drugs and Crime

44 UNODC, *supra note 14*, at 1

Protocol, trafficking victims are subjected to greater uncertainties while traffickers face reduced risks and penalties.

In 2006, UNODC offered Armenia, Lebanon and South Africa assistance in drafting anti-human trafficking legislation. Criminal justice officials from Burkina Faso, Ghana, Nigeria, Togo, Ukraine and South Africa received specialized training, while assisting NATO in training its senior officials to combat trafficking in persons, as well as, providing computer-based training modules in Thailand. UNODC also trained police, border guards, prosecutors, judges and NGO staff in many countries, including Afghanistan, Burkina Faso, Finland, Ghana, Laos, Moldova, Nigeria, South Africa, Ukraine and Vietnam.⁴⁵

Additionally, UNODC has issued a series of training manuals and “toolkits” to combat trafficking in persons, such as “*Training Manual: Assistance for the Implementation of the ECOWAS Plan of Action Against Trafficking in Persons*”⁴⁶ and “*Toolkit to Combat Trafficking in Persons – Global Programme against Trafficking in Human Beings*”.⁴⁷

II. IDENTIFYING CHALLENGES FOR A SUCCESSFUL PROSECUTION

II.1. Prosecution as a form of prevention of trafficking in persons?

The Palermo Protocol’s specific purpose is to “*prevent, suppress and punish trafficking in persons*”. In this context, prevention means the positive measures, aimed to stop future acts of trafficking from occurring, that include: (i) the decrease vulnerability of potential victims, and (ii) increase the risk to traffickers of apprehension and prosecution.⁴⁸

The Commission on Impact Assessment to the Council Framework Decision on preventing and combating trafficking in human beings, and

45 <https://www.unodc.org/unodc/en/human-trafficking/prosecution.html?ref=menuaside>, last accessed at 22/06/2016

46 UNODC, “*Training Manual: Assistance for the Implementation of the ECOWAS Plan of Action Against Trafficking in Persons*”, (2006), https://www.unodc.org/documents/human-trafficking/ecowas_training_manual_2006.pdf, last accessed 22/06/2016

47 UNODC, “*Toolkit to Combat Trafficking in Persons – Global Programme against Trafficking in Human Beings*”, (2008), https://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf, last accessed 22/06/2016

48 Dr. Anne T Gallagher, *op. cit.*, (2010), at 125

protecting victims (“Impact Assessment”) defined prosecution as one of the operational objectives for the new Council of Europe Trafficking Convention, through: (a) imposing effective, proportionate and dissuasive penalties; (b) facilitating victims’ cooperation; (c) removing obstacles to international cooperation and generalizing the use of investigative tools; and (d) facilitating the prosecution of traffickers when the offence has been committed out of the territory of the State.⁴⁹

The Palermo Protocol has been praised for treating affected persons as victims instead of offenders (of anti-prostitution or immigration regulations)⁵⁰. But is justice is being served for the victims of this “modern slavery”? Are criminals liable to sanctions that take into account the gravity of this offence?⁵¹

Although a large number of countries already have a solid legal framework regarding trafficking in persons, the number of convictions has remained at a very low level. The low rate of convictions in cases of trafficking in persons can be further attested by the analysis of Fig. 2 of Annex I. It shows that 15% of the 128 countries covered by the data collection for the UNODC Global Report on Trafficking in Persons (2014) did not have a single conviction during the reporting period of 2010-2012, while 26% recorded only a number less than ten convictions, another 26% reported a number of convictions between 10 and 50 and 16% noted a number of conviction higher than 50%.

From the analysis of the data collected from *Sherloc* data base on case law from UNODC⁵², it is easy to infer that the efforts of the international societies have so far failed to move towards to an efficient prosecution of cases of trafficking in persons.

With respect to the applicability of international criminal law, the first ICC case, *Prosecutor v. Thomas Lubanga Dyilo*⁵³, convicted Mr. Lubanga for

49 Commission, *supra note 38*, at 19

50 Sarah Krieg, *op. cit.*, (2014), at 108

51 Article 11(1) of UNTOC

52 Please refer to the statistics provided by UNODC in Annex I, Fig. 3, <https://www.unodc.org/cld/v3/sherloc/cldb/index.html?lng=en>, last accessed 16/06/2016

53 ICC, “*Prosecutor v. Thomas Lubanga Dyilo*”, ICC-01/04-01/06, 14 March 2012

the war crimes of enlisting and conscripting child soldiers, which, in my opinion, falls within the scope of Article 3(a) of the Palermo Protocol.

Similarly, the US State Department's 2007 report also concluded that the unlawful recruitment of children through force, fraud or coercion of children in conflict areas to be sexual or labor exploited is an exceptional and severe form of trafficking in persons. The perpetrators could be government forces, paramilitary organizations, and rebel groups. The trafficked child soldiers are frequently treated as objects and subject to inhumane treatment, hence, those that survive are often bearers of psychological wounds, irreparable traumas and are often rejected by their home communities.⁵⁴

Dr. Benjamin Ferencz⁵⁵ noted the significance of the Court's landmark first case: "[w]hat makes this court so distinctive is its primary goal to deter crimes before they take place by letting wrongdoers know in advance that they will be called to account by an impartial international criminal court. The law can no longer be silent but must instead be heard and enforced to protect the fundamental rights of people everywhere."⁵⁶

The Author paraphrases the wise words of Dr. Ferencz regarding the importance of prosecution, and especially international prosecution, as a tool at the disposal of national and international authorities to prevent and combat trafficking in persons. Be that as it may, it is my opinion that, if in the case of *Prosecutor v. Thomas Lubanga Dyilo*, the Court upheld a conviction for war crime that falls within the scope of the Palermo Protocol, in the case of *Prosecutor v. Germain Katanga*⁵⁷, "even though there was sufficient evidence and known instances, forced marriage was not charged due to lack of international jurisprudence and independent recognition of forced marriage as a crime against humanity".⁵⁸

54 US Department of State, "Trafficking in Persons Report", June 2007, available at <http://www.state.gov/documents/organization/82902.pdf>, last accessed 21/06/2016, at 24

55 Former Prosecutor in the Nuremberg Trials and Special Counsel to the Office of the Prosecutor

56 ICC, "*Prosecutor v. Thomas Lubanga Dyilo*", ICC-01/04-01/06, 14 March 2012, Dr. Benjamin Ferencz, "*Office of the Prosecutor's Closing Statements*", at para 50 and 51

57 ICC, "*Prosecutor v. Germain Katanga*", ICC-01/04-01/07, 7 March 2014

58 Elena Gekker, "*Rape, Sexual Slavery, and Forced Marriage at the International Criminal Court: How Katanga Utilizes a Ten-Year-Old Rule but Overlooks New Jurisprudence*", *Hastings Women's Law Journal*, Volume 25, Issue 1, Article 7, (2014), at 106

Nevertheless, not only should forced marriage, meaning the imposition of a forced conjugal relationship through force or threat of force, coercion, abuse of power or vulnerability, be considered as a crime against humanity but also as a “*practices similar to slavery*”, within the meaning of Article 3(a) of the Palermo Protocol.

Despite the evidence in several cases judged in International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”), the only *ad hoc* or international criminal tribunal that has thus far actively prosecuted and independently addressed the issue of forced marriage is the Special Court for Sierra Leone (“SCSL”), which, in 2008, recognized forced marriage as a distinct crime falling under “other inhumane acts”, as part of crimes against humanity.⁵⁹

A State, or an international Court, that fails to investigate any cases of trafficking in persons, to protect the trafficking victims or to prosecute the perpetrators when there is reliable evidence available of the existence of trafficking in persons, will certainly fail the due diligence test.⁶⁰

II.2. Specific duty of care on States to prosecute – some reflections on judgements from International courts

Under international law, it is foreseen that State responsibility arises when an international wrongful act has occurred considering that such act (or omission) is attributable to the State under international law and that such act (or omission) constitutes a breach of international obligations of that State.

Regarding trafficking in persons, there are positive obligations attributable to the State Parties which violation(s) would constitute a breach(es) of the applicable international conventions.

There are several components of the positive obligations established by the Palermo Protocol, the Council of Europe Trafficking Convention and the European Convention on Human Rights.

59 SCSL, “*Prosecutor v. Brima, Kamara & Kanu*”, Case No. SCSL-2004-16-A, 22 February 2008, para 202

60 Dr. Anne T Gallagher, *op. cit.*, (2010), at 383

Obligation on the State to implement an effective legislative and administrative framework

In the *C.N. and V.* Case the Court decided that a minor girl had been subjected to forced or compulsory work by her relatives (uncle and aunt) and found that the French authorities failed to implement the legislative and administrative framework which would enable an effective fight against servitude and forced labor.⁶¹

The first case to be judged regarding the positive obligation on a State to adopt and adequate its criminal legal system in order to secure an effective protection of individuals was “*X and Y v. The Netherlands*”.⁶²

Such positive obligation of establishing an effective legal framework for combating trafficking in persons should also be accompanied by the foreseeing a long statute of limitations period for trafficking offences.

