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# White Slave Traffic in International Law

Jean Allain*

## 1. Introduction

The evolution in the legal regime governing human trafficking can be separated neatly into three eras: the pre-League of Nations, the League of Nations, and the United Nations. This study considers the first of these eras; in the development of the pre-League of Nations legal regime surrounding the 'White Slave Traffic'. While that very term was considered troublesome at the time; today it is downright offensive: clearly objectionable on a number of grounds, most obviously its overt racism.[1] Despite this, the regime of white slave traffic is: the 1904 International Agreement for the Suppression of the White Slave Traffic and the 1910 International Convention for the Suppression of the White Slave Traffic; and remains fundamental to understanding the evolution of what is today understood as human trafficking generally, and more specifically, trafficking related to sexual exploitation; and the dynamics which shaped its contemporary contours and the language used to define it.

This article considers the development of the white slave traffic regime, which spans the first decade of the twentieth century. That regime is a reflection of a time when the limited engagements of the nineteenth century Congress of Europe gave way to a growing willingness by European states to cooperate, multilaterally, through negotiating international agreements (though these were, in effect, largely European in scope). Both the 1904 International Agreement for the Suppression of the White Slave Traffic ('1904 Agreement') and the 1910 International Convention for the Suppression of the White Slave Traffic ('1910 International Convention') were negotiated in substance at the 1902 International Conference on the White Slave Traffic. However, due to the nature of international law at the time, the showcase of the negotiations of 1902, its Draft Convention, was left to linger for eight years before a hastily convened diplomatic conference was able to iron out the legal niceties and bring that Convention into force. In the interim, a negotiated afterthought, the Draft Arrangement meant to give administrative effect to the Convention was, in fact, brought into force as the 1904 Agreement.

The development of these white slave traffic instruments provides a number interesting considerations which remain central to contemporary human traf-

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Jean Allain, Professor of Law, Faculty of Law, Monash University, Australia; Extraordinary Professor, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa; and of the Editorial Board of this journal. All translations from French by the author.

1 The term 'White Slave Traffic' is often placed in quotation marks reflecting a disquiet amongst scholars. Yet, much like the phrase 'general principles of law recognized by civilised nations', 'White Slave Traffic' is a window onto a very different world of the early twentieth century, one dominated by a Euro-centrism of overt racism, at the height of its colonial conquest. With this in mind, from hereon in, the protection of the quotation marks is dispensed with.

ficking including: the appearance, for the first time, of various terms which find their way into the current definition of trafficking; but also whether trafficking is meant to suppress sexual exploitation or prostitution; and the internal/external dichotomy of trafficking. This study considers the records of those two international conferences on the white slave traffic to better understand the early years of the regime which today is manifest in the 2000 United Nation Palermo Protocol – the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime ('2000 Palermo Protocol') and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings. In so doing, it moves away from much of the ahistorical considerations endued throughout contemporary legal scholarship in the area human trafficking; providing context and a better sense of what was sought to be achieved by those who negotiated the first international agreements to address, in the language of the times: the white slave traffic.

## 2. The White Slave Traffic

The basis of what is today recognised in international law as human trafficking is an account which is only now emerging from the archives and the pens of historians. The history of the white slave traffic is grounded in the issue of venereal disease.[2] It found its origins in a Victorian paternalism of the late nineteenth century which sought to control women in the face of communicable diseases which were playing havoc on troops destined to engage in Europe's colonial project. Judith Walkowitz argues that genesis of the white slave traffic was a reaction to the founding, in the United Kingdom, in 1869, of the Ladies National Association which sought to repeal the various Contagious Disease Acts of the 1860s as being unconstitutional, discriminatory, and promoting male vice; while subjecting women to 'degrading internal examinations'.[3] Such talk of repeal put the expansionist project of Empire at risk and was countered by a moral panic in regard to children and prostitution.

At the international level the issue fell to attempts to control women, during the Age of Steam, who sought to accompany armies in the field, as mass prostitution was 'organized to serve the needs of colonial troops'.[4] In 1873, the Inter-

2 J. Allain, *Slavery in International Law: Of Trafficking and Human Exploitation* (Leiden: Martinus Nijhoff, 2013), 340.

3 J. Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (Cambridge: Cambridge University Press, 1980), 2.

4 L. Reanda, 'Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action' *Human Rights Quarterly* 13 (1991), 207; also see N. Demleitner, 'Forced Prostitution; Naming an International Offense', *Fordham International Law Journal*, 18 (1994-1995), 163.

national Medical Congress called for an end to state regulation of brothels and prostitution; but this was understood to be a matter of domestic jurisdictions.[5] What made the issue an international one was the scandal which broke in relation to Belgium in 1880 with the publication, in London, of Alfred Dyer's *The European Slave Trade in English Girls*. The scandal had at its core, the so-called 'French system' of legal sex work requiring the mandatory registration of prostitutes for 'reasons of public health and public order', and 'strongly encouraged' the establishment of brothels.[6] The scandal turned on the revelation that girls under the age of twenty-one from the United Kingdom had procured false documents which had been accepted by the Brussels' police despite 'a discrepancy between the declared age and the age they appeared to be'.[7]

The momentum started in Brussels in 1880 would, in time, galvanise public opinion, with the exposé of child prostitution in London by W.T. Stead in 1885 leading directly to the creation of the National Vigilance Society; which, in turn, would be the conduit from a non-governmental to an official, governmental, response to the white slave traffic through the Vigilance Society's 1898 resolution 'to open definite measures for its mitigation – if possible its suppression'.[8] To that end, the Society sent its Secretary, William Alexander Coote, on mission to Copenhagen, Berlin, Brussels, Paris, St. Petersburg, Stockholm, and The Hague, where, it is said, the 'Governments of these different countries were found [...] to be fully alive to the importance of the question'. To that end, a number of states were prepared to send official delegations to London for the planned first International Congress on the White Slave Trade, in 1899, to be hosted by the National Vigilance Society. However, the British Foreign Office demurred, 'pointing out that to give an official character to the Congress might prove embarrassing'.[9] While the British Foreign Secretary, Lord Salisbury, in

5 V. Bullough/B. Bullough, *Women and Prostitution: A Social History* (Amherst: Prometheus Book, 1987), 263.

6 See generally J.-M. Chaumont, *Le mythe de la traite des blances* (Paris: La Découverte, 2009). Chaumont places the origins of campaigns against the White Slave Traffic as transpiring in Belgium in 1880, then in the United Kingdom in 1885, in France in 1902, and in the United States in 1907. See J.-M. Chaumont/C. Machiels (eds.), *Du sordide au mythe: L'affaire de la traite des blanches (Bruxelles, 1880)* (Louvain: Presses universitaires de Louvain, 2009), 235, n. 849.

7 J.-M. Chaumont, 'The White Slave Trade Affair (1880-1881), A Scandal specific to Brussels?', *Brussels Studies* 46 (2011), 2-4.

8 'Memorandum on the Origin and Evolution of the Movement for the Suppression of the White Slave Traffic', Annex 3, Correspondence respecting the International Conference on the White Slave Traffic, held in Paris, October 1906, House of Commons Parliamentary Papers (United Kingdom), Miscellaneous No. 2 (1907), Cd. 3453, 15.

9 Annex 3, 'Memorandum on the Origin and Evolution of the Movement for the Suppression of the White Slave Traffic', Correspondence respecting the International Conference on the White Slave Traffic, held in Paris, October 1906, House of Commons Parliamentary Papers, *ibid.*, 15. In opening the 1902 International Conference on the White Slave Traffic, the French Foreign Minister, Delcassé spoke of this possibility of embarrassment, saying that those deliberations at the 1899 Congress where 'people who allowed their hearts to guide their intellect'. See Procès-Verbaux des Séances, Première Séance, Ministère des Affaires Étrangères, *Conférence Internationale pour la Répression de la Traite des Blanches*, Documents Diplomatiques (Paris: Ministère des Affaires Étrangères, 1902), 58.

correspondence with his European counterparts, promised 'the most careful attention' would be paid to 'evidence collected and the conclusions arrived at' during 1899 International Congress on the White Slave Trade (1899 Congress); these diplomatic platitudes would become a reality in the hands of the French Foreign Ministry, as it would convoke a diplomatic conference three years later.

For its part, the 1899 Congress had put forward the following, with a wish that 'an agreement be established between the most interested Governments':

1. To punish, and as far as possible by penalties of equal degree, the procuring of women and girls by violence, fraud, abuse of authority, or any other method of constraint, to give themselves to debauchery, or to continue in it; and in cases were persons are accused of this crime: –
2. To undertake simultaneous investigations into the crime when the facts which constitute it occur in different countries.
3. To prevent any conflict of jurisdiction by determining the proper place of trial.
4. To provide by International Treaties for the extradition of the accused.[10]

The Congress had 'formulated these propositions after having recognised that the causes of impunity of this odious traffic are the absence of a specific offence and penalty, the difference in legislation applicable to such infraction of the law, and most importantly, the impossible situation which States find themselves in without extradition procedures to deal with authors of acts committed outside their own territory'.[11]

During the 1899 Congress a body was created to oversee the execution of its various resolutions, including inviting a state to take the lead in calling an official international diplomatic conference. It was within this context that the French Government was approached and later moved to convene the International Conference on the White Slave Traffic from 15 to 25 July 1902. In so doing, it set out the following 'questions which were to be the object of deliberation at the Conference'; these having been based on the four points, noted above, as set out at the 1899 Congress:

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10 National Vigilance Association, Transactions of the International Congress on the White Slave Trade, held in London on 21-23 of June, 1899 (London: National Vigilance Association, 1899), 17.

11 Document Préliminaires, Ministère des Affaires Étrangères, *Conférence Internationale pour la Répression de la Traite des Blanches*, Documents Diplomatiques (Paris: Ministère des Affaires Étrangères, 1902), 13.

I. – *Penal Measures.*

To include in the penal legislation of countries, whose laws contain insufficient provision for dealing with them, the following offences:–

*A.* – *Girls under Age.*

1. Procuring or kidnapping of girls with a view to prostitution: admission to, or detention in, houses or places of ill-fame. Penalties to be fixed.
2. The increase of penalties if the offence is accompanied by violence, threats, fraud, abuse of authority, or any other means of compulsion.

*B.* – *Women.*

Procuring or kidnapping with a view to prostitution, admission or detention in houses of ill-fame or brothels, when the proceedings are accompanied by violence, threats, fraud, abuse of authority, or any other means of compulsion.

Penalties to be fixed.

II. – *The Conclusion of an International Convention dealing with the following points:*

1. Competency as regards prosecutions;
2. The extradition of offenders and their accomplices;
3. The execution with the least possible delay of warrants of arrest and letters of request;
4. The supervision of the departure and arrival of persons suspected of the denounced practices, and of their victims; the transmission of information to the Governments concerned respecting the domicile of the latter, and their repatriation;
5. The instructions to be given to the Diplomatic or Consular Agents of the various foreign Governments.[12]

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[12] See 'Questions Submitted to the Consideration of the Conference', Correspondence respecting the International Conference on the 'White Slave Traffic', held in Paris, July 1902, House of Commons Parliamentary Papers (United Kingdom), Miscellaneous No. 3 (1905), Cd. 2667, 6. Note also a Report prepared by the French delegation with regard to the Questions Submitted to the Consideration of the Conference; and the Response by the German Government appended hereto: Document Préliminaires, *supra* n. 11, 16-45; which considered the legislation, administrative measures, and measure related to jurisdiction and procedure, in relation to the state participating in the Conference.