One of the most significant cases in United Kingdom regarding a violation of Article 4 of the European Convention on Human Rights was the “Boy Soldier case”⁶³ the Commission held that the required consent was given by the parents of the minors in accordance with the relevant law, hence, the complaint was dismissed as manifestly ill-founded.⁶⁴ Should a State be exempt from its obligation to adequate its domestic legislation to the international conventions and customary law regarding trafficking in persons?

Furthermore, even if the criminal offence is not foreseen in the domestic legal framework of a specific State it does not mean that the offence does not exist and does not excuse the State from its duty to establish an acceptable legal system that would punish and take the necessary measures to prevent.

Hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation or the proper exercise of the operational measures and procedural obligations, the responsibility of the State for that violation is engaged.

61 ECtHR, “*C.N. a V. v France*”, of 13 November 2012, No 4239/08, para 71

62 ECtHR, “*X and Y v. The Netherlands judgment*”, of 26 March 1985, Series A no. 91, para 23

63 ECtHR, “*W,X,Y and Z v. United Kingdom*”, of 19 July 1968, No 3435/67, 3436/67, 3437/67, 3438/67

64 Richard Clayton, Hugh Tomlinson and Carol George, “*The Law on Human Rights*”, Oxford University Press (2000), at 443

In fact, sexual slavery not only constitutes a violation of human rights but also an infringement of international humanitarian law⁶⁵.

In the case of *Prosecutor v. Kunarac*, the Court held that as it is considered to be international customary law and, under specific circumstances, “*rape, enforced prostitution and other forms of sexual abuse [should be viewed] as a crime against humanity*”.⁶⁶

The Court decided that the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person and the *mens rea* is the violation consists in the intentional exercise of such powers. In order to reach this decision, the Court consider the following facts:

- i. the victims were detained (physically and psychologically);
- ii. the victims had to do everything they were ordered to do, including the cooking and household chores;
- iii. the victims were at the constant disposal of the accused;
- iv. the victims were effectively denied any control about their lives;
- v. some of the victims were sold to soldiers;
- vi. some of the victims were handed to other soldiers;
- vii. the accused claim of exclusivity over one or more of the victims;
- viii. the poor living conditions, and the lack of food.

Obligation on the State to take operational measures

One of the positive obligations on a State is the establishment of operational measures to protect victims, or potential victims, of treatment in breach of the international laws on trafficking in persons.⁶⁷ Prof. Schabas, in his commentary to the European Convention on Human Rights, states that such positive obligation arises where “*States authorities were aware, or ought to*

65 ICC Statute, Article 8(2)(b)(xxii)

66 ICTY, “*Prosecutor v. Kunarac*”, Case No.: IT-96-23-T & IT-96-23/1-T, of 22 February 2001, para 537

67 ECtHR, “*Rantsev v. Cyprus & Russia*”, of 7 January 2010, No 25965/04, para 286; ECtHR, “*C.N. a V. v France*”, of 13 November 2012, No 4239/08, para 67; ECtHR, “*Mahmut Kaya v. Turkey*”, of 28 March 2000, No 22535/93, para 115

*have been aware that an identified individual had been, or was at real and immediate risk of being subjected to such treatment. In such cases, the State must then take the appropriate measures within its powers to address the situation of the victim”.*⁶⁸

In its *Siliadin v. France* judgment, the Court confirmed that Article 4 of the European Convention on Human Rights entailed a specific positive obligation on member States to penalize and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labor.⁶⁹ The Court held that forcing a person over years to work without remuneration in constant fear of arrest, as it was the case with a minor African girl who was completely at the mercy of a French family (as a “household slave”), constituted slavery.⁷⁰

Bearing in mind the above, the Court also held that the obligation to take operational measures must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.⁷¹

In the case of *De Wilde, Ooms, and Versyp v. Belgium*⁷² the Court decided that work in a vagrancy center was not in breach of Article 4(3) of the European Convention on Human Rights since it had a rehabilitation purpose of the detainee and was not in violation of European standards.⁷³ Therefore, when analyzing whether a State is in breach or not of its positive obligation to take the operational measures, it should be based on comparable practice (such as nature, purpose and extent of the services) of other members of the Council of Europe.⁷⁴

68 Prof. William A Schabas, *op. cit.*, (2015), at 206

69 ECtHR, “*Siliadin v. France*”, of 26 July 2005, No 733316/01, para 112

70 Dr. Christopher Grabenwarter, “*European Convention on Human Rights – Commentary*”, Verlag C. H. Beck OHG, (2014), at 55

71 ECtHR, “*C.N. a V. v France*”, of 13 November 2012, No 4239/08, para 71, as cited by Prof. William A Schabas, *op. cit.*, (2015), at 206

72 ECtHR, “*De Wilde, Ooms, and Versyp v. Belgium*”, of 18 June 1971, No 2832/66; 2835/66; 2899/66

73 ECtHR, “*De Wilde, Ooms, and Versyp v. Belgium*”, para 90

74 Richard Clayton, Hugh Tomlinson and Carol George Kelly Hyland *op. cit.*, (2000), at 440

Obligation on the State to take procedural obligations

In the case of *Rantsev v. Cyprus & Russia*⁷⁵, the Court decided that States have positive obligations under Article 4 of the European Convention on Human Rights to combat trafficking and the elaboration of measures States must take to meet these obligations. Ms. Rantseva, arrived in Cyprus with an “artiste” visa, although she was forced to work in a “cabaret”. After attempting to flee she was taken to the police by her “employer” for expulsion but the police refused to detain her as she did not appear to be illegal and left her to her “former employer”, hence, the latter kept her locked up in a room. Later on, Ms. Rantseva was found dead in the street below the 6th floor apartment. The Court held that the particular measures taken by Cyprus State to protect Ms. Rantseva had not been sufficient although Cypriot authorities were aware of the fact that many women were being trafficked to Cyprus on “artistes visas” and they were sexually exploited by the “cabaret owners”. Therefore, the Cypriot authorities violated the State’s positive obligation to conduct effective investigations and to take operational measures to protect Ms. Rantseva from trafficking; this despite circumstances had given credible suspicion of a real and immediate risk for the victim.⁷⁶

Prof. Schabas mentions that generally the credible suspicion will generally result from a complaint by the victim, but in case of absence of such complaint, from the victim or next-of-kin, there is still an obligation to pursue a prompt, effective and independent investigation. Such investigation is an obligation of means rather than of result and should be capable of leading to identification and punishment of those criminally responsible for trafficking in persons. Therefore, States must penalize and prosecute any act that is aimed at maintaining a person in a situation that falls within the meaning of trafficking in persons.⁷⁷

Importantly, ECtHR does not limit these measures to criminal investigations and prosecutions (in an manner that is effective, independent and fulfilling all conditions required by Article 2 and 3 of the European Convention on Human Rights)⁷⁸ but also held that States must regulate

75 ECtHR, “*Rantsev v. Cyprus & Russia*”, of 7 January 2010, No 25965/04, para 89 and 112

76 *Ivi*, para 294 et seq.

77 Prof. William A Schabas, *op. cit.*, (2015), at 206

78 ECtHR, “*Rantsev v. Cyprus & Russia*”, of 7 January 2010, No 25965/04, para 288

businesses that are used as a cover for human trafficking; ensure that immigration rules do not encourage or facilitate trafficking; and take effective steps to protect the human rights of current and potential trafficking victims.⁷⁹

An example of appropriate measures established by UNTOC is to ensure that conditions of release for defendants do not jeopardize the ability to secure their presence at subsequent criminal proceedings (Article 11(3)); criminalize obstruction of justice (Article 23); protect victims and witnesses from potential intimidation (Articles 24 and 25); take appropriate measures to encourage those individuals involved in trafficking to cooperate with or assist national authorities (Article 26); provide channels of communication and police-to-police cooperation in relation to the investigation of trafficking in persons (Article 27).

The Court also established additional duties and responsibilities of a State linked to its procedural obligations such as discourage trafficking in persons' demand, ensure an adequate law enforcement response, build victims' confidence in the police and judicial systems and ensure that, by conducting appropriate training, the identification of victims of trafficking would take place in an efficient and effective manner.⁸⁰

Obligation on the State to cooperate in cross-border trafficking cases

In the case of *Rantsev v. Cyprus & Russia*, the Court found that the obligation to investigate a death related to trafficking in persons had been violated because, *inter alia*, the State of destination failed to seek assistance from the State of origin under an existing mutual legal assistance regime.⁸¹

The ECtHR has held that States of origin, transit, and destination must all take appropriate measures. In cross-border trafficking cases all Member States are obliged to investigate into the events that have occurred on their territory. "*In addition, these States are subject to a duty to cooperate effectively with the competent authorities of other States concerned in the investigation.*"⁸² Furthermore, networks facilitate such cooperation by providing a reliable

79 *Ivi*, para 285 and 287; Prof. William A Schabas, *op. cit.* (2015), at 207

80 ECtHR, "*Rantsev v. Cyprus & Russia*", of 7 January 2010, No 25965/04, para 267

81 ECtHR, "*Rantsev v. Cyprus & Russia*", of 7 January 2010, No 25965/04, para 241

82 Dr. Christopher Grabenwarter, *op. cit.* (2014), at 60

forum for the exchange of information and intelligence between operational level officials who may not have another way to interact with each other.⁸³ International Criminal Police Organization (“Interpol”) and European Police Office (“Europol”) are good examples of efficient networks which promote the coordination between States as well as the strengthening of domestic law enforcement capacity.

The obligation to provide other State Parties with mutual legal assistance in investigation, prosecution, and judicial proceedings for trafficking in persons (Article 18 UNTOC) also include the obligation to criminalize the laundering of proceeds of trafficking (Article 6 UNTOC) and to provide, to the greatest extent possible, for the tracing, freezing and confiscating of the proceeds of trafficking in persons in both domestic cases and in aid of other State Parties (Articles 12-14 UNTOC).

In summary, it is *“unsurprising that State responsibility remains an area where angels (and international lawyers) fear to tread. The Challenges must, however, be faced head-on. State responsibility is the heart and soul of international law.”*⁸⁴

II.3. Identify barriers to successful prosecution

One of the questions risen in this essay is why traffickers of human beings remain free although countries have a solid legal framework criminalizing trafficking in persons? The answer to this question may be linked to the degree to which the domestic anti-trafficking law is being enforced, weak and inefficient institutions, lack of victim cooperation and corruption may also be a driving force to explain the low rate of accurate prosecution of cases of trafficking in persons⁸⁵.

Under-prosecution by the ad hoc tribunals and ICC – is trafficking in persons not a serious crime?

83 Dr. Anne T Gallagher, *op. cit.*, (2010), at 489

84 *Ivi*, at 275

85 Christine Balarezo, *“The lack of conviction: Why human traffickers remain free”*, (2012), fourth annual interdisciplinary conference on human trafficking, paper 15, (2012), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1016&context=humtrafconf4>, last accessed 16/06/2016

The “*under-prosecution of sexual violence by the ad hoc tribunals has been identified as particularly problematic*.”⁸⁶ However, the *Prosecutor v. Kunarac* judgement is of significant relevance as it introduces an evolution of the concept of enslavement, that departs from highly prescribed notions of property and ownership towards a more nuanced understanding, echoed in the definition of trafficking, of the many and varied ways in which individuals can and do exercise complete and effective control over others.⁸⁷

A “new” crime with specific characteristics and indicators difficult to identify

From the perspective of national criminal justice agencies, trafficking is still considered to be a new crime, frequently involving new and untested laws. Although the number of prosecution cases is increasing, it is still very low when compared to the size of the trafficking in persons issue. “*Most [States] are developing and adapting their responses on the run, often under strong political pressure, and principally through trial and error*”.⁸⁸

Trafficking in persons is a crime which police, border control officers, health authorities, labor inspectors, embassy personnel, service providers or other persons who potentially could come into contact with human trafficking cannot easily notice.⁸⁹ Consequently, majority of crimes related to trafficking in persons are undetected. The challenges of detection also differ depending on the purposes of exploitation of trafficking in persons, *i.e.*, sexual exploitation, forced labor or services, slavery or practices similar to slavery as it is the case of child soldiers, debt bondage or forced marriages, servitude or removal of organs.

An additional obstacle for a clear identification of the trafficked victim is the involvement of the parents or next-of-kin, which often give their consent for their own children to be trafficked. Scholars have noted that Southeast Asian women become involved in cross-border sex exploitation in order to support their parents, “*thereby conforming to the cultural values that encourage*

86 Dr. Anne T Gallagher, *op. cit.*, (2010), at 212

87 *Ivi*, at 217

88 *Ivi*, at 489

89 Kristiina Kangaspunta, “*Was Trafficking in Persons Really Criminalised?*” (2015) <http://www.antittraffickingreview.org/index.php/atrjournal/article/download/100/121>, last accessed 16/06/2016, at 6

filial piety”.⁹⁰ Similarly, in Thailand, cultural practices allow parents to have the *de facto* power to sell their daughters.⁹¹

Prosecution depending heavily on victims (not always able or willing to cooperate)

Moreover, since typically (although internal trafficking does exist) the trafficking victims are not in their country of origin, language barrier is a constraint between victims and law enforcement officers which results in an issue for accurate gathering of information.⁹² Besides being unable to provide information due to the language barrier, victims are often unwilling to cooperate with criminal justice authorities and report their traffickers due to the lack of trust, fear of being deported or prosecuted for related criminal activity, fear of being stigmatized, or even because of intimidation, threats of violence.⁹³ While counselling Indian victims of trafficking in persons within the period I volunteered with an Indian NGO, I also found that they were ashamed of having been raped and sexually exploited, hence, tried to keep it as a secret from their families and community after being rescued from their traffickers.

Victims from trafficking may also be unwilling to cooperate with the criminal authorities due to the effect of Stockholm Syndrome as they start to sympathize and make a strong bond with their traffickers⁹⁴. *“When a victim crosses this threshold it becomes virtually impossible to for service providers to break through, gain their trust, and obtain their assistance in bringing their traffickers to justice”*.⁹⁵

90 Kara Abramson, *“Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol”*, Harvard International Law Journal, Vol. 44, (2003), at 486

91 *Ivi* at 495

92 Lindsay King, *“International Law and Human Trafficking”*, in Human Rights and human welfare online journal of academic literature review (2008), <http://www.du.edu/korbel/hrhw/researchdigest/trafficking/InternationalLaw.pdf>, last accessed 16/06/2016, at 90

93 Kristiina Kangaspunta, *op. cit.*, at 6

94 There are several reasons that could explain such bonding from a psychological perspective, being the main the fact that the victim is often isolated and away from its culture, and must rely and depend solely on its trafficker.

95 Virginia M Kendall and Marcus T Funk, *“Child exploitation and trafficking: examining the global challenges and US responses”*, Rowman & Littlefield Publishers, (2012), at 34

Be that as it may, “*because the proof of trafficking in human beings strongly depends not only on police work but particularly on the so-called witness testimonies*”, it is difficult to investigate, prosecute or even prove the existence of the trafficking in persons’ criminal offence.⁹⁶ Therefore, it is important to ascertain how easy (or difficult) it is for victims to make complaints to police.

Lengthy timeframes

Moreover, “[i]dentifying cases of human trafficking is the first step in what is often a lengthy process of bringing these cases forward to prosecution”.⁹⁷ Due to the expected lengthy timeframe for investigation and prosecution, victims often agree to cooperate if they have a secure long-term shelter.⁹⁸

During this process, the witness-victims can also provide inconsistent statements which could be justified by the fear of repercussion from its trafficker or from a trafficking trauma. Such inconsistencies can cast doubt on the credibility of such witness-victim.

Lack of communication and cooperation between law enforcement authorities

Another obstacle to an effective action against the trafficking in persons is the lack of communication and cooperation between national law enforcement authorities. Similarly, although significant efforts have been observed in order to launch specialized teams and specific action plans for international cooperation, it still represents an obstacle to successful investigation and prosecution of cases of trafficking in persons.

Corruption

Finally, corruption continues to be an obstacle to successful prosecution of trafficking in persons. Traffickers, in corrupted countries, count on their established relationships with police, border control officers, judges and ministers by bribing them. Therefore, trafficking in persons remains

⁹⁶ Council of Europe, “*Problems of prosecuting trafficking in human beings*”, Project on Combating and Preventing Trafficking in Human Beings in Azerbaijan, (February 2011), http://www.coe.int/t/dghl/cooperation/economiccrime/trafficking/Projects/THB%20Azerbaijan/REP_ORL_LEHNERT.pdf, last accessed 16/06/2016

⁹⁷ Amy Farrell et al, “*Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases*”, Urban Institute, Northeastern University, (2002), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf>, last accessed 22/06/2016, at 105

⁹⁸ Amy Farrell et al, *op. cit.*, at 120

unprosecuted and innocent victims continue to be trafficked and exploited within and across borders. *“Preventative mechanisms against money laundering currently do not exist globally, allowing for the use of bribery and one’s influence to move illicit proceeds. Finally, the networks employed in human trafficking often intersect with global and regional rings that control the trade in other contraband, such as drugs and arms.”*⁹⁹

The lack of accountability in law enforcement and the fact that traffickers still have low risks of being seized and arrested are factors that maintain the rate of convictions at a low level. In fact, public officials are rarely prosecuted for complicity in cases of trafficking in persons.¹⁰⁰

III. ANALYSIS OF POTENTIAL SOLUTIONS FOR A SUCCESSFUL PROSECUTION

III.1. What potential solution?