## 3. The 1902 International Conference on the White Slave Traffic

While the diplomatic gathering was billed an 'International Conference', it was very much a European affair (and – it must be said – save Switzerland, an affair of the kingdoms of Europe and their aristocratic representatives), with the participation of Austria, Belgium, Denmark, France, Hungary, Italy, Germany, Norway, Portugal, Russia, Spain, Sweden, the Netherlands and the United Kingdom. The only outlier being Brazil. For the noted French jurist, Louis Renault, commenting on the Conference, he took no heed of the divide of Atlantic Ocean, instead noting that the participants included 'all European States except for the Balkan States'.[13]

During the first sessions of the 1902 International Conference on the White Slave Traffic ('1902 Conference') it was decided that a record would be made of the discussion during the plenary sessions of the Conference; while the four Commissions (re: sub-committees of the Conference) formed – related to legislation, administration, and jurisdiction and procedural matters; as well as the Drafting Commission – would provide reports of their deliberations.[14] When, during the third session, the commissions provided their conclusions – though not their Reports – the fundamental question of what the Conference would be proposing to their Governments was broached. While the Legislative Commission set out 'indications and recommendations' to be made to the Governments, the very active Swiss delegate, Mr. Lardy, was of the opinion that the Conference 'must present to its Governments a draft of a Convention which it recommends for adoption'; deeming that it would be a 'veritable failure if the work of the Conference ended with only expressions of non-binding wishes'.[15] While this was not agreed to right away, it foreshadowed the outcome of the Conference as Lardy spelled out the benefits of putting forward a draft instrument. The states, he said, could either 'immediately approve or reject or even

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13 L. Renault, 'La "Traite des Blanches" et la Conférence de Paris au point de vue du droit international', *La Revue Genéral de droit international public* 9 (1902), 499. Note that for the Rapporteur for the Legislative Commission convened by the Conference, Mr. Ferdinand-Dreyfus of the French delegation, the negotiation sought to reach agreement amongst 'Civilised Nations'. See Commission Législative, Rapport présenté par Mr. Ferdinand-Dreyfus, Annexe au Procès-Verbal de la Quatrième Séance, *supra* n. 11, 125. From today's perspective, the absence of the United States of America is of note, especially in the context of being in the midst of addressing its own white slave traffic. At the federal level, this would transpire through the so-called 'Mann Act', the White Slave Traffic Act of 1910. See generally: Jessica Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI* (2014). However, it should be recalled that there was, at the time, a current of American isolationist foreign policy, which in this era would preclude it from joining this Conference and, it might be added, the League of Nations, despite being the brainchild of US President Woodrow Wilson.

14 Procès-Verbaux des Séances, Première Séance, at p. 61, and Deuxième Séance, at p. 84; in *supra* n. 11, 125.

15 Procès-Verbaux des Séances, Troisième Séance, *ibid*., 105.

delay signing and ratifying'; the latter possibilities would give certain states the opportunity to modify their domestic legislation in order to bring it into line with the requirements of the proposed instrument.[16]

When the Plenary of the Conference turned to consider the substance of the Reports of the various commissions, it was clear that the Report of the Legislative Commission held the most interest, as it looked to make up the bulk of the envisioned Draft Convention. Starting off the substantive deliberations was what was deemed a 'preliminary question' by the Italian delegate, the Marquis Palucci de Calboli, who noted that:

'the words "white slave traffic" appeared to be improper. The word "white" does not apply to the generality of women, yellow, black, etc. As for "slave traffic" this also indicated the notions of import and export, characteristics which do not always appear in the violation in question which, as a result of the discussion on which the delegates are unanimous, are not aiming to deal only with an international violation."[17]

Although not seriously engaged with, the link between the white slave traffic and the trade of enslaved Africans was broached in an earlier Session by Mr. Macaré of the Netherlands, who drew the attention of the Conference to a provision of Dutch law related to the slave trade (*traite des noirs*) 'which seemed to us offered a formula which we are looking for to suppress the white slave traffic' (*traite des blanches*).[18]

As for the French jurist, Renault, he stated that he also considered the term 'white slave traffic' to be:

'very unsatisfactory and undertook, on behalf of the Drafting Commission, to not use it in any text which has a legislative or conventional character. That said, that this designation was known and accepted appeared to him to require its absolute prescription: it could be included in the preamble of a draft convention. We have spoken a lot of the Congress on the "White Slave Trade". To completely abandon this established expression would not be without its inconveniences."[19]

16 *Ibid*.

17 *Ibid*., 111.

18 Procès-Verbaux des Séances, *supra* n. 11, 76. Macaré stated somewhat flippantly that 'all we have to do is change a word'. That change, which was never given consideration, was from 'whoever undertakes commerce in *slaves* for his own benefit', to 'whoever undertakes commerce of *women without their knowledge* for his own benefit', *Ibid*. Emphasis in the footnote added.

19 Procès-Verbaux des Séances, Troisième Séance, *supra* n. 11, 112.

When presenting the Report of the Drafting Commission, Renault expanded on the thinking noted above, stating that the Commission 'preserved both in the title and in the preamble of the Convention, the well-established expression "White Slave Traffic" because of its significance, because it indicates the traffic which is to be suppressed in a manner which everyone will understand, and because it would be difficult to find an alternative'. He followed this by insisting that: 'We do not, however, pretend that it is not in itself open to criticism, and we have avoided using it in the actual official instrument'.[20]

When setting out his thoughts on the Conference later that year in *La Revue genéral de droit international public*, Renault was less guarded, saying that term white slave traffic 'appears to be the title of a melodrama or a popular romance rather than a legislative or diplomatic text'.[21] Renault, for his part, would come around, first indicating that he thought the 'expression is rather ringing, destined to make an impression on the general public, though singularly exaggerated', and yet, he came to the realisation, 'after serious enquires, that the expression, good or bad in and of itself, corresponded to a real wrong and that the biggest efforts were necessary if one wanted to diminish or simply try to stop its growth'.[22]

As for the racialised element of the term 'white' slave traffic, it was not happenstance; rather it was evident throughout the deliberation of the 1902 International Conference. This was most apparent in the Report of the Legislative Commission which set out as being at the forefront of the minds of the negotiators that the harm which was sought to be addressed was in regard to women of European stock: 'The victim procured in a northern country, conveyed across a central country, has been delivered up in a southern country'.[23] In assessing the 1902 Conference, Renault's thoughts demonstrate the undercurrent of racialised thinking which permeated the era, as he considered that 'the draft developed between European delegates naturally was aimed at the *White* Slave trade, but it is worth remarking that the trade is not only fixed on women of a certain colour. In that, a not inconsequential traffic in yellow women is practiced between Japan and different countries.'[24]

Having undertaken a comparative consideration of legislation in force in the delegations' home states, the Legislative Commission provided a definition of what constitutes white slave traffic and, in so doing, would provide the first,

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20 Commission de Rédaction, Rapport présenté par M. Louis Renault, Annexe au Procès-Verbal de la Septième Séance, *supra* n. 11, 181; English translation from 'Questions Submitted to the Consideration of the Conference', *supra* n. 12, 33.

21 Renault, 'La "Traite des Blanches"' 1902 (n. 13), 497.

22 *Ibid.*, p. 497.

23 See Commission Législative, Rapport présenté par Mr. Ferdinand-Dreyfus, Annexe au Procès-Verbal de la Quatrième Séance, *supra* n. 11, 123; as translated into English in: *supra* n. 12, 9.

24 Renault, 'La "Traite des Blanches"'1902 (n. 13), 508. Emphasis in the original.

embryonic, definition of what would later become the established definition of trafficking in persons within the 2000 Palermo Protocol. The Report of the Legislative Commission believed that even 'those States which have the most rigorous laws may find certain new constitutive elements, such as definitions which are more adequate to the stated purpose'. To that end, and 'with a view of affording a better definition of the new offence', the Legislative Commission set out the constitutive elements of the offence of white slave traffic:

'it is committed by any person who, to satisfy the passions of another, has procured, enticed, or led astray a woman or girl, with immoral intent.'

The Report went on to consider these elements, stating that: 'to "procure" is to invite or lead the woman or girl to become a prostitute; to "entice" is to take her away with or persuade her to follow; to "lead astray" is to remove her illegally from her surroundings'. The Report continued by noting, more generally, that:

'The offence is characterized by its continuity; the successive steps which it may entail take place either within the frontiers of one country alone or in several countries. There is no unity of place. This criminal traffic is international: the human body is traded in and treated as merchandize; the traffickers in it have their agencies, their depots, their correspondents, their export offices, and even their code. To reach there; the hand of justice must fall on them wherever an offence is committed.'[25]

Having established the constitutive elements of the crime of white slave traffic, the Legislative Committee sought to make the distinction of the offence itself, as between women and the girl child. As regards girls, 'the crime exists even with consent; as for a woman, the crime exists only where violence or threats have been visited upon her, or where she has been deceived'.[26] The Legislative Commission thus proposed the following:

1. Severely punished will be any person who, to satisfy the passions of another, shall have procured, enticed or led astray, even with her consent, an underage girl, with immoral intent.

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25 See Commission Législative, Rapport présenté par Mr. Ferdinand-Dreyfus, Annexe au Procès-Verbal de la Quatrième Séance, *supra* n. 11, 122; as translated into English in *supra* n. 12, 9.

26 Commission Législative, Rapport présenté par Mr. Ferdinand-Dreyfus, Annexe au Procès-Verbal de la Quatrième Séance, *supra* n. 11, 123.

2. Equally will be punished any person who by violence, threats, abuse of authority, compulsion or fraud will have procured, enticed, or led astray a woman or a girl over age, with immoral intent.[27]

For those familiar with the contemporary definition of human trafficking, the terms 'abuse of authority', 'fraud', 'threats' and 'violence' will stand out, as they have been maintained throughout the process from 1902 to the contemporary definition of the 21st century.[28] And it might be added, this genealogy has an even longer ascendancy as these specific terms appear as part of the concluding wishes of the 1899 London International Congress for the Suppression of the White Slave Traffic, noted above. The terms were themselves drawn for a comparative consideration of domestic legislation related to prostitution and the debauchery of minors – where the issue of abuse of authority was focused on persons such as parents, guardians, teachers, and tutors.[29]

The two provisions setting out the offences, as finalised during the 1902 Conference, would ultimately find their way into the 1910 International Convention. However, two modifications did take place during the tail end of the 1902 Conference. The first, somewhat minor, was with regard to making plain that what was being legislated against was an international offence.[30] Hence, the final clause in each of the following provisions, as set out here in italics, read:

'Article I

Penalties shall be inflicted on any person who, to satisfy the passions of another, has procured, enticed, or led astray, even with her consent, a woman or girl under age with immoral intent, *even where the various actions constituting the offence have taken place in different countries*.'

'Article II

Penalties shall also be inflicted on any person who, to satisfy the passions of another has by fraud, violence, threats, abuse of authority, or any other means

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27 *Ibid*., 123.

28 The definition of trafficking in person is found in Article 3(a), 2000 Palermo Protocol and reproduced in substance, but for the use of the term 'trafficking in human beings' within Article 4(a), 2005 Council of Europe Convention on Action against Trafficking in Human Beings. The following is the 2000 Palermo Protocol definition: '"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'

29 See relevant provision in Document Préliminaires, *supra* n. 11, 17-28.

30 See Procès-Verbaux des Séances, Quatrième Séance, *ibid*., 114-115.

of compulsion procured, enticed, or led astray a woman or girl over age, with immoral intent, *even where the various actions constituting the offence have taken place in different countries.*'

The second modification which transpired as between the Legislative Commission's proposal and the one that found its way into the 1910 Convention, was fundamental: both in regard to that Convention, because of the contemporary echoes it carries in regard to debates around the legalising of sex work.