There is also an evolving compromise regarding the best way trafficking should be addressed, at least amongst the more significant countries of destination. The main points of compromise are the criminalization of all forms of trafficking in persons, the prosecution and punishment of traffickers, the strengthening of national border controls to fight trafficking and cross-border collaboration ensuring that there are no “safe havens” for traffickers.¹⁰¹

Toolkit to combat trafficking in persons

Chapter 5 of UNODC’s *“Toolkit to Combat Trafficking in Persons – Global Programme against Trafficking in Human Beings”*¹⁰² provides:

99 Maryse Tremblay and Camille Karbassi, *“Corruption and human trafficking”*, Transparency International, available at <http://www.ciaonet.org/attachments/18569/uploads>, last accessed on 16/06/2016, (2011), at 2

100 Kristiina Kangaspunta, *op. cit.*, at 80 to 97

101 Dr. Anne Gallagher and Paul Holmes, *“Developing an effective criminal justice response to human trafficking. Lessons from front line”*, International Criminal Justice Review, Vol. 18, No. 3, (2008) at 319 and 320

102 UNODC, *supra* note 47, at 175 to 252

a) snapshot of investigative tools¹⁰³, including reactive investigation (victim-led investigations instigated as a result of a complaint from one or more victims)¹⁰⁴, proactive investigation (multi-agency, intelligence-led approaches that bring together law enforcement, the intelligence community and various Government departments)¹⁰⁵, disruptive investigation¹⁰⁶, special investigative techniques (as per Article 20 of UNTOC and introducing the use of informants, surveillance and undercover operations)¹⁰⁷, crime scene investigation¹⁰⁸, joint investigation teams (describing the main aspects of joint proactive operations and explaining the main steps involved in establishing such a unit)¹⁰⁹, border control measures¹¹⁰ and intelligence gathering and exchange¹¹¹;

b) a comprehensive analysis of other associated crimes used to facilitate trafficking in persons and committed in its aftermath, including parallel financial investigation¹¹², seizure of assets and confiscation of proceeds of crime¹¹³;

c) international standards of due diligence, including the duties and rights of prosecutors¹¹⁴, important practices in order to involve offenders in investigation and prosecution¹¹⁵, recommended principles of UNHCHR concerning law enforcement¹¹⁶, summary of good practices for law

103 *Ivi* Tool 5.2, at 177 to 179

104 *Ivi* Tool 5.3, at 179 to 181

105 *Ivi* Tool 5.4, at 181 to 185

106 *Ivi* Tool 5.5, at 185 to 186

107 *Ivi* Tool 5.8, at 189 to 193

108 *Ivi* Tool 5.9, at 193 to 195

109 UNODC, *supra* note 47, Tool 5.10, at 195 to 200

110 *Ivi* Tool 5.11, at 200 to 206

111 *Ivi* Tool 5.12, at 206 to 210

112 *Ivi* Tool 5.6, at 186 to 188

113 *Ivi* Tool 5.7, at 188 to 189

114 *Ivi* Tool 5.13, at 210 to 218

115 *Ivi* Tool 5.14, at 218 to 219

116 *Ivi* Tool 5.15, at 219 to 222

enforcement approaches¹¹⁷, measures for protection of witnesses (as per Article 24 of UNTOC and Article 23(a) and (b) UNTOC)¹¹⁸; and

d) recommended resources for training law enforcement officials and members of the judiciary in combating trafficking in persons¹¹⁹.

Furthermore, the “*Anti-Human Trafficking Manual for Criminal Justice Practitioners*”¹²⁰, composed of 14 modules, is the result of a global cooperative process in which worldwide experts (from all scholars to law enforcement officials and members of the judiciary) contributed their expertise and experiences. This manual includes recommendations such as:

a) making routine checks of vehicles and documents, visits to brothels, factories or agricultural locations, scanning of adverts in the media and the Internet, enquiries into missing children, among others¹²¹;

b) conduct more proactive operations and investigations, e.g., target raids on suspected premises and locations, accompany other agencies (health or labor inspector) to specific locations, identify routes used and plan operations at transport facilities and other suspected *nexus* points, surveillance and other proactive investigation techniques as well as planned cross-border operations, among others¹²².

When other crime is inchoating trafficking. No prosecution or detention of victims

Criminalization of victims is usually linked to the failure of the law enforcement officers to identify the victim as such. In certain situations, trafficked persons are detained and, far from being treated as victims of trafficking, are subsequently charged as smuggled, illegal migrants, illegal workers or “drug mule”.

As an example, due to its financial and/or social vulnerability, hence targeted for trafficking in persons, a trafficking victim may also be coerced,

117 *Ivi* Tool 5.16, at 222 to 227

118 *Ivi* Tool 5.17, at 227 to 233, Tool 5.18, at 233 to 240 and Tool 5.19, at 240 to 243

119 *Ivi* Tool 5.20, at 243 to 253

120 UNODC, *supra* note 7

121 UNODC, *supra* note 7, Module 2, at 3

122 *Ivi* Module 2, at 3 and 4

without any given alternative, to transport illicit drugs, become a drug supplier, be subject to sexual or labor exploitation. Considering the present example, it is difficult to distinct between a trafficking victim and a criminal offender that traffic drugs for its own benefit.

*“Criminalization is the antithesis of a victim-centered approach, inevitably operating to deny trafficked persons the rights to which they are entitled under international law”.*¹²³ Nonetheless, such principle is not an immunity blanket for trafficked victims to commit other non-status-related crimes with the requisite level of criminal intent.¹²⁴

Investigators and prosecutors need to clearly identify and understand the causes and the circumstances of the trafficked victim’s inability or unwillingness to cooperate.¹²⁵

Measures regulating businesses often used as a cover for human trafficking

In addition to criminal law measures to punish traffickers, Article 4 of the European Convention on Human Rights requires Member States to put in place adequate measures regulating businesses often used as a cover for human trafficking¹²⁶.

The Council of Europe Commissioner urged Cyprus (following the ECtHR decision on *Rantsev v. Cyprus & Russia*) to be *“especially vigilant about monitoring the situation and ensuring that the system of artiste visas is not used for facilitating trafficking or forced prostitution”*¹²⁷.

EU’s cooperation with third countries should include *“assisting third countries in identifying victims of trafficking at airports before they board”*¹²⁸.

123 Dr. Anne T Gallagher, *op. cit.*, (2010) at 283

124 *Ivi*, at 288

125 Shivaun Scavlan, *“The Identification of Trafficked Persons in the Face of Conflicting Agendas”* (presented at the conference *“Assistance to Victims of Trafficking: We Can Do Better”*, OSCE, Vienna, (September 2007), available at <http://www.osce.org/what/trafficking/60585?download=true>, last accessed 22/06/2016, at 5

126 ECtHR, *“Rantsev v. Cyprus & Russia”*, of 7 January 2010, No 25965/04, para 284

127 Council of Europe Commissioner for Human Rights, *“Follow-up report of 26 March 2006”*, para 58, <https://wcd.coe.int/ViewDoc.jsp?p=&id=984105&direct=true>, last accessed on 16/06/2016

128 Council of Europe, *“Action Oriented Paper (AOP) on Strengthening the EU externa dimension on action against trafficking in human beings (THB): Towards Global EU Action against Trafficking in Human Beings”*, Doc 6865/10 (2010), at 13

The Commission has also criticized the absence of applicable domestic legislation concerning resident permits for third country national whether they are willing or able to cooperate with the authorities.¹²⁹

Criminalize the demand – purchase of services

Article 19 of the Council of Europe Trafficking Convention requires States Parties to consider criminalization of those “*using the services*” of a victim of trafficking in persons. In the understanding of Dr. Anne Gallagher, this provision could be used to prosecute owners of businesses that use trafficked persons (whenever it is difficult or impossible to prove the required action and means for trafficking in persons) as well as to “*prosecute someone who knowingly uses the services of a trafficker to procure a sexual service or even an organ*”.¹³⁰

UNCHR have criticized anti-trafficking policies for neglecting the demand side of trafficking.¹³¹ Similarly, the Commission urged Member States to consider adopting a legal provision that would criminalize the purchase of services that “*are the objects of exploitation as defined in Article 2 with the knowledge that the person is a victim of an offence referred to in Article 2*”¹³². In the same lines, the Impact Assessment proposed that Member States would move towards criminalizing prostitution.