This is so, as the proposal put forward by the Legislative Commission sought to establish 'an essential distinction' between girls and women. That is: a distinction around the issue of age of consent as between those girls who are minors (*fille mineur*) and those over the age of majority (*fille majeure*). The dichotomy being made was as regards to girls under the age of majority (re: minors), where consent was irrelevant; and for those who had reached the age of majority, wherein the crime was the leading astray, as a result the means of procurement: 'violence, threats, abuse of authority, compulsion or fraud'. Consider those provisions developed by the Legislative Commission once more:

1. Severely punished will be any person who, to satisfy the passions of another, shall have procured, enticed or led astray, even with her consent, an underage girl, with immoral intent.
2. Equally will be punished any person who by violence, threats, abuse of authority, compulsion or fraud will have procured, enticed, or led astray a woman or a girl over age, with immoral intent.[31]

In detailing this distinction, the Report of the Legislative Commission went on to explain:

'A minor does not have complete exercise over her free will. She is *res sacra*; the law must defend her, even against her own weakness. She who is in the majority can resist, at least in certain terms, it is only if her consent is by deceit, through force, or vitiated, that the law, less rigorous than morality, intervenes to supress the procurement.'[32]

The Legislative Commission noted that this distinction was to be found in domestic legislation in regard to *proxenetism*, that is: in regard to brokers who negotiated sex work; in the colloquial: pimping. The distinction also had the benefit, the Report noted: 'of leaving aside the very serious question of the

31 *Ibid.*, 123.
32 *Ibid.* There are a number of possible translations of *res sacra*: sacred, sacred object, or sacred thing.

regulation of prostitution for which the Conference does not have a mandate thus making agreement easier to achieve'.[33]

However, the question of regulating prostitution did effectively rear its head during the Plenary Session when the Italian delegate, the Marquis Palucci de Calboli stated that he 'regretted that Article 1 did not aim both at those of a majority as it did those of a minority'. Effectively, he sought to establish an international offence of procurement of a woman with immoral intent; in other words: to criminalise the prostituting of others. While the Italian delegate was willing to concede that a woman could deliver herself into prostitution, he believed there was 'a necessity to make it a crime to procure even a girl over age'.[34] In response, the French delegate, Mr. Ferdinand-Dreyfus, noted:

'That the legislation of the States represented at the Conference could be assembled into two distinct groups: the first, which punishes *proxenetism* without distinction between major or minor; the second, which distinguishes between these two categories of women. The criterion presented to the Legislative Commission was that the state of minority, of an under-age girl, was always a crime even where there was consent; but in regard to a girl over age, procurement is only punished if there is violence, fraud, threats, or coercion. To punish *proxenetism*, without taking note of this distinction, that is to raise the general and delicate question of prostitution. It would seem in wanting to resolve this, we risk not succeeding. Further, those delegates whose legislation is more rigorous have accepted the distinctions proposed, as constituting a minimum. To go further would be to compromise the successful efforts undertaking by the delegates.'[35]

While it was agreed that the proposal by the Palucci de Calboli would be considered by the Drafting Commission, the issue was still discussed in Plenary Session, with word on the issue given to two others. The delegate of the Netherlands, Mr. de Savornin Lorman, considered that the proposal introduced aggravating circumstances, in a situation where the Legislative Commission had been unwilling to consider such circumstances. He stated that the Legislative Commission 'had agreed to leave this in the care of [domestic] legislatures'; 'the Commission', de Savornin Lorman continued, 'sought uniquely to establish a demarcation between minors and those of an age of majority'. Renault, for his part, was in agreement stating that 'the important question in regard to the international level is to establish two penalties. One for the procurement of

33 *Ibid.*, p. 123; i.e.: '*n'est pas saisie*'.
34 *Ibid.*, 113.
35 *Ibid.*

minors, the other for the procurement of those who have attained the age of majority.'[36]

When the Draft Convention was presented in the Report of the Drafting Commission, the proposal which had been put forward by Palucci de Calboli was found to have been included in Article 1 which read, in part, that 'penalties shall be inflicted on any person who, to satisfy the passions of another, has procured, enticed, or led astray, even with her consent, a *woman or girl under age* with immoral intent'. However, Renault, speaking as Rapporteur of the Drafting Commission was adamant that a distinction existed between Article 1, which was only applicable to minors, and Article 2, which was only applicable to those over the age of majority.

At first blush, Renault's words appear to go against a textual interpretation of the Article 1 which sets out that penalties are to be established for those who 'to satisfy the passions of another, has procured, enticed, or led astray, even with her consent, a woman [...] with immoral intent'. Yet, it would appear that the Italian proposal had ultimately been dealt with by means of a classic example of legal nicety; wherein constructive ambiguity appears to provide one reading, while in law it meant another. In so doing, the one 'distinct group' of states, namely those who wished to address *proxenetism* writ large, failed to achieve their objective, though they went home thinking they had.

The compromise reached was the inclusion of term 'woman', *but ultimately the reading of Article 1 turns on an interpretation of the word 'or'*. This is so, as it will be recognised that in English (as with its French equivalent: '*ou*'), the conjunction 'or' can, in grammatical terms, be used either as alternation or continuation. In the case at hand, the issue falls to the following wording: 'a woman or girl under age'. Should these words be understood as being in the alternative: 'a woman' or as 'a girl under age'; or as a continuation: as a 'woman or girl' under age? Again, at first blush, the former interpretation would seem to hold logically; an alternative can be understood between a woman and girl; or even a woman or a girl under age. Yet, through various means, the negotiations which transpired in 1902 and later in 1910, sought to maintain the distinction between Article 1 and Article 2 as being based on age by setting out markers which called for an contextual interpretation of these words as a grammatical continuation: as 'a woman or girl' under age. In other words: a person under age, whether called a girl or a woman.

In this light, we can thus understand why Renault is adamant is emphasising that the distinction between Articles 1 and 2 turns on age. As Renault explained in the Report of the Drafting Commission: 'the requirement to suppress is defined in Articles I and II of the draft Convention; this establishes a fundamental distinction as between minors and those above the age of majority (*entre les*

36 *Ibid.*, 113-114.

*mineures et les majeures)*, the fact of procuring being punishable in the case of minors, while in case of those above the age of majority it must be accompanied by certain aggravating circumstances'.[37] Renault continues, seeking to emphasise that Article 1 only criminalised actions in regard to minors, but states, if they wish can go further and criminalise *proxenetism* in relation to those above the age of majority as well. The French jurist stated that 'there must be no misunderstanding as to the import of the definitions proposed by the Conference; they constitute the *minimum* that is considered indispensable'.[38] He makes plain that the legislation in every country 'must punish at least the acts which are indisputably abominable in the eyes of every one [...] because it is a question of persons who need to be protected on account of their age or of the machinations of which they are victims'. Renault then provides a number of examples of where states can go further in their own legislation, the first being that states 'may punish the procurement of those beyond the age of majority in the absence of the aggravating circumstances'.[39] Clearly, with the last statement, Renault is making plain that Article 1 does not apply to women over the age of majority, but rather, that if states wish to go beyond the purview of Article 1, it is their sovereign prerogative to put in place legislation which seeks 'to punish the procurement of those beyond the age of majority', where the aggravating circumstances of Article 2 are not at play.

Beyond this interpretive marker, other, more overt, markers were set out through the establishment of the Final Protocol – *Protocol de Clôture* – to the 1902 Draft Convention for the Suppression of the White Slave Traffic. The very *raison d'être* of the Final Protocol, despite its non-binding nature, was to provide interpretive guidance. The 1902 Draft Final Protocol says as much:

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37 Note here there is difference in the French text and its English translation which appears in the Parliamentary Papers. The provision quoted in the text above is a translation from the French and reads:
'*Le fait à réprimer est défini dans les articles 1 et 2 du projet de Convention; il comporte une distinction fondamentale entre les mineures and les majeures, le fait d'embauchage devant être puni par lui-même, taudis que, pour les majeures, il doit être accompagné de certaines circonstances aggravantes.*'
See Commission de Rédaction, Rapport présenté par M. Louis Renault, Annexe au Procès-Verbal de la Septième Séance, *supra* n. 11, 182.
The Parliamentary Papers translate that provision, in *supra* n. 12, 33, as:
'The act to be suppressed is defined in Articles I and II of the draft Convention; a fundamental distinction is drawn between girls under age and women, the act of procuring in itself being punishable in the case of girls under age, while in case of women it has been accompanied by certain aggravating circumstances.'

38 Commission de Rédaction, Rapport présenté par M. Louis Renault, Annexe au Procès-Verbal de la Septième Séance, *supra* n. 11, 182; as translated into English in *supra* n. 12, 34. Emphasis in the original.

39 Here again, the Parliamentary Papers use the term 'women' in the text rather than Renault's original words which were '*des majeures*', that is: 'those above the age of majority'. I have thus translated from Commission de Rédaction, Rapport présenté par M. Louis Renault, Annexe au Procès-Verbal de la Septième Séance, *supra* n. 11, 182; rather than the English translation found at *supra* n. 12, 34.

'At the moment of proceeding to the signature of the Convention of this day, the undersigned Plenipotentiaries think it expedient to indicate the spirit in which Articles I, II, and III of that Convention should be interpreted, and in accordance with which it is desirable that, in the exercise of their legislative sovereignty, the Contracting States should provide for the execution of the arrangements decided upon or for completing them.'[40]

Article A of the Draft Final Protocol speaks to Renault's reading of Articles 1 and 2; that these provisions constitute minimum threshold requirements for offences. Beyond this, the reading of Article A of the Final Protocol gives credence to a recognition that Article 1 of the Draft Convention does not apply to women per se, but rather to women or girls who are under age; making plain that states can go beyond the requirements of Article 1 of the Draft Convention. That is, that states are free to punish those who – without the use of the means of compulsion – seek to satisfy the passions of others by procuring those beyond the age of majority with immoral intent. Article A of the Final Protocol of the 1902 Draft Convention for the Suppression of the White Slave Traffic reads:

'The stipulations of Articles 1 and 2 are to be considered as a "minimum" in the sense that it is understood that the Contracting Governments remain absolutely free to punish other similar offences, such, for instance, as the procuring of women over age, when their neither fraud nor compulsion.'[41]

The issue would again arise during the negotiations which were held in 1910 which finalised both the 1910 International Convention for the Suppression of the White Slave Traffic and its Final Protocol. Thus, the question will be returned to later in this article when consideration turns to those 1910 negotiations. However, it might be emphasised here that what emerges from the negotiation of 1902 Conference – and is later confirmed at the 1910 negotiations – is an interpretation of Articles 1 and 2 which speaks to a grammatical continuation which reads the following as phrases: 'a woman or girl under age' and 'a woman or girl over age'. Or for the sake of clarity: 1) a woman or girl who is under age and 2) a woman or girl who is over the age of majority.

In part, the difficulty in seeking to understand the nuances of language at play, at this point, hinges on the fact that the considerations remain abstract because no age of majority has been set. However, let us consider a counterfactual scenario whereby an age of majority had been set during the 1902 Conference of say, for example, eighteen years of age. If State *X*, has designated

40 Draft Protocole de Clôture, *supra* n. 12, 19.

41 There appears to be an issue with the English translation of this provision, as it appears in the League of Nations Treaty Series (Number 20, page 278), as the French term '*majeures*' is translated as 'women over age' rather than the more accurate 'those above the age of majority'.

sixteen years of age as being the age of majority within its domestic legislation; it might consider that 'girls' were those under the age of sixteen, whereas 'women' where those over sixteen years of age. Yet, from the perspective of the Draft Protocol, those women over sixteen years of age but under eighteen years would fall under the protection of Article 1 as 'a woman [...] under age'.

Here, it should be emphasised that while attempts were made during the 1902 Conference to reach agreement as to a specific age of majority, this was unsuccessful. Instead, Article B of the Draft Final Protocol states: 'For the suppression of offences contemplated in Articles I and II. The age of majority must be laid down in the civil law'.[42] When Article B was considered in Plenary Session, it was suggested that previous discussions had not turned on the benchmark of the civil law; rather it had been to call the attention of states to the utility of prolonging, in regard to the specific issue of the Conference, the period of age of minority as much as possible, so as to protect women for as long as possible, and thus render the suppression that much more energetic.[43]

In sum, the offence established at the 1902 Conference was an international one, which made a distinction based on age – an age to be determined by each State Party – and applicable to all females, regardless of race. Where the victim was under the age of majority, the crime was the procuring, enticing, or leading astray, even with her consent, with immoral intent. Where the victim was over the age of majority, the same crime required the following means of compulsion: 'violence, threats, abuse of authority, compulsion or fraud'.

The offences having been determined, considerations should have turned to the penalties, yet the Drafting Commission stated that the Draft Convention contains 'no indication as to the penalties with which the offences are to be punished. That is the business of internal legislation.'[44] This was, in fact, an acknowledgment of the domestic/international dichotomy which was a fundamental theme which ran throughout the conference proceedings and would ultimately require not one, but two international instruments. Having not been given full powers to conclude legal instruments, the delegates were very much attuned to the nature of international relations, wherein state sovereignty reigned supreme; and said so, openly and often.

That said, delegate Ferdinand-Dreyfus, who chaired the Legislative Commission, noted that in certain situations his Commission engaged in 'its consideration with the traffic both internally and externally'. He continued: 'it would not be possible, or logical, or fair, to punish an external traffic if there is impunity as to the practice internally'.[45] For Mr. Buzzanti, the Italian delegate, the Con-

42 Draft Protocole de Clôture, *supra* n. 12, 19.

43 Procès-Verbaux des Séances, Septième Séance, *supra* n. 11, 170.

44 Commission de Rédaction, Rapport présenté par M. Louis Renault, Annexe au Procès-Verbal de la Septième Séance, *supra* n. 11, 182; as translated into English in *supra* n. 12, 34.

45 Procès-Verbaux des Séances, Quatrième Séance, *supra* n. 11, 114.

ference was meant to deal with both categories of the traffic: 'it has been said that it is impossible to punish the offense internationally without punishing the domestic offense and that he did not logically suppose that any State could adhere to a future Convention without first having adopted measure to counter the traffic within the domestic order'.[46] However, it was the opinion of Renault, as set out in introducing the Report of the Drafting Commission, which would carry the day; as he stated that as internal traffic was a domestic issue, 'the offence takes on a purely territorial character'. Yet, he went on to say, it cannot 'be disputed that it is inadmissible for a country to suppress external and not internal traffic'.[47] He continued: 'both must be suppressed by legislation which is intended to be logical. Moreover, it may be said that the texts of Articles I and II take it for granted that internal traffic will be suppressed, if they do not lay stress upon it'.[48] Thus, while the Draft Convention was silent on internal traffic, the negotiators expected that states would see the logic in also criminalising domestic white slave traffic.

In the Report prepared by the French delegation on the Questions Submitted for the Deliberations of the Conference in the lead-up to their meeting in Paris, it was clear that what was to transpire was a move to establish an international crime. To counter the nefarious acts, 'the result of which was too often impunity', it was understood that the purpose of the Conference was 'to oppose this internationalism by a group of international social forces which, exclusively, have the efficient means of putting it to an end'.[49] Despite this internationalist perspective, concerns were raised as to the proposal by the Drafting Commission – in line with the one of the original questions that were put to the deliberations of the Conference – in regard to the holding of a girl in a house of debauchery which could 'become, for her, a prison'.[50] The Russian delegate, Mr. Malewsky-Maléwitch, considered this proposal to be an intervention into 'the domain of domestic legislation of countries'. For his part, Renault agreed, considering that this issue was situated within the territorial limits of each state and thus fell 'exclusively within the domain of territorial sovereignty'; as such, it was within the jurisdiction of the police and was not to be dealt with 'by virtue of an international engagement'.[51] As a result of these discussions, the proposed offence related to sequestration within houses of ill-repute was shelved.

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46 *Ibid.*, 115.

47 *Ibid.*

48 Commission de Rédaction, Rapport présenté par M. Louis Renault, Annexe au Procès-Verbal de la Septième Séance, *supra* n. 11, p. 183; as translated into English in *supra* n. 12, 34.

49 Rapport rédigé par la Délégation Française sur les Questions soumises aux délibérations de la Conférence, Document Préliminaires, *supra* n. 11, 16.

50 Commission Législative, Rapport présenté par Mr. Ferdinand-Dreyfus, Annexe au Procès-Verbal de la Quatrième Séance, *ibid.*, 123.

51 Procès-Verbaux des Séances, Quatrième Séance, *ibid.*, 114-115.

The issue of the distinction between international and domestic jurisdictions not only animated the discussions with regard to offences; in fact it did much more, shaping both the outcome of 1902 International Conference on the White Slave Traffic and the very regime of white slave traffic. Renault recognised this fundamental issue:

'The problem of the suppression of this criminal traffic raises both national and international questions. The Governments may consent to come to an understanding and give undertakings in regard to international questions as long as their sovereignty is respected, but they cannot, by an international act, undertake to realize any particular reform of an exclusively national character, because this would involve an encroachment on the domain proper of their internal sovereignty.'

Renault then ended the introduction to the Report of the Drafting Commission, in the following manner:

'In respect of the international questions, we could propose to the Governments to come to an agreement, to give undertakings, at least to a certain extent; in respect of the national questions we had to restrict ourselves to the expression of wishes and to more or less urgent recommendations. The difficulty arises from the fact that the distinction is not always very clearly defined, and that the questions often present themselves under a double aspect. It is then necessary to proceed with great caution, and to take into consideration both the international engagement and the domestic measure.

It is in this general spirit that we have endeavoured to adapt the Resolutions of the Conference to a wording which could be submitted to our Governments without arousing the susceptibilities of any of them. [...]

You will find at the end of this Report the draft Final Protocol, [...] This Protocol, contains the result of our deliberations, which we propose to record under several heads adapted to the nature of the questions dealt with; we request you to submit to our Governments: 1. a Draft International Convention with a draft *Protocol de Clôture* annexed; 2. a Draft Agreement.'[52]

The proposed instruments put forward at the 1902 Conference would ultimately find their way into law; however, 'susceptibilities' of certain states were in fact 'aroused' in regard to the Draft Convention, requiring a wait of eight more years and a further international conference to gain agreement on it as a binding text. As for the Draft Agreement, the road was rather shorter.

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52 Commission de Rédaction, Rapport présenté par M. Louis Renault, Annexe au Procès-Verbal de la Septième Séance, *ibid.*, 180; as translated into English in *supra* n. 12, 33.

## 4. 1904 International Agreement for the Suppression of the White Slave Traffic

During its early deliberations the Belgian delegate, Mr. Hoyois, had pointed the way to the solution ultimately accepted by the 1902 Conference: that two binding instruments would be drafted. Hoyois noted that a distinction could first be made between non-binding proposals (those recommendations constituting the Draft Final Protocol) made to states; and other, binding, proposals. Those binding proposals could then be sub-divided into 'two categories: those that have as object legislative measures and those which are administrative measures. Both could, and no doubt should, find their way into international agreements.' He then set out his rationale:

'On certain points, in effect, the approval of Governments could be more easily gaining than in others. This would be the case for most of the resolution of the Conference related to measures of an administrative kind. On the administrative plane, Governments are in position, if need be, to make modifications to the actual state of things much quicker than in the domains where they can only act after the eventual intervention of their respective parliaments.'[53]

It was for these reasons that ultimately the 1902 International Conference spawned two instruments; and saw the Draft Agreement come into force shortly thereafter, while the Draft International Convention not only took longer to gain consent, but required a further international conference to do so.

It will be recalled that amongst the questions that were to form the object of deliberation of the 1902 Conference, the French Government had proposed, as the final elements of an international convention to be concluded, the following:

'4. The supervision of the departure and arrival of persons suspected of the denounced practices, and of their victims; the transmission of information to the Governments concerned respecting the domicile of the latter, and their repatriation;

5. The instructions to be given to the Diplomatic or Consular Agents of the various foreign Governments.'[54]

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53 Procès-Verbaux des Séances, Troisième Séance, *supra* n. 11, 107.

54 See 'Questions Submitted to the Consideration of the Conference', *supra* n. 12, 6. Note also a Report prepared by the French delegation with regard to the Questions Submitted to the Consideration of the Conference; and the Response by the German Government appended hereto: Document Préliminaires, *supra* n. 11, 16-45; which considered the legislation, administrative measures, and measure related to jurisdiction and procedure, in relation to the state participating in the Conference.

In the Report prepared by the French Government regarding these questions to be considered during the Conference, it noted that:

'if the discovery of the procurement of women and girls, in the great urban metropolitans where it is ordinarily practiced presents, for a hundred different reasons, extreme difficulties, it is not the same on the platforms of arrival and departure, on the trains which carry these unfortunate travellers, in the ports of embracement or on the ships which will transport them beyond the seas. Here, there are abundant controls and these can be exercised with success by agents who, with experience, have become very shrewd.'[55]

In the Report of the Administrative Commission prepared during the 1902 Conference, it was noted that the Commission had been encouraged to develop administrative measures which could be voluntarily accepted by states. The Commission was in agreement that there was 'the need to establish the methodical international surveillance of the circulation' of those who might be caught up in the white slave traffic; but that – in the words of the Rapporteur of the Administrative Commission, the French delegate, Mr. Hennequin – this should not 'limit freedom of movement'.[56] Beyond this, there was very little engagement or thoughts expressed as to the nature of the administrative measures that were being considered: that is, those proposed measures put forward by the French Government in the lead up to the 1902 Conference. The light touch given by the Administrative Commission was also reflected in the considerations of the Report of the Administration Commission by the Plenary Session, despite the fact that its proposal were more voluminous than the reports of the other commissions. Throughout these discussions, one gets the sense that the delegates considered these administrative arrangements to be of a second order and that they would, in all likelihood, be deemed non-binding recommendations rather than what, in fact, transpired: their transformation, shortly thereafter, into a binding instrument. In part, this was due to the fact that the Report of the Administrative Commission set out its ultimate findings not in the form a draft legal instrument, but rather as a number of resolutions. As to the substance of its ultimate consideration, the first of the Resolutions put forward by the Commission was general in nature, reading:

'Constant and active watch to be kept in all the railway stations, and particularly on the frontiers and in the ports, with a view to the detection, as far as is possible and is allowed by law, of the persons in charge of girls and women

55 Mesures Administrative, Document Préliminaires, *ibid.*, 38.
56 Commission Administative, Rapport présenté par Mr. Hennequin, Annexe au Procès-Verbal de la Cinquième Séance, *ibid.*, 138.

who are destined for immoral purposes, and who are in ignorance of the fact, or even, in the case of girls under age, those who are acquainted with the intent.