For the other non-sexual means of exploitation persons as per the Palermo Protocol, the Employer Sanctions Directive¹³³ proposes the criminalization of those who employ third-country nationals illegally staying in the country and even those who employ EU nationals and non-EU nationals legally staying but under slavery or servitude conditions.

129 Commission, “*Opinion No 1/2008 of the Experts Group on Trafficking in Human Beings on the revision of the Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings*” (2008), at 3 and 6

130 Examples from the Council of Europe Trafficking Convention, at para 232, as cited by Dr. Anne T Gallagher, “*op. cit.*”, (2010), at 123

131 UNCHR, “*Integration of the Human Rights of Women and Gender Perspective: Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda*”, UN Doc E/CN.4/2006/62, (2006), para 79

132 Commission, *supra* note 38, at 18 and 29

133 Directive 2009/52/EC of the European Parliament and the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24 (2009)

Having mentioned the above, it is the opinion of the Author that for all forms of exploitation of trafficking in persons, a potential alternative is the criminalization of demand, *i.e.*, the purchase of services. The *actus reus* and *mens rea* proposed by Dr. Anne Gallagher for the said criminal offence would be the “*action (use of services) and knowledge (of the fact the services were only made available through trafficking)*”.¹³⁴

Ineffective prosecution

Ineffective prosecution could be attributed to the low level of cooperation between victims and authorities.¹³⁵

The required international due diligence standards foresee that investigators do not only rely on complaints from victims but actually investigate on their own. An effective criminal justice response to trafficking requires trained and competent officials.¹³⁶

Article 26 of UNTOC sets out a range of measures to be adopted by States Parties to enhance effective law enforcement through, *inter alia*, improving information flows and enhancing between relevant bodies. Article 18 of UNTOC also encourages States to establish a detailed legal framework on mutual legal assistance in investigation, prosecutions and judicial proceedings in relation to trafficking in persons, including “*taking of evidence, effecting service of judicial documents, execution of searched, identification of proceeds of crime, and production of information and documentation.*”¹³⁷

If one of the obstacles present above to an effective prosecution was the length timeframe, which could give rise to inconsistencies in the witness-victim statement, it is the opinion of the Author that law enforcement officers should take one lengthy, detailed statement (in accordance with the principle that investigators are recommended to follow of “*due no harm*”), and, consequently, allowing the witness-victim to read it, ensuring that all the relevant facts are included in the statement and that such facts are accurate and representative of the true and fair view of the offence such trafficked victim was subject to.

134 Dr. Anne T Gallagher, *op. cit.*, (2010), at 124

135 Sarah Krieg, *op. cit.*, (2014), at 212

136 Dr. Anne T Gallagher, *op. cit.*, (2010), at 386

137 *Ivi* at 76

In this respect, Eurojust has started a project a report in 2012 reinforced its role in assisting national authorities to effectively investigate and prosecute cases of trafficking in persons and implemented an action plan against trafficking in persons, including specific actions to address the main problems identified in the investigations and prosecutions of trafficking in persons and proposed timelines.¹³⁸

III.1.1. *Specialized investigation and judicial and prosecutorial specialists*

States may have implemented the Palermo Protocol and the Council of Europe Trafficking Convention but have not established the necessary border control officers and local police officers, prosecutors and judges may also not be aware or trained on international or national laws concerning trafficking in persons.

Opening a case against traffickers needs time, energy and resources. The complexity of the issue, particularly in countries with limited resources, is the cause to stop enforcement of trafficking in persons. There are several reasons that could explain the limited or unavailable resources from most States to properly apply the legal framework concerning trafficking in persons¹³⁹. Therefore, a more efficient prosecution requires training to law enforcement authorities as well as specialized investigation teams¹⁴⁰ that could, for example, recognized when a trafficking victim suffers from Stockholm Syndrome in order to be able to do their job carefully and thoroughly, hence, improving the successful ratio of cases in trafficking in persons being investigated and prosecuted. As mentioned before in this essay, a trafficking victim in this circumstances might be inconsistent, unreliable, angry and loyal to its trafficker. Regardless of the fact that the victim is hostile to the prosecutor or identifies with the perpetrator, these characteristics must be recognized as attempts as complex survival methods, as opposed to co-conspiracy or

138 Eurojust, "Strategic Project on Eurojust's Action Against Trafficking in Human Beings", (October 2012)

139 Lindsay King, *op. cit.*, at 89 and 90

140 In this respect see Article 29 of Council of Europe Trafficking Convention

licentious misbehavior.¹⁴¹ The failure to recognize these symptoms would stop the prosecutor to adopt the proper technique and for the judge to be convinced that the victim has been subject to trafficking and should be protected.

*“In operational terms, it is also essential that the unit is able to provide an adequate nationwide specialist investigative response, either by undertaking all trafficking investigations or by acting as a coordination point and/or supervisory and advisory center for other law enforcement colleagues.”*¹⁴² Furthermore, the specialist units of trafficking in persons must be willing and able to work closely and effectively with other generalist and frontline law enforcement officers as well as prosecutorial bodies.¹⁴³ States are also required to take the necessary measures to certify that specialist are independent and have the appropriate training and resources to do their job accurately.¹⁴⁴

States Parties, as per Article 10(2) of the Palermo Protocol *“shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons”*. There is a recognition of the critical importance of specialist investigation techniques in the international legal and policy instruments. Such techniques include: proactive investigation (such as intelligence gathering and management, human and technical surveillance, undercover operations, controlled deliveries), reactive investigation (such as victim identification, management of trauma and cultural challenges), specialized video-recorded interview techniques for adult and child victims, collection of corroborative evidence, witness protection and witness management, as well as a simultaneous financial and money-laundering investigations, for which specialized personnel is required.¹⁴⁵

141 Bruce D Perry and Maia Szalavitz, *“The boy who was raised as a dog and other stories from a child psychiatrist’s notebook: What traumatized children can teach us about loss, love, and healing”*, Basic Books, (2006), at 187

142 Dr. Anne Gallagher and Paul Holmes, *op. cit.*, (2008) at 324

143 *Ivi*, (2008) at 324

144 Dr. Anne T Gallagher, *op. cit.*, (2010), at 124

145 Dr. Anne Gallagher and Paul Holmes, *op. cit.*, (2008) at 325

*“A skilled, empowered, and adequately resourced law enforcement response provides a powerful disincentive for traffickers by increasing the risks and costs associated with their activities”.*¹⁴⁶

III.1.2. Joint investigation teams

Article 19 of UNTOC encourages States Parties to establish joint investigative bodies.

Joint investigation teams play a key role in fighting trafficking in persons and are characterized by the formation of strong interpersonal relationships nurtured through repeated interactions, the reinforced capacity of identifying and effectively rescuing victims, detaining suspects and securing high-quality evidence related to trafficking in persons.

*“The possibility of coordinated specialist investigator-prosecutor investigation teams being deployed at the regional level has been raised in Africa¹⁴⁷, Europe¹⁴⁸ and Southeast Asia¹⁴⁹”.*¹⁵⁰

Furthermore, such linked units have developed or contributed to a variety of instruments that incorporate and actively encourage the reach of international norms related to trafficking in persons, including: *“the use of the internationally agreed-upon definition; due diligence [standards] in investigation and prosecution; protection of victims and victim-witnesses; no*

¹⁴⁶ Dr. Anne T Gallagher, *op. cit.*, (2010), at 387

¹⁴⁷ ECOWAS Initial Plan of Action, available at http://www.unodc.org/pdf/crime/trafficking/Minimum_Plano_CEDEAO.pdf, last accessed 22/06/2016, (December 2001), at 7 and 8, recommends the development of joint investigation units with input from government law enforcement agencies, government personnel and training agencies, Interpol, and other law enforcement agencies

¹⁴⁸ Council of Europe, *“Brussels Declaration on Preventing and Combating Trafficking in Human Beings, European Conference on Preventing and Combating Trafficking in Human Beings”*, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52003XG0612\(01\)&from=FI](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52003XG0612(01)&from=FI), last accessed 22/06/2016, (September 2002), recommends the establishment of *“specialized, joint investigative teams of investigators and prosecutors”*, at Annex para 17

¹⁴⁹ ASEAN Practitioner Guidelines, available at http://jica-cb-workshop.weebly.com/uploads/8/0/7/2/8072630/criminal_justice_responses_to_trafficking_in_persons.pdf, last accessed 22/06/2016, (June 2007), at Part 2.A.1