The Commissioner of Emigration at ports of embarkation to be allowed, if necessary, to examine individuals suspected of being engaged in the White Slave Traffic, such examination to bear, in the case of women, on the places of departure and destination, their civil status, and the profession they contemplate pursuing abroad.'[57]

Where the work of the Administrative Commission was transformed into the Draft Agreement which would later become the 1904 Agreement, was through the work of the Drafting Commission of the 1902 Conference. As concluded, the Draft Agreement required each consenting state to establish an authority to act as a central clearing-house of information regarding 'the procuring of women or girls for immoral purposes abroad'; to keep watch in line with the Resolution noted above; to interrogate foreign prostitutes; to assist in the repatriation of both victims and foreign prostitutes wishing to return to their country of origin; and, finally, to supervise 'office and agencies engaged in finding employment for women or girls abroad'.[58]

When considering the text in the Report of the Drafting Commission, Renault was prophetic in noting that the provisions of the Draft Agreement 'are of quite a different character from those of the Convention; further, what is more important from a practical point of view, the putting into force of this Agreement seems capable of more rapid achievement than that of the Convention'. This was so, as:

'For the latter Parliamentary approval will in many cases be required, and special Laws will have to be voted, all of which necessarily, and with the best of will, entails considerable delay. The Arrangement seems capable of acceptance by the different Governments in virtue of their ordinary powers; they are only asked to agree on the employment of existing instruments, not to create new ones. It would certainly be a great step forward if our different countries could agree within a short time on administrative measures for paralyzing the traffic, detecting its commencement, and protecting the unfortunate women who are its victims.'[59]

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57 *Ibid*., 142; as translated into English in *supra* n. 12, 13.

58 International Agreement for the Suppression of the White Slave Traffic, League of Nations, Treaty Series, Volume 1(1), 1920, 85-87. See Appendix I for the provision of the 1904 International Agreement for the Suppression of the White Slave Traffic.

59 Commission de Rédaction, Rapport présenté par M. Louis Renault, Annexe au Procès-Verbal de la Septième Séance, *supra* n. 11, 18; as translated into English in *supra* n. 12, 37.

With the closing of the International Conference on the White Slave Traffic on 25 July 1902, states were left to consider whether they would move forward to bring both the Draft Arrangement and Draft Convention into force. In April 1903, the French Government suggested that the time was ripe to do just that; circulating a Note asking if states were in a position to carry out these formalities. In February 1904, the negotiating parties were contacted once more by France to say that while states were prepared to proceed to consent to the Arrangement; that with regard to the Convention, 'in view of the fact that several Governments are unable to assure its execution without previously altering their legislation, that the signature should be postponed'.[60]

On 18 May 1904, the International Agreement for the Suppression of the White Slave Traffic was signed. During those ceremonies, at the behest of the Dutch Government which had noted, in February 1904, that it was unclear if the Agreement would be applicable within the respective colonies, the French Government added a Declaration to that effect, for the consideration of the Signatory Parties.[61] The International Agreement for the Suppression of the White Slave Traffic came into force on 18 July 1905 with ultimately twelve states ratifying; nine more acceding; and a further large number becoming party as a result of their adherence to the 1910 International Convention for the Suppression of the White Slave Traffic. By way of closing the bracket on the 1904 Agreement, it should be noted that it has been superseded by the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, which consolidates the 1904 Agreement and other instruments, thus leading to the – rather remote – possibility of termination of the 1904 Agreement, were all its Parties to bind themselves to the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.[62]

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60 Declassé to Sir E. Monson, Enclosure Number 14, *ibid.*, 44.

61 See Procès-verbal of Signature, Enclosure 2 in No. 19, *ibid.*, 52.
'The undersigned Plenipotentiaries, assembled this day for the purpose of proceeding to the signature of the Arrangement intended to secure effective protection against the "White Slave Traffic" have exchanged the following Declaration as regards the application of the said Arrangement to the respective Colonies of the Contracting States:–
Article 1. The countries, signatories of the Arrangement mentioned above, shall have the right to accede thereto at any time for their Colonies or foreign possessions. They may do this either by a general Declaration comprehending all their Colonies or possessions within the accession, or by specially naming those comprised therein, or by simply indicating those which are excluded.
Article. 2. Each Government shall make the Declaration which it shall think suitable.
Article. 3. The Governments who shall have subsequently to make Declarations with regard to their Colonies, shall do so in the form laid down by Article 7 of the Arrangement.'

62 Information in this paragraph available via the United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Chapter VII, Number 8, available at: https://treaties.un.org/.

## 5. 1910 International Convention for the Suppression of the White Slave Traffic

In January 1910, the German Ambassador in Paris wrote to the French Foreign Minister, stating that his Government's proposal to hold a conference on the suppression of obscene publications had been inspired by the decisions made during the 1902 Conference related to the white slave traffic. In the context of a general willingness of European states to address vice, Germany's Imperial Government wanted the agreements on obscene publications to mirror as much as possible those that had been agreed to in 1902 in regard to the white slave traffic. The German Ambassador went on to say that, as the Conference relating to obscene publication, which was to transpire shortly in Paris, would include 'all those States interested in the suppression of the White Slave Traffic, it seemed an opportune time to profit from the occasion to once more take up the discussions of the [1902 Draft] Convention'.[63] Having sounded out his counterparts; in February, the French Foreign Minister noted that those who had negotiated the Draft Convention seemed willing to 'make some minor changes [re: *retouches*] necessary to allow this diplomatic instrument to be signed without delay'. However, the French Minister, Stephen Pichon, was clear in seeking to bracket the negotiations, stating that: 'it should be clearly understood that the discussions on the subject, will only touch on the reservations which different States have in regard to the text drafted in 1902'.[64]

It is worth pausing here for a moment to consider the regime of reservation to treaties which existed in international law at the time, as it was this technical, legal, issue which both blocked the coming into force of the 1902 Draft Convention, and precipitated the need to hold a second round of negotiations so as to iron out the difficulties. In essence, the nature of public international law at the time: little more than a *jus publicum Europeaum*; established that a reservation to a treaty would only be acceptable if all other parties to that treaty accepted it. While this regime of treaty reservations would give way during the United Nations era; in the wake of the 1902 Conference it effectively blocked the coming into existence of the Draft Convention.[65] The fact that, having had their domestic

63 Ministère des Affaires Étrangères, *Deuxiéme Conférence Internationale pour la Répression de la Traite des Blanches*, Documents Diplomatiques (Paris: Ministère des Affaires Étrangères, 1910), 11.

64 *Ibid*., 13.

65 In essence, a reservation is a unilateral act which would allow a state to opt-out or exclude itself from an article of a treaty. Article 2(d) of the 1969 Vienna Convention on the Law of Treaties defines a reservation as:
'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.'
The change from what was previously understood as the bilateral nature of reservations (wherein each state had to, bilaterally, agree to the reserving state's proposed modification, before that state can be deemed a party to the treaty in question); to the current multilateral nature of reservations (wherein, the reserving state becomes party to a treaty when at least one state agrees

legal orders consider the 1902 Draft Convention, resulted in a number of states having difficulties in being able to consent to becoming party to it without various reservations, meant that the Draft Convention was effectively dead in the water. The only means of seeking to bring it back to life was to have the parties sit down at the same table and talk through those reservation which they had with the text.

In 1910, they did just that, literally: sitting at the same table, in the same room, as they had in 1902, at the First International Conference for the Suppression of the White Slave Traffic. Not only that, but a number of delegates who were present in 1902, including Hennquin and Renault found themselves, on 18 April 1910, once again in Paris at the *salons du Ministères des Affairs étrangères*, accredited to take up the negotiations during what was now the Second International Conference for the Suppression of the White Slave Traffic ('1910 Conference'). The delegates were in fact representing their Governments at both this Conference and the concurring International Conference on the Suppression of Obscene Publications. This is manifestly evident by the Opening Session which was devoted to the inaugurating both Conferences, jointly, before the first turning its attention to the 1902 Draft Convention. The basis of discussion during the deliberations of the 1910 Conference were both: the reservations made by Germany, the Netherlands, and Sweden; and the Notes, by Belgium and by France, which gave consideration to those reservations.

In his opening address to the 1910 Conference, Pichon made plain that his Government sought to have the 1902 Draft Conventions come into force. The eight-year delay which had transpired was a recognition that this task had been difficult, 'as, to be made good, it was necessary for the different States to introduce into their respective legislation an offence which, previously had not existed'. While this task was effectively complete, there 'were objections to minor details or drafting language which had made it impossible for the 1902 accord to be officially recognised'.[66] Thus, to speed up the process, which could otherwise have occurred through diplomatic correspondence, the French Government thought it best to have this Second Conference transpire in parallel to the Conference related to obscene publications.

There were two issues which animated the discussions at the 1910 Second Conference, the first was the procedural elements of effecting cooperation on

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to its reservations), came about as a result of both the Advisory Opinion of the International Court of Justice in the 1951 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case; and the provisions later included in the 1969 Vienna Convention on the Law of Treaties (see Articles 19-23).
While the current multilateral system of reservations is rather more technical then has just been set out, it goes beyond the purview of this study to provide more detail. For those interested, see generally: J.K. Koh, 'Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision', *Harvard International Law Journal* 23 (1982), 71-116.

66 Procès-Verbaux des Séances, Premième Séance, *supra* n. 63, 43.

criminal matters as between states. This, in fact, was the third sets of issues considered at the 1902 Conference, after matters of administration and legislation: issues of jurisdiction and procedure.[67] While issues of jurisdiction were straightforward, the issues of procedure, and specifically the channels by which cooperation between states would transpire raised concerns that needed to be revisited in 1910. The issue of 'Letter of Requests' (re: *commissions rogatoires*) was rather technical in nature and demonstrated different approaches as to how communication should transpire from state to state. The ultimate solution, which was negotiated at the 1910 Conference was to provide a plurality of options that took into consideration various approaches states had developed, whether that be communication directly judge to judge, through the intermediaries of consular agents, or through diplomatic channels.[68]

The second item of note which engaged the 1910 negotiations in Paris was the issue age of minority/majority and where to draw the line. Before considering those discussions, it will be recalled that the offences envisioned within the 1902 Draft Convention were ultimately incorporated into the 1910 Convention. In the evolution of our considerations thus far, no official translation into English of the provisions of Articles 1 and 2 of the 1910 International Convention for the Suppression of the White Slave Traffic has been set out. The following is drawn from the United Kingdom Treaty Series:

'Article 1

Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, with immoral purposes, shall be punished notwithstanding that the various acts constituting the offence may have been committed in different countries.'

'Article 2

Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other means of compulsion, procured, enticed, or led astray a woman or girl over age, for im-

67 Issues of jurisdiction in regard to these international crimes was of minor deliberation, it having been noted that the *Institut de droit international* had, in its session of 1883 in Munich set out a number of principles which clarified the issue. See Document Préliminaires, *supra* n. 11, 34. Also consider: Institut de droit international, 'Règles relatives aux conflits des lois pénales en matière de competence', Munich Session, 1883 available at: www.justitiaetpace.org/idiF/resolutionsF/1883_mun_04_fr.pdf.

68 Those discussions can be found in *supra* n. 11, 34-37, 159-161, 185-187; and *supra* n. 63, 49-54, 87-89; and manifest in Article 6, of the 1910 International Convention for the Suppression of the White Slave Traffic found in Appendix II.

moral purposes, shall also be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.'[69]

It should be noted here that in regard to the clause 'with immoral purposes' in both Articles 1 and 2; while the wording would stay consistent in French ('*en vue de la débauche*') from 1902 Conference through the 1910 Convention, in English what was originally translated in 1902 as 'with immoral intent', in 1910 would become 'with immoral purposes' in the authentic English-language text of the Convention.

During both the deliberations of the Drafting Commission and during the Plenary Session of the 1910 Conference, an attempt was made by the Hungarian delegation to have the provisions of Articles 1 and 2 re-opened for discussion. However, this was not to be, 'as no formal proposal for modifying Articles 1 and 2 of the draft Convention of 1902 had been circulated to the different Powers, the Conference could not consider a suggestion of the Hungarian Government that an age limit of 20 should be substituted for references in those Articles to "majority" and "minority"'.[70]

Instead, the Hungarian Proposal was handed to a Sub-Commission of the Commission relative to the Repression of the White Slave Traffic head by none other than Louis Renault. The Sub-Committee, it was reported, noted that the 1902 Draft Convention provided more protection to a woman or girl under age procured for foreign debauchery than to a woman or girl over age, but without however entering into any specificities as to the terms 'under age and over age'.[71] The Report of the Commission noted that to leave the provisions of Article B as they now stood – it will be recalled these stated: 'For the suppression of offences contemplated in Articles I and II. The age of majority must be laid down in the civil law' – would leave a gap between the different ages of majority established in the civil law of various states. This could lead to a situation where states punished the same offence differently, 'or even not punishing a trafficker at all, where he had procured a foreign women or girl from a country where the age of civil majority was different. The repression could thus be severally compromised'. Although recognising that to set such an age would be 'rather

69 International Convention for the Suppression of the White Slave Traffic, 1910, United Kingdom Treaty Series, 1912, Number 20, pp. 269-270, House of Commons Parliamentary Papers (United Kingdom), Cd. 6326. Available from UK Treaties Online, at: http://treaties.fco.gov.uk/docs/pdf/1912/TS0020.pdf.

70 Report of the British Delegation to Sir Edward Grey, International Conference of the Drat Convention of 1902, respecting the White Slave Traffic, No. 6, Correspondence respecting the International Conference on Obscene Publications and the 'White Slave Traffic', held in Paris, April and May 1910, House of Commons Parliamentary Papers (United Kingdom), Cd. 6547, 27.

71 Commission de Rédaction, Rapport présenté par M. Charles Alphand, Annexe Numéro 1, Annexes au Procès-Verbal de la Deuxième Séance, *supra* n. 63, 66.

arbitrary', it was considered to it was a better option than to refer to domestic civil law generally.[72]

For its part, the Sub-Commission considered that 'the terms person "under age" and "over age" (re: *majeures* and *mineures*) did not have any absolute meaning and that many different interpretations could be given to them. These terms have, in reality, but a relative meaning and, by reference to their etymology, it came to be realised that they simply meant "more old" or "less old".'[73] Having considered the rather young age ('11, 13, or 16 years of age') for making the distinction between age of minority and majority in regard to different legislation on the crime of rape; the Commission considered that they should set an age, but that this be recognised as a minimum, while it would be up to states to protect minors up to that age, but were welcome to go further, even go as far as not to use age as a condition in regard to violation so Article 1.

Having set out its considerations, the Commission moved 'to fix a *uniform minimum* age under which the repression should be established for the offence of White Slave Traffic, even without fraud or violence, and to that end decided by a majority to fix that age at 21 completed years'.[74] As a result of a threat of a Swiss reservation to this provision, the age was lowered to 20, so that the new Article B of the Final Protocol of what would become the 1910 Convention reads:

'As regards the suppression of the offences provided for in Articles 1 and 2, it is fully understood that the words "woman or girl under age, woman or girl over age" refer to women or girls under or over twenty completed years of age. A law may, nevertheless, fix a more advanced age for protection, on condition that it is the same for women or girls of every nationality.'[75]

It will be recalled that it was an open question whether the wording of Article 1 created an offence of *proxenetism*, that is: of prostituting another person in generally; or whether it created an offence specifically in regard to under aged girls. The issue turns on the phrase 'women or girl under age'. Should this phrase be read, in light of the conjunction 'or', in grammatical terms, as alternation or continuation? The answer appears clear: it should be read as continuation, as a phrase 'a woman or girl under age' or, for clarity sake: as meaning 'a woman under age' and 'a girl under age'.

Not only do we have the weight of the considerations which were given during the negotiation of the 1902 Conference, but the wording of Article B of the Final Protocol attached to the 1910 Convention sets out this reading of

72 *Ibid.*, 66 and 67.
73 *Ibid.*, 67.
74 *Ibid.*, 67 and 68. Emphasis in the original.
75 See International Convention for the Suppression of the White Slave Traffic, *supra* n. 69.

grammatical continuation when it refers to 'women or girls under or over twenty'. To give further credence to this reading, there is no attempt in Article B to provide an alternation when considering women as opposed to, for instance 'girls under age'; rather, the wording is set out as phrases, in quotation marks: 'woman or girl under age, woman or girl over age'. Finally, if one refers back to the Article 1 of the 1910 Convention the words 'a woman or girl under age' are separated by commas from what comes before and what comes after, and thus an independent clause which further adds authority to it being read as a phrase; grammatically as continuation.

It will be recognised – and was recognised as such by the negotiators at the 1902 Conference – that the Final Protocol is non-binding. Thus, the question should be broached as to what weight can be afforded to the provisions of the Final Protocol to the 1910 International Convention on the White Slave Traffic as an interpretative guide or marker, in light of its non-binding character? The answer to that question is to be found in the rules of treaty interpretation.

First, it should be understood that the considerations given to the issue at hand during the 1902 and the 1910 Conferences may assist in interpreting the provisions of the phrase 'a woman or girl under age', but only in supplementary fashion. This is so, as the negotiations are part of the preparatory work of the treaty, and as such the 1969 Vienna Convention on the Law of Treaties makes plain that these *travaux préparatoires* can assist in confirming a meaning of such a phrase, where there is ambiguity resulting from an interpretation in concert with the general rule of treaty interpretation set out in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.[76] That provision of Article 31(1) sets out the general rule of treaty interpretation in the following terms: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The Vienna Convention then goes on to spell out what is meant, in part, by the 'context'. Article 31(2) states that: 'the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty'.

In the Commentary to these provisions provided by the United Nations International Law Commission, it states that the provisions of Article 31(2) seek 'to define what is comprised in the "context" for the purposes of the interpretation of the treaty. That the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment, as is also the case with documents which are specifically made annexes to the treaty.'[77] Here then we see

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76 See Article 32, Vienna Convention on the Law of Treaties, 1969.

77 United Nations, International Law Commission, *Yearbook of the International Law Commission*, Volume II, 1966, UN Doc. A/CN.4/SER.A/1966/Add.1, 221.
Note that customary nature of provisions such as those of Article 31 of the Vienna Convention on the Law of Treaties are 'practically undisputed'. See K. Zemanek, *Introductory Note: Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009), 1.

that despite the Final Protocol being deemed non-binding, it is recognised in law that it should be taken into account when interpreting the provisions of the 1910 Convention. In its Commentary on the provisions related to treaty interpretation, the International Law Commission noted that items such as the Final Protocol, which are agreements related to a treaty made by all the parties 'in connection with the conclusion of the treaty' should be understood as more than simply preparatory works, rather they add substance to the 'context' element, for the purposes of treaty interpretation. In the words of the Commission:

'What is proposed in paragraph 2 is that, for purposes of interpreting the treaty, these categories of documents should not be treated as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty.'[78]

The in-depth consideration given to the phrase 'a woman or girl under age' and the grammatical use of the conjunction 'or', leads to the conclusion that the provision of Article 1 of the 1910 International Convention on the White Slave Traffic is to be interpreted to mean that its provisions are only applicable to females who are under age, be they women or girls. What that age is was ultimately left to the domestic jurisdiction of each state to decide. Thus, the 1910 Convention does not criminalise the prostitution of others. At Article 2, it criminalises the exploitation of prostitutes where the various means of compulsion are at play. At Article 1, it establishes that consent is vitiated for those who are under age. For those above the age of majority – for those who are deemed to be able to consent – the 1910 Convention is silent.

The Second International Conference for the Suppression of the White Slave Traffic having been brought to a close on 2 May 1910, the International Convention for the Suppression of the White Slave Traffic was signed two days later and came into force on 8 August 1912.[79] Like the 1904 Agreement, a Declaration regarding colonial possession was also open for signature at the time of ratification of the 1910 Convention. That Convention ultimately had thirteen states ratify its provisions; a further twenty-two acceded, with six other states mani-

Available at: http://legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf.

78 United Nations, International Law Commission, *Yearbook of the International Law Commission*, Volume II, 1966, UN Doc. A/CN.4/SER.A/1966/Add.1, 221.

79 Note, the information from the United Nations Treaty Series (see following footnote citation) appears to be inaccurate as to the coming into force of the International Convention for the Suppression of the White Slave Traffic, as it sets the date at 18 July 1905, which predates its negotiation. Information regarding the Protocol recording the Deposit of Ratifications of the International Convention for the Suppression of the White Slave Traffic, signed at Paris, 4 May 1910 putting the date of ratification at 8 August 1912 appears accurate. See Foreign Office to Home Office, Enclosure 2 of No. 10, *supra* n. 70, 44.

festing consent through succession. As was noted previously, the 1910 Convention, like the 1904 Agreement, is superseded by the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. While there remains a theoretical possibility that the 1910 Convention will be terminated, this is rather remote as the 1950 Convention has itself been overtaken by the 2000 Palermo Protocol. As a result, there is very little likelihood that states that are party to the 1910 Convention will expend legislative energy to consent to the 1950 Convention, leading to the demise of the 1910 International Convention for the Suppression of the White Slave Traffic, or for that matter, the 1904 International Agreement for the Suppression of the White Slave Traffic.[80]

## 6. Conclusion

This study has considered the first of the three eras of evolution, at the international level, of the regime of what is today known as human trafficking. The development, in the pre-League of Nations era, of the white slave traffic regime during the first decade of the twentieth century bears witness to a jilted move from bilateralism to multilateralism in European diplomacy. In this instance, the experiment of the 1902 International Conference on the White Slave Traffic failed, as its primary consideration – to produce a draft convention which could be brought into force – was unsuccessful. States were required to then reload, holding a Second International Conference on the White Slave Traffic in 1910 to give effect to the work undertaken eight years previously. The result was the conclusion of the 1910 Convention.

The negotiations of that instrument has highlighted a bit of a lost history which is of relevance to contemporary considerations of human trafficking: that, despite the fact that they were criminalising international trafficking, that it was self-evident then that states should take it upon themselves in their domestic legislation to punish the white slave traffic, both internationally and domestically. The negotiations demonstrate that despite the two camps – those states that sought the international criminalisation of the prostitution of others, and those states that advocated the suppression of the exploitation of the prostitution of others – the outcome manifest in the 1910 Convention is an agreement on the minimum which states were to suppress. That minimum was the criminalisation of the exploitation of the prostitution of those over the age of majority; and, in regard to those under age, all prostitution of others.

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80 Information in this paragraph available via the United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Chapter VII, Number 10, available at: https://treaties.un.org/.

Finally, that the terms 'abuse of authority', 'fraud', 'threats' and 'violence' – first expressed through the 1910 Convention and now incorporated in the 2000 definition of trafficking in persons – are the original 'means' elements which along with 'method' and 'purpose' constitute what is today, the three elements of human trafficking. The 1910 Convention for the Suppression of the White Slave Traffic sheds some light on our understanding of that 'means' element as Article 2 of the 1910 International Convention indicates that the means of 'abuse of authority', 'fraud', 'threats' or 'violence' are, in fact, 'means of compulsion'. It might be added that these means of compulsion were the elements which constituted the crime of white slave traffic for those over the age of majority, but were to be considered as aggravating circumstances for the determination of a penalty where the victim was under age.

To consider the white slave traffic, despite its odious terminology, is to provide a further piece of the puzzle of understanding the evolution of the regime which is today human trafficking. Focused, as the regime of white slave traffic was, on the issue of prostitution and sexual exploitation, the insights garnered here provide more depth of understanding in regard to trafficking for sexual purposes. In so doing, it chips away at the ahistorical considerations which have thus far been given to the study of human trafficking within international law.