¹⁵⁰ Dr. Anne T Gallagher, *op. cit.*, (2010), at 413

prosecution status-related offenses; and adequate and proportionate sanctions".¹⁵¹ For example, the heads of the specialist trafficking investigation units of ASEAN Member States have been requested by ASEAN Member States to provide their views on a proposal for an ASEAN treaty on trafficking.¹⁵² Similarly, the establishment of trafficking-specialist network of prosecutors through Eurojust has led to the creation of a Europe-wide arrest warrant which is valid throughout the European Union and applicable to cases of trafficking in persons and the abolition of the principle of dual criminality in relation to offences of trafficking in persons.¹⁵³

Bearing in mind the above, *"these networks have moved beyond reactive shaming strategies by involving themselves in the development of 'solutions' at both national and international levels such as legislative reform, institutional capacity development, support to victims and activism aimed at addressing vulnerabilities to trafficking"*.¹⁵⁴

As an example of a successful joint investigation and prosecution, the Author will mention the operation "*Terra Promessa*" carried out at the place of destination of trafficked victims in Italy and in the regions of origin of such persons in Poland. A parallel investigation was conducted by the Italian and the Polish police, with the assistance of Interpol and Europol. Culprits involved in the trafficking in persons' network were arrested in both Italy and Poland. The police of both countries cooperated in the information and evidence gathering which led to the ultimate arrest of traffickers and the release of the trafficking victims.¹⁵⁵

151 *Ivi*, at 491

152 ASEAN, "*Minutes of the First Meeting of the Working Group on Trafficking in Persons, Senior Officials Meeting on Transnational Crime (SOMTC)*", Kuala Lumpur, 16 June 2008

153 Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), OJ L 203/1, 1 August 2002, at Article 2(2)

154 Dr. Anne T Gallagher, *op. cit.* (2010), at 493

155 UNODC, *supra note 47*, at 199

III.1.3. *Particularity of cybercrime*

Cyber-trafficking in persons is a real threat. States must ensure that the problem is appropriately tackled by specialized investigative sections, in accordance with the Council of Europe's Convention on Cybercrime.¹⁵⁶

The flare-up of the Internet and the increasing use of digital cameras and cell phone cameras have given perpetrators additional means to execute its intention of exploiting other human beings for their own profit. The online demand has led, for example, to child pornography trade and planning of sex tours. It is usual for "sex tourists" to use chat rooms, message boards, peer-to-peer file-sharing servers, news groups, and specialized websites to obtain information on potential destinations. Recent studies have demonstrated the increasing establishment of "cyber-sex dens" where some children may be sexually abused and the images beamed via a webcam to the Internet for a price, which payment is often made by a credit card via an Internet connection."¹⁵⁷ Additionally, alternative payment markets such as "Bitcoin" can be utilized for payments.

President Barack Obama stated that "[w]e are turning the tables on the traffickers. Just as they are now using technology and the Internet to exploit their victims, we're going to harness technology to stop them."

Mr. Yury Fedotov remarked: "[w]e do not have an accurate picture of the scope and nature of [the misuse of technology] and cannot act as effectively as we should. Knowledge is essential for evidence-based policy, and we must fill the information gap."¹⁵⁸

According to Violeda Umali, there are three main forms of cyber-trafficking: sex tourism, pornography and prostitution. The Author share her opinion concerning the problematic of cyber-trafficking in the sense that it is

156 Council of Europe, "Convention on Cybercrime", European Treaty Series, No 185, 23 November 2001

157 US Department of State, *supra* note 54, at 23

158 UNODC, "Crime Commission to address protection of children from exploitation on the Web," (11 April 2011), available at <http://www.unodc.org/unodc/en/frontpage/2011/April/crime-commission-to-address-the-protection-of-children-from-exploitation-on-the-web.html>, last accessed 22/06/2016

not a problem anchored in cyberspace but rooted in the socio economic conditions and circumstances of a vulnerable individual.¹⁵⁹

Recently, to the types of cyber-trafficking presented by Violeda Umali, we could also add the recruitment for forced labor. In fact, reported cases of trafficking in persons begin with the offender contacting the potential victims on social networking sites such as “Facebook”, “Twitter” and “Instagram”.

Although the techniques used may vary, the trafficker gains the victim’s trust, makes several promises of employment or other job opportunities such as a modelling career, which, consequently, results in an unsuspecting victim relocating from her/his home on the promise of an unbelievably good job and other opportunities.

After the victim has joined the offender, various techniques are used to restrict the victim’s access to communication with home, such as imposing physical punishment unless the victim complies with the trafficker’s demands and making threats of harm and even death to the victim and her family.¹⁶⁰

Instead of relying on anecdotal events, most commentators agree that significant research is necessary to judge the extent to which human trafficking is facilitated and effectively combated by the Internet and other technologies.¹⁶¹

Technology is a tool that has been used by traffickers to advertise and coordinate the sale of victims. The advertising/selling process has been shift from the “street corner” to the “digital room”, changing, consequently, the physical and legal risks involved in this process. In the media stratosphere, for example, there are many more traces of the interaction perpetrators and victims, creating, thus, generating data which can be used later by law enforcement. There is also less risk for traffickers to identify potential

159 Violeda A Umali, *“The Cyber-trafficking of Filipino Girl-children: Weaknesses of Philippine Policies”*, University of the Philippines College of Mass Communication, (2004), at 1

160 Erin I. Kunze, *“Sex Trafficking Via the Internet: How International Agreements Address the Problem and Fail To Go Far Enough”* in *Journal of High Technology Law*, Vol. 10, (2010), at 241 to 289

161 Mark Latonero et al., *“Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds”*, USC Annenberg Ctr. on Commc’n Leadership & Policy, (2011), https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking_FINAL.pdf, last accessed 21/06/2016, at 21 and 22

trafficking victims using the internet, but then again it is also harder to go from identification to intervention.¹⁶²

The solution presented by Mark Latonero includes integrating human experts and computer-assisted technologies. “*Researchers developed a computer prototype to locate and extract or “scrape” the information appearing on the websites, then collect and store the aggregate data for analysis. Sites of interest were identified by the FBI and included for monitoring. A number of online classified and social networking sites were targeted, such as Backpage sites in dozens of U.S. cities and a number of explicit websites and forums known for trafficking activity. Information scraped from the sites includes all text, dates, and photograph.*”¹⁶³ Therefore, automated data collection is a first step towards effective cyber-trafficking investigation. Similarly, natural language processing, facial recognition and mapping technologies and methods are being employed by cyber-trafficking investigators.¹⁶⁴

Digital forensics and electronic evidence provide new opportunities, but also new challenges. Given the issue of digital traces, there are also opportunities to engage new partners, including technology companies and financial institutions, to coordinate with law enforcement.¹⁶⁵

States must, therefore, allocate the appropriate resources for further research related to sex and labor trafficking in domestic and international contexts. It is also required to establish independent, specialized investigators that can keep pace with the rapidly changing technologies that can be used to facilitate or combat cyber-trafficking in persons.¹⁶⁶

Furthermore, UNODC’s executive director notes the need for a partnership between public and private sectors as “*Internet service providers, civil society, the media, educational institutions and the public on board*”.¹⁶⁷

162 Danah Boyd, Heather Casteel, Mitali Thakor and Rane Johnson, “*Human Trafficking and Technology: A framework for understanding the role of technology in the commercial sexual exploitation of children in the U.S.*”, (2011), available at <http://research.microsoft.com/en-us/collaboration/focus/education/htframework-2011.pdf>, last accessed 21/06/2016, at 5 and 6

163 Mark Latonero et al., *op. cit.*, at 28 and 29

164 *Ivi*, at 29

165 Danah Boyd, Heather Casteel, Mitali Thakor and Rane Johnson, *op. cit.*, at 7

166 Mark Latonero et al., *op. cit.*, at 34

167 UNODC, *supra note 158*

In cases of trafficking in persons, the prosecution process often relies on testimonies of victims. Given the increase of data traces, technology introduces new types of evidence for the prosecution process. Be that as it may, judges may not be adequately equipped to analyze electronic documentation of cyber-trafficking and there are also serious questions about the validity of such evidentiary material. Consequently, there are new opportunities to explore how technology can be used as a part of the prosecution process in cases of trafficking in persons.¹⁶⁸

III.2. Other associated crimes used to facilitate trafficking in persons and committed in its aftermath: corruption and money-laundering

*“Human trafficking is a crime of opportunity and it is committed only when the costs of committing the crime remain lower than the benefits received”.*¹⁶⁹

As mentioned above, trafficking in persons is closely associated with corruption and money laundering.

In India, for example, that traffickers bribe local police and public officials for their silence and protection. However, India is not the only country where traffickers and employers of trafficked victims recur to corruption so that police or other officials can overlook the crime. *“In cases where a raid or arrest happens, corruption is often used to pay off the police, prosecutors or judges to drop the charges. In Germany and Spain, there have been strong allegations of judges having links to human trafficking and other criminal networks, which are used to prevent or stall investigations”.*¹⁷⁰

UNODC has reported that referral of cases of trafficking in persons with indicators of corruption and *vice versa* are inexistent, hence, it is essential to develop indicators that would assist an effective investigation of corruption cases related to trafficking in persons.¹⁷¹

168 Danah Boyd, Heather Casteel, Mitali Thakor and Rane Johnson, *op. cit.*, at 8 and 9

169 Regan R Demas, *“All hands on Deck: Collaborative Global Strategies in the Battle Against Corruption and human Trafficking in Africa”*, University of St Thomas Law Journal, Vol 6, Issue 1 (Fall 2008), at 214

170 Maryse Tremblay and Camille Karbassi, *op. cit.*, (2011), at 4

171 UNODC, *supra note 14*, at 27 to 31

Notwithstanding the lack of scholarly studies or official data available to confirm the widely held statement that corruption plays a most important role in trafficking, it is certainly clear that traffickers need the active involvement or at least the acquiescence of public officials to move individuals across international borders and to deliver and maintain the victims in situation of exploitation.¹⁷²

Police staff shall be trained in respecting and enhancing some codes of conduct as a condition for decreasing corrupt opportunities, and shall be sanctioned if these conducts are not respected.¹⁷³ It is therefore proposed that the following guidelines are implemented: (i) officials conducting raids, in brothels or factories, shall always be accompanied by at least another colleague; (ii) special recruitment and training for the officials; (iii) job rotation and monitoring system in order to supervise rotations;¹⁷⁴ and an effective, transparent and independent investigation and prosecution.¹⁷⁵

The implementation of monitoring supervision systems for those staff members who are at higher risks of corruption can ensure a more transparent environment; amending domestic codes of conducts will also be functional, especially during investigations, as, for example, the avoidance of one to one meetings in order to ensure their fairness.¹⁷⁶

Article 23 of UNTOC establishes the criminalization of “obstruction of justice” in two-fold: (a) “the use of physical force, threats, or intimidation or the promise, offering, or giving of an undue advantage either to induce face testimony or to interfere in the giving of a testimony or the production of evidence in proceedings in relation to offences covered by UNODC; and (b) the use of physical force, threats, or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to offences covered within the meaning of UNODC.

172 Dr. Anne T Gallagher, *op. cit.*, (2010), at 443

173 UNODC, *supra note 14*, at 30

174 Klaus Abbink, “Staff Rotation: A Powerful Weapon Against Corruption?”, University of Bonn, 1999, available at <http://www.wiwi.uni-bonn.de/sfb303/papers/1999/b/bonnsfb460.pdf>, last accessed 21/06/2016, at 7

175 Regan R Demas, *op. cit.*, (Fall 2008), at 215

176 UNODC, *supra note 14*, at 29

There is no justice if evidence cannot be freely presented or even if judges, jurors, witnesses or victims are intimidated, threatened or corrupted. No serious crimes can be spotted and penalized, if the evidence is prevented from reaching investigators, prosecutors and the Court.¹⁷⁷

According to Article 9 of UNTOC, States Parties are required to adequate their domestic legal framework in order to implement “*legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish corruption of public officials*”, including providing such authorities with the appropriate independence to deter the exertion of inappropriate influence on their actions and applying the suitable sanctions according to the gravity of nature of the offence.

An accurate prosecution must also foresee that the proceeds of trafficking in persons will be duly confiscated and seized as per Articles 12 to 14 of UNTOC, therefore ensuring that there will be no “safe havens” for traffickers, namely by reducing the criminal advantages presented to criminals by national borders and differences in legal systems through the implementation of several mechanisms which enhance international cooperation.

In the context of trafficking, effective asset recovery renders such an activity less lucrative and increases the risks, thereby acting as an important mean of prevention, and its link with an effective prosecution and criminal justice response is significant. “*A strong confiscation and recovery regime can operate to support the criminal conviction of traffickers by providing evidence to substantiate or corroborate a case of human trafficking, for example by demonstrating to the court that the income of an individual or of a legal person far exceeds that which can be explained by legitimate sources*”.¹⁷⁸

On the particular issue of trafficking in persons, the UN General Assembly has emphasized the importance of asset confiscation.¹⁷⁹

177 UNODC, “*Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*”, Part One, para 195

178 Dr. Anne T Gallagher, *op. cit.*, at 400

179 UN General Assembly, “*Trafficking in Women and Girls*”, UN Doc. A/RES/63/156 of 30 January 2009, at para 11; UN General Assembly, “*Trafficking in Women and Girls*”, UN Doc. A/RES/61/144, 19 December 2006, at para 10; UN General Assembly, “*Trafficking in Women and*

IV. CONCLUSIONS

The purpose of this research paper was to bring to light implied assumptions regarding trafficking in persons and presuppositions regarding accurate prosecution in cases of trafficking in persons. What are the problems and silenced issues that lead to ineffective prosecutions? Why is it that in some parts of the world, although a legal framework is accurately established, criminal authorities are not applying their respective trafficking legislation? What are the factors that obstruct combating trafficking in persons?

The States' choice to characterize trafficking in persons as criminal conduct and oppose it with criminal law is prompt by a certain belief in the superior effects of criminal law. The actual success of criminal law and accurate prosecution in preventing trafficking in persons has not been subject of empirical investigation, and therefore its alleviating effect on human trafficking cannot be measured.¹⁸⁰

One of the Author's presented solutions for a more effective prosecution of cases of trafficking in persons was the highly controversial criminalization of demand. The special link between prostitution and trafficking in persons, based either on the assumption that (i) the demand for prostitution services fuels trafficking or that (ii) trafficking stimulates the increase of prostitution, takes us to the conclusion that prostitution is either a cause or a consequence of trafficking. Therefore, Article 9(5) of the Palermo Protocol urged State Parties to take measure to discourage demand, although refraining from mentioning the criminalization of customers. It is my opinion that criminalizing the demand, hence, prosecuting also the customers of prostitution would decrease the demand, which would have a direct impact in the flow of trafficking in persons.

Ultimately, my analysis has shown that legislative and other measures should be in place to ensure that judicial proceedings protect victims' rights.

Girls", UN Doc. A/RES/59/166, 20 December 2004, at para 9; UN General Assembly, "Strengthening International Cooperation and Preventing and Combating Trafficking in Persons and Protecting Victims of such Trafficking", UN Doc. A/RES/58/137, 4 February 2004, at para 1

180 Sarah Krieg, *op. cit.*, (2014), at 342

As demonstrated in this research paper, the line between the choice to prosecute cases of trafficking in persons and other offences (smuggling of migrants, drug trafficking, etc.) is blurry, being easy to forgo the trafficking nature, hence its prosecution, when in the presence of other straight forward offences that hide the nature of the crime of trafficking and exploitation of persons.

The EU Anti-Trafficking Directive requires Member States to prevent from prosecuting victims of trafficking in persons for violating immigration or prostitution laws. But what happens when such persons are not characterized as victims of trafficking but as drug smugglers or illegal immigrants? In this respect, the ECtHR *Rantsev v Cyprus and Russia* judgement is significant because of its contribution to clarify the substantive content of certain key positive obligations of States. Be that as it may, there is still a silent legislative and judicial gap that needs to be addressed.

Indeed, it is essential for crimes of trafficking in persons, such as sexual exploitation, forced labor or services, slavery or practices similar to slavery as it is the case of child soldiers, debt bondage or forced marriages, servitude or removal of organs, to be upheld in the ICC to ensure that the trafficked persons, who have been hidden in plain sight, will have the opportunity to tell her/his story and verify that justice is being served. Moreover, and as quoted previously in this essay, ICC's primary goal is "*to deter crimes before they take place by letting wrongdoers know in advance that they will be called to account by an impartial international criminal court. The law can no longer be silent but must instead be heard and enforced to protect the fundamental rights of people everywhere.*"¹⁸¹

The Author has also concluded that in many countries, corruption within local police, prosecutorial and judicial agencies, underdeveloped systems, and resistance to the integration of international criminal justice standards present seemingly insurmountable barriers. Therefore, efforts, policies, studies, activities, civil and governmental actions against trafficking in persons should focus in the development of effective preventive mechanisms that can address the underpinning causes of trafficking in persons such as corruption.