## APPENDIX I

### International Agreement For The Suppression Of The White Slave Traffic

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the German Emperor, King of Prussia, in the name of the German Empire; His Majesty the King of the Belgians; His Majesty the King of Denmark; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of Italy; Her Majesty the Queen of the Netherlands; His Majesty the King of Portugal and of the Algarves; His Majesty the Emperor of all the Russias; His Majesty the King of Sweden and Norway; and the Swiss Federal Council, being desirous of securing to women of full age who have suffered abuse or compulsion, as also to women and girls under age, effective protection against the criminal traffic known as the 'White Slave Traffic' have decided to conclude an Agreement with a view to concerting measures calculated to attain this object, and have appointed as their Plenipotentiaries, that is to say: [List of plenipotentiaries not reproduced here.]

Who, having exchanged their full powers, found in good and due form, have agreed upon the following provisions:

Article 1

Each of the Contracting Governments undertakes to establish or name some authority charged with the coordination of all information relative to the procuring of women or girls for immoral purposes abroad; this authority shall be empowered to correspond direct with the similar department established in each of the other Contracting States.

Article 2

Each of the Governments undertakes to have a watch kept, especially in railway stations, ports of embarkation, and *en route*, for persons in charge of women and girls destined for an immoral life. With this object instructions shall be given to the officials, and all other qualified persons, to obtain, within legal limits, all information likely to lead to the detection of criminal traffic.

The arrival of persons who clearly appear to be the principals, accomplices in, or victims of, such traffic shall be notified, when it occurs, either to the authorities of the place of destination, or to the diplomatic or consular agents interested, or to any other competent authorities.

Article 3

The Governments undertake, when the case arises, and within legal limits, to have the declarations taken of women or girls of foreign nationality who are prostitutes, in order to establish their identity and civil status, and to discover who has caused them to leave their country. The information obtained shall be communicated to the authorities of the country of origin of the said women and girls, with a view to their eventual repatriation.

The Governments undertake, within legal limits, and as far as can be done, to entrust temporarily, and with a view to their eventual repatriation, the victims of a criminal traffic when destitute to public or private charitable institutions, or to private individuals offering the necessary security.

The Governments also undertake, within legal limits, and as far as possible, to send back to their country of origin those women and girls who desire it, or who may be claimed by persons exercising authority over them. Repatriation shall only take place after agreement as to identity and nationality, as well as place and date of arrival at the frontiers. Each of the Contracting Countries shall facilitate transit through its territory.

Correspondence relative to repatriation shall be direct as far as possible.

Article 4

Where the woman or girl to be repatriated cannot herself repay the cost of transfer, and has neither husband, relations, nor guardian to pay for her, the cost of repatriation shall be borne by the country where she is in residence as far as the nearest frontier or port of embarkation in the direction of the country of origin, and by the country of origin as regards the rest.

Article 5

The provisions of the foregoing Articles 3 and 4 shall not affect any private Conventions existing between the Contracting Governments.

Article 6

The Contracting Governments undertake, within legal limits, to exercise supervision, as far as possible, over the offices or agencies engaged in finding employment for women or girls abroad.

Article 7

Non-Signatory States can adhere to the present Agreement. For this purpose they shall notify their intention, through the diplomatic channel, to the French Government, who shall acquaint all the Contracting States.

Article 8

The present Agreement shall come into force six months after the exchange of ratifications. If one of the Contracting Parties denounces it, this denunciation shall only have effect as regards that party, and that only twelve months after the date of denunciation.

Article 9

The present Agreement shall be ratified, and the ratifications shall be exchanged, at Paris, with the least possible delay.

*IN FAITH WHEREOF* the respective plenipotentiaries have signed the present Agreement, and thereunto affixed their seals.

*DONE* at Paris, the 18th May, 1904, in single copy, which shall be deposited in the archives of the Ministry of Foreign Affairs of the French Republic, and of which one copy, certified correct, shall be sent to each Contracting Party.

## APPENDIX II

### Internaional Convention For The Suppression Of The White Slave Traffic

The Sovereigns, Heads of States, and Governments of the Powers hereinafter designated,

Being equally desirous of taking the most effective steps for the suppression of the traffic known as the 'White Slave Traffic', have resolved to conclude a Convention with this object, and a draft thereof having been drawn up at a first Conference which met at Paris from 15 to 25 July 1902, they have appointed their plenipotentiaries, who met at a second Conference at Paris from 18 April to 4 May 1910 and agreed upon the following provisions:

Article 1

Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.

Article 2

Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.

Article 3

The Contracting Parties whose legislation may not at present be sufficient to deal with the offences contemplated by the two preceding Articles engage to take or to propose to their respective legislatures the necessary steps to punish these offences according to their gravity.

Article 4

The Contracting Parties shall communicate to each other, through the intermediary of the Government of the French Republic, the laws which have already been or may in future be passed in their States relating to the object of the present Convention.

Article 5

The offences contemplated in Articles 1 and 2 shall, from the day on which the present Convention comes into force, be deemed to be lawfully included in the list of offences for which extradition may be granted in accordance with Conventions already existing between the Contracting Parties.

In cases in which the above provision cannot be made effective without amending existing legislation, the Contracting Parties engage to take or to propose to their respective legislatures the necessary measures.

Article 6

The transmission of Letters of Request relating to offences covered by the present Convention shall be effected:

1. Either by direct communication between the judicial authorities;
2. Or through the intermediary of the diplomatic or consular agent of the demanding State in the country to which the demand is addressed. This agent shall forward the Letter of Request direct to the competent judicial authority, and will receive direct from that authority the documents establishing the execution of the Letter of Request; (in these two cases a copy of the Letter of Request shall always be addressed at the same time to the superior authority of the State to which the demand is addressed);
3. Or through the diplomatic channel.

Each Contracting Party shall make known, by a communication addressed to each of the other Contracting Parties, the method or methods of transmission which it recognises for Letters of Request emanating from that State.

All difficulties which may arise in connection with transmissions effected in cases 1 and 2 of the present Article shall be settled through the diplomatic channel.

In the absence of any different understanding, the Letter of Request must be drawn up either in the language of the State on whom the demand is made or in the language agreed upon between the two States concerned, or else it must be accompanied by a translation made in one of these two languages and duly certified by a diplomatic or consular agent of the demanding State, or by a sworn translator of the State on whom the demand is made.

The execution of the Letters of Request shall not entail repayment of expenses of any kind whatever.

Article 7

The Contracting Parties undertake to communicate to each other the records of convictions in respect of offences covered by the present Convention where

the various acts constituting such offences have been committed in different countries.

These documents shall be forwarded direct by the authorities designated in conformity with Article 1 of the Agreement concluded at Paris on 18 May 1904, to the corresponding authorities of the other Contracting States.

Article 8

Non-signatory States may accede to the present Convention. For this purpose they shall notify their intention by a declaration which shall be deposited in the archives of the Government of the French Republic. The latter shall communicate a certified copy thereof through the diplomatic channel to each of the Contracting States, and shall inform them at the same time of the date of such deposit. The laws of the acceding State relative to the object of the present Convention shall also be communicated with the said declaration.

Six months after the date of the deposit of the said declaration the Convention shall come into force throughout the extent of the territory of the acceding State, which will thus become a contracting State.

Accession to the Convention shall necessarily entail, without special notification, a concomitant accession to the Agreement of 18 May 1904, in its entirety, which shall take effect, on the same date as the Convention itself, throughout the territory of the acceding State.

The preceding stipulation does not, however, derogate from Article 7 of the aforementioned Agreement of 18 May 1904, which remains applicable in cases where a State prefers to accede solely to that Agreement.

Article 9

The present Convention, completed by a Final Protocol which forms an integral part thereof, shall be ratified, and the ratifications shall be deposited at Paris as soon as six of the Contracting States are in a position to do so.

A Protocol recording all deposits of ratifications shall be drawn up, of which a certified copy shall be transmitted through the diplomatic channel to each of the Contracting Parties.

The present Convention shall come into force six months after the date of the deposit of the ratifications.

Article 10

In case of one of the Contracting Parties shall denounce the Convention, such denunciation shall only have effect as regards that State.

The denunciation shall be notified by a declaration which shall be deposited in the archives of the Government of the French Republic. The latter shall communicate a certified copy, through the diplomatic channel, to each of the

Contracting States, and shall inform them at the same time of the date of deposit.

Twelve months after that date the Convention shall cease to take effect throughout the territory of the State which has denounced it.

The denunciation of the Convention shall not entail as of right a concomitant denunciation of the Agreement of 18 May 1904, unless it should be so expressly mentioned in the declaration; if not, the Contracting State must, in order to denounce the said Agreement, proceed in conformity with Article 8 of that Agreement.

Article 11

If a Contracting State desires the present Convention to come into force in one or more of its colonies, possessions, or consular judicial districts, it shall notify its intention to that effect by a declaration which shall be deposited in the archives of the Government of the French Republic. The latter shall communicate a certified copy thereof, through the diplomatic channel, to each of the Contracting States, and shall inform them at the same time of the date of the deposit.

The said declaration as regards colonies, possessions, or consular judicial districts, shall also communicate the laws which have been therein enacted relative to the object of the present Convention. Laws which may in future be enacted therein shall be equally communicated to the Contracting States in conformity with Article 4.

Six months after the date of deposit of the said declaration, the Convention shall come into force in the colonies, possessions, and consular judicial districts mentioned in such declaration.

The demanding State shall make known, by a communication addressed to each of the other Contracting States, which method or methods of transmission it recognizes for Letters of Request destined for those colonies, possessions, or consular judicial districts in respect of which the declaration mentioned in the first paragraph of the present Article shall have been made.

The denunciation of the Convention by one of the Contracting States on behalf of one or more of its colonies, possessions, and consular judicial districts, shall be made under the forms and conditions laid down by the first paragraph of the present Article. Such denunciation shall take effect twelve months after the date of the deposit of the declaration thereof in the archives of the Government of the French Republic.

Accession to the Convention by a Contracting State on behalf of one or more of its colonies, possessions, or consular judicial districts shall entail, as of right and without special notification, a concomitant accession to the Agreement of 18 May 1904 in its entirety. The said Agreement shall come into force therein on the same date as the Convention itself. Nevertheless, the denunciation of the Convention by a Contracting State on behalf of one or more of its colonies,

possessions, or consular judicial districts shall not necessarily entail a concomitant denunciation of the Agreement of 18 May 1904, unless it should be so expressly mentioned in the declaration; moreover, the declarations which the Powers signatories of the Agreement of 18 May 1904 have been enabled to make respecting the accession of their colonies to the said Agreement are maintained.

Nevertheless, from and after the date of the coming into force of the present Convention, accessions to and denunciations of that Agreement as regards the colonies, possessions, or consular judicial districts of the Contracting States, shall be made in conformity with the stipulations of the present Article.

Article 12

The present Convention, which shall be dated 4 May 1910, may be signed in Paris up to 31 July following, by the plenipotentiaries of the Powers represented at the second Conference for the Suppression of the 'White Slave Traffic'.

*DONE* at Paris, the 4th May, 1910, in a single copy, of which a certified copy shall be communicated to each of the Signatory Powers.

## FINAL PROTOCOL

At the moment of proceeding to the signature of the Convention of this day, the undersigned plenipotentiaries deem it expedient to indicate the sense in which Articles 1, 2, and 3 of that Convention are to be understood, and in accordance with which it is desirable that the Contracting States, in the exercise of their legislative sovereignty, should provide for the execution of the stipulations agreed upon or for their extension.

*A.* The stipulations of Articles 1 and 2 are to be considered as a *minimum*, seeing that it is self-evident that the Contracting Governments remain entirely free to punish other analogous offences, such, for example, as the procuring of women over age, even where neither fraud nor compulsion may have been exercised.