181 ICC, "*Prosecutor v. Thomas Lubanga Dyilo*", ICC-01/04-01/06, 14 March 2012, Dr. Benjamin Ferencz, "*Office of the Prosecutor's Closing Statements*", at para 50 and 51

Furthermore, even if arrested and punished, traffickers will often be able to make use of their illegal gains in order to maintain their trafficking operations. Therefore, an obligation to pursue the proceeds of trafficking should be considered as an integral part of the broader obligation on States to develop and implement an effective criminal justice response, and, consequently, asset recovery regime becomes part of State's due diligence standards.¹⁸²

In the present essay there were presented as potential solutions the implementation of specialized investigation and judicial and prosecutorial specialists, as well as joint investigation teams. In fact, there is an added-value in the implementation of specialist trafficking units within national police forces, with direct collaboration with generalist, frontline officers and we have witness an emergent and growing acknowledgment of the importance of bilateral and regional networks for prosecutors and central authority lawyers. It is widely accepted that a dedicated and specialized investigatory, prosecutor and adjudicatory capacity is an essential component of an effective criminal response. Such specialist capacity should have the needed independence, capacity, resources, and gender profile to pursue its task. Furthermore, coordination between the criminal justice agencies is equally required.¹⁸³

Given the complex transnational nature of trafficking in persons, functional and effective criminal justice network are essential in order for States to fulfil their international legal obligations, such as, to conduct proper investigations and prosecutions of cases of trafficking in persons. This kind of State's positive obligation was upheld by the ECtHR: "*Member States are (...) subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside of their territories*".¹⁸⁴

Notwithstanding the above, the Author concludes that States are failing their positive obligation to fully and effectively criminalize trafficking in persons, to provide the necessary structures within State agencies to investigate, prosecute and adjudicate cases of trafficking in persons to the

182 Dr. Anne T Gallagher, *op. cit.*, (2010), at 400

183 *Ivi*, at 388

184 ECtHR, "*Rantsev v. Cyprus & Russia*", of 7 January 2010, No 25965/04, para 289

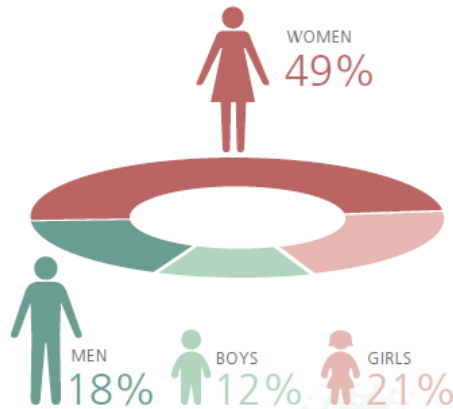
required standard of due diligence, to positively cooperate internationally in order to prevent “safe havens”.

It is evident from this research paper that amendments and recommendations need to be taken, especially regarding the implementation of specialized units within domestic jurisdictions with delegated authority to conduct an appropriate investigation, including cyber-trafficking units. Specific training and an in-depth specialization of law enforcement authorities, in example how to recognize trafficking in persons’ indicators, how to cease and apply counter-measures for trafficking-related corruption of public officials, is required in order to conduct adequate and accurate investigations and prosecutions of cases of trafficking in persons.

Annex I

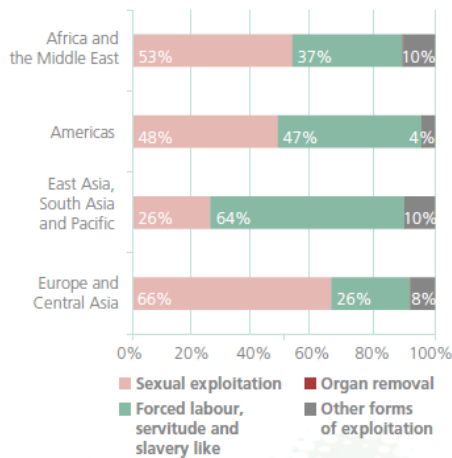
Fig. 1 - Detected victims of trafficking in persons by age and gender (2011) and Forms of exploitation among detected trafficking victims, by region of detection (2010-2012) ¹⁸⁵

Detected victims of trafficking in persons, by age and gender, 2011



Source: UNODC elaboration on national data.

Forms of exploitation among detected trafficking victims, by region of detection, 2010-2012 (or more recent)

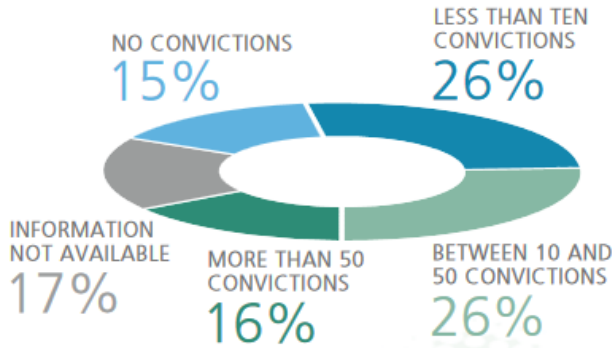


Source: UNODC elaboration on national data.

¹⁸⁵ UNODC, *supra* note 14, at 5

Fig. 2 – Number of Convictions recorded per year (2010-2012)¹⁸⁶

**Number of convictions recorded per year,
share of countries, 2010-2012**



Source: UNODC elaboration on national data.

¹⁸⁶ UNODC, *supra* note 14, at 13

Fig. 3 – Analysis of Prosecution data by year, victim’s nationality and gender, defendant’s nationality and gender and also by type of action, means or exploitation purposes.¹⁸⁷

Decision / Verdict Date:	Victim's nationality	Victim's gender / child	Number of conviction according to nature of action, means or purpose of trafficking in persons
1981	1 Brazilian	67 Child	445 Abduction
1985	1 Filipino	56 Female	765 Abuse of power or position of vulnerability
1986	1 Portuguese	1 Male	95 Deception
1990	1 Romanian	64	Domestic servitude / servitude
1992	1		Forced labour or services
1993	2		Fraud
1993	2 American	50 Female	609 Harboring
1995	1 Brazilian	64 Male	924 Hotel/Restaurant/Bar
1996	2 Filipino	38	Internal
1997	6 Moldovan	50	Organ/tissue removal/removal of organs
1998	2 Portuguese	3	Slavery or practices similar to slavery
1997	7 Romanian	55	Threat or use of force or other forms of coercion
2000	10		Transnational
2001	11		Transportation
2002	14		Giving or receiving payments or benefits to achieve the consent of a person having control over another person
2003	22		Exploitation of the prostitution of others or other forms of sexual exploitation
2004	29		
2005	41		
2006	76		
2007	79		
2008	156		
2009	159		
2010	210		
2011	171		
2012	112		
2013	72		
2014	26		
2015	8		

Source: <https://www.unodc.org/cld/v3/sherloc/cldb/index.html?lng=en>
Last accessed 16/06/2016

¹⁸⁷ <https://www.unodc.org/cld/v3/sherloc/cldb/index.html?lng=en>, last accessed 16/06/2016

Fig. 4 *Push and pull factors for potential victims of trafficking in persons*

<i>Push factors</i>	<i>Pull factors</i>
High unemployment	Improved standard and quality of life
Labour market not open to women and gender discrimination	Better access to higher education
Lack of opportunity to improve quality of life	Enforcement of minimum standards and individual rights
Sexual or ethnic discrimination	Better employment opportunities
Poverty	Demand for cheap labour
Escaping persecution, violence or abuse	Demand for commercial sexual services
Escaping human rights violations	Higher salaries and better work conditions
Collapse of social infrastructure	Demand for workers within the sex industry and higher earnings
Other environmental conditions, including conflict and war	Established migrant communities / diasporas

Sources: Table contents taken from Europol report "*Trafficking in Human Beings in the European Union* (1 September 2011)

Fig. 5 *Push and pull factors for potential trafficking in persons criminal networks*

<i>Dimensions</i>	<i>Push factors</i>	<i>Pull factors</i>
Criminal market research	Increased law enforcement Increased competition from criminal	Mass demand Access to supply Lax law enforcement High impunity/corruption Proximity to trafficking routes Porous borders Presence of brokers and facilitators
Research on ethnic-based criminal groups	Legitimation of group Increased socioeconomic status Decreasing cultural marginalisation Increased enforcement in country of	Individualist value system Legitimation of previous groups (ethnic succession theory) New opportunities for cross-border crime (eg immigrant diasporas in consuming countries, open borders) Ethnic group's criminal reputation Local ties and kinship networks
Research on criminogenic conditions in legitimate settings	Displacement by credible authority	Lax security/enforcement/high impunity Poorly regulated economic sectors Overlaps between upper and underworld actors Low skill trade Low technology and professionalisation High number of unemployed disenfranchised workers Lack of conventional products and services (emergence of black markets and private protection needs)

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188 C. Morselli, M. Turcotte and V. Tenti, *The Mobility of Criminal Groups*, Ottawa: Public Safety Canada, (2010), at 3 and 4

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