*B.* As regards the suppression of the offences provided for in Articles 1 and 2, it is fully understood that the words 'woman or girl under age', 'woman or girl over age' refer to women or girls under or over twenty completed years of age. A law may, nevertheless, fix a more advanced age for protection, on condition that it is the same for women or girls of every nationality.

*C.* With a view to the suppression of the same offences the law should decree, in every case, a punishment involving loss of liberty, without prejudice to other penalties, principal or accessory; it should also take into account, apart from the age of the victim, the various aggravating circumstances which exist in the case, such as those referred to in Article 2, or the fact that the victim has been in effect delivered over to an immoral life.

*D.* The case of detention, against her will, of a woman or girl in a brothel could not, in spite of its gravity, be dealt with in the present Convention, seeing that it is governed exclusively by internal legislation.

The present Final Protocol shall be considered as forming an integral part of the Convention of this day, and shall have the same force, validity, and duration.

*DONE AND SIGNED* at Paris in a single copy, the 4th May, 1910.

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# The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance

Dr Marija Jovanović*

## Abstract

*The principle of non-punishment of victims of human trafficking introduced in the recent anti-trafficking instruments has caused a lot of controversy. These strikingly cryptic provisions leave much space for various interpretations. In analysing the non-punishment principle, this article examines, first, legal instruments establishing the principle, the accompanying interpretative guides, and other material where it has been elaborated. This is followed by an examination of the UK case-law and the most recent Modern Slavery Act 2015 (MSA), which introduced a new statutory defence for victims of trafficking and slavery. This article offers a critical account of the problems and obstacles in applying this principle in practice as well as the lack of understanding of its normative and conceptual grounding. In particular, this article asks questions that need to be clarified in order to make this principle operational in each jurisdiction, which include: the type of criminal or other offences to which it applies; the necessary conditions for its application; and finally, its legal effects. In identifying and engaging with these questions, this article offers a comprehensive scholarly discussion of the role of human rights law in providing guidance for the implementation of the non-punishment principle. The article concludes that this principle represents an important instrument in victim protection, but that the role of human rights law, which is often claimed to be its rationale, is limited when it comes to providing specific guidance for its practical operation.*

## 1. Introduction

The importance of victim protection has been emphasized in all anti-trafficking instruments adopted over the last fifteen years.[1] Nevertheless, practice reveals that their victim status is often downplayed or renounced in favour of being treated as illegal immigrants or even criminals, which effectively

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Dr Marija Jovanović, *MJur (Oxon), MPhil (Oxon), DPhil (Oxon)* Faculty of Law, University of Oxford.

1 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319; Convention on Action against Trafficking in Human Beings (16 May 2005) CETS 197 (Anti-Trafficking Convention); Directive of the European Parliament and of the Council on Preventing

denies the promised protection.[2] Thus, a large number of trafficking victims end up detained, prosecuted, convicted, and summarily deported without being given due consideration to their victim status.[3] Consequently, the risk of being detained, prosecuted and deported is one of the reasons why victims of human trafficking are wary of coming forward to the authorities and is one of the main tools used by traffickers to keep them in control.[4] Not only does this represent an obstacle to their protection, but it also leaves the original offence undetected. A trafficking victim, thus, simultaneously occupies conflicting legal positions, which prompts the question of the relationship between these statuses, both on a conceptual level and in practice.

The principle of non-punishment of victims of trafficking for crimes they commit in the course, or as a consequence of being trafficked established in the recent anti-trafficking instruments is seen as a possible solution to this tension.[5] This principle is said to constitute an 'essential element of a human rights approach'.[6] This article engages critically with this claim offering a thorough analysis of different aspects of the relationship between the principle of non-punishment of trafficking victims and human rights. In addition to ex-

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and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA (5 April 2011) 2011/36/EU (Anti-Trafficking Directive); ASEAN Convention Against Trafficking in Persons, Especially Women and Children (22 November 2015).

2 Group of Experts against Trafficking in Persons (GRETA), *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by UK* (First evaluation round, GRETA (2012) 6, 12 September 2012); GRETA, *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by France* (First evaluation round, GRETA (2012) 16, 28 January 2013); GRETA, *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands* (First evaluation round, GRETA (2014) 10, 21 March 2014). See also GRETA, *Second General Report on GRETA's Activities* (GRETA (2012) 13, 4 October 2012) ('Second GRETA Report') [52]. See also Rachel Annison, *In the Dock: Examining the UK's Criminal Justice Response to Trafficking* (The Anti-Trafficking Monitoring Group, June 2013), Ch. 8.

3 A.T. Gallagher/E. Pearson, 'The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking, *Human Rights Quarterly* 32(1) (2010); Global Alliance against Traffic in Women (GAATW), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007).

4 A. Farrell/J. McDevitt/S. Fahy, 'Where Are All the Victims? Understanding the Determinants of Official Identification of Human Trafficking Incidents', *Criminology and Public Policy* 9(2) (2010), 201; A. Weiss/S. Chaudary, 'Assessing Victim Status under the Council of Europe Convention on Action Against Trafficking in Human Beings: the Situation of "Historical" Victims', *Journal of Immigration Asylum and Nationality Law* (2011).

5 Anti-Trafficking Convention, Article 26; Anti-Trafficking Directive, Article 8. See A. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010); A. Gallagher, 'Exploitation in Migration: Unacceptable but Inevitable', *Journal of International Affairs* 68(2) (2015), 55.

6 OSCE, Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and Legislative Recommendations towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking* (22 April 2013) SEC.GAL/73/13 ('OSCE Guidance'), para. 26.

amining the rationale of the non-punishment principle, this article also engages with questions concerning its application in practice, since the instruments establishing this provision do not offer much guidance in that respect. These include: the type of criminal or other offences to which it applies; the necessary conditions for its application (the link between a victim's offence and her trafficking experience); and finally, its legal effects. In identifying and engaging with these questions, this article seeks to initiate comprehensive scholarly discussion of the role of different legal frameworks in providing guidance for the implementation of the non-punishment principle. This type of inquiry is found missing in the current discussion on human trafficking.[7]

This article concludes that this principle represents an important instrument in victim protection, but that the role of human rights law in providing specific guidance as to its practical operation is limited. Namely, whereas human rights law lays down general guidance as to goals to be achieved (victim protection), it is for national legislation (and criminal law in particular) to develop guidance on the specific questions concerning the type of offences to which the non-punishment principle applies, the necessary requirements for its application, and its legal effect.

The analysis of the non-punishment principle is approached by looking, first, at the legal instruments establishing the principle, the accompanying interpretative guides, and other material where it has been elaborated. This analysis is accompanied by an examination of the UK case-law and the most recent Modern Slavery Act 2015. The UK is chosen as a case study because its recent legislation introduces a new defence for victims of trafficking and slavery, and it provides highly relevant jurisprudence on the non-punishment principle. This sets the UK aside from most countries, which to date have not adopted a specific provision to implement this principle, and instead rely on prosecutorial discretion within general criminal law provisions.[8]

For the purpose of this analysis, the principle will be referred to as the non-punishment principle, even though it will be shown in section 4.3. that its effects are intended to be broader than simply not imposing penalties on the victims of trafficking for their involvement in criminal activities. Thus, for example, the principle has also been referred to as 'non-liability'[9] or 'non-criminalisation

7 R. Piotrowicz/L. Sorrentino, 'Human Trafficking and the Emergence of the Non- Punishment Principle', *Human Rights Law Review* 16(4) (2016). See also the special issue of *Groningen Journal of International Law* 'Human Trafficking in International Law' *GroJIL* 1(2) (2013); A. Schloenhardt/R. Markey-Towler, 'Non-Criminalisation of Victims of Trafficking in Persons – Principles, Promises, and Perspectives', *GroJIL* 4(1) (2016), 10.

8 Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), *Fourth General Report on GRETA's Activities* (March 2015) GRETA (2015) 1 ('Fourth GRETA Report'), 53.

9 UNODC, Model Law against Trafficking in Persons (5 August 2009). Article 10 requires that 'A victim of trafficking in persons shall not be held criminally or administratively liable [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation

principle',[10] which may imply much broader protection that excludes any sort of law enforcement action against trafficking victims.

## 2. The Curious Case of the Non-Punishment Principle

In spite of vast research and enormous international attention given to human trafficking in the past decade, reliable statistics are difficult to find.[11] In comparison to the estimated figures,[12] it is striking how very few victims are formally assigned to that role, with even fewer traffickers being brought to justice.[13]

What is more, practice reveals that 'the criminalization of trafficked persons is commonplace, even in situations where it would appear obvious that the victim was an unwilling participant in the illegal act'.[14] They have been most frequently prosecuted for offences concerning their often irregular immigration status.[15] Moreover, trafficking victims are often forced to commit more serious criminal offences in the course of their exploitation that include: shoplifting, ATM theft, benefit fraud, cannabis cultivation or even recruitment of other victims.[16] Thus, for example, in the case *R v. N and Le*, currently pending before the ECtHR, a Vietnamese minor who had been arrested on a cannabis farm and sentenced to 20 months imprisonment had his conviction confirmed by the UK Court of Appeal even though a conclusive decision by the UK Border

as trafficked persons.' See also Working Group on Trafficking in Persons, 'Non-punishment and Non-prosecution of Victims of Trafficking in Persons: Administrative and Judicial Approaches to Offences Committed in the Process of Such Trafficking' (9 December 2009) CTOC/COP/WG.4/2010/4.

10 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (2010) ('UN Trafficking Principles and Guidelines – Commentary)'; Schloenhardt/Markey-Towler, 'Non-Criminalisation of Victims' 2016 (n. 7).

11 UNODC, *Global Report on Trafficking in Persons 2014* (November 2014). For statistical data at EU level for the years 2010, 2011 and 2012 as gathered and submitted by national authorities see Eurostat, *Trafficking in Human Beings* (2015). For the UK statistics see www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics 3 October 2015.

12 According to ILO, *Global Estimate of Forced Labour* (2012), almost 21 million people are victims of forced labour.

13 According to the UNODC, *Global Report on Trafficking in Persons 2014*, which covered 128 countries in the time period 2010-2012, the total number of reported victims was 40,177, whereas the total number of reported offenders was 13,310. These figures include officially detected offenders and victims (persons who have been in contact with an institution – the police, border control, immigration authorities, social services, shelters run by the state or by NGOs, international organizations).

14 UN Trafficking Principles and Guidelines – Commentary, Principle 7.

15 *R v. O* [2008] EWCA Crim 2835.

16 *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practice Examples* (Race in Europe Project, 2014).

Agency (UKBA) had identified him as a victim of trafficking.[17] Also, it is not uncommon that victims have been prosecuted for being involved in prostitution where these practices are still criminalized.[18]

In order to understand how and why this occurs, it is important to note that the definition of human trafficking contains an open-ended list of different types of exploitation.[19] This is generally not a bad thing since it allows for new forms to be included as our knowledge of these emerge. However, the Palermo definition does not define the concept of exploitation itself, nor does it offer any criteria that would help determine which other practices may also fall within its ambit. In fact, the concept of exploitation has never been defined in international law,[20] leaving the entire notion of human trafficking, which is premised on it, somewhat legally and theoretically shallow.

Regardless of this conceptual ambiguity, it is important for the argument here that some of these forms of exploitation may be criminalized in national legislations. While many states have now decriminalized prostitution, a range of other practices through which one may be exploited is fast emerging – from pick-pocketing, street begging, cannabis cultivation to trafficking of other victims. The most recent anti-trafficking instrument – the EU Anti-Trafficking Directive – recognizes this trend, and in addition to the exploitative purposes from the Palermo definition, it explicitly lists forced begging and the exploitation of criminal activities in its definition.

Moreover, even if a victim is exploited in a way that does not entail engaging in criminal activities, she may still break the law simply by using false documents or by contravening immigration or labour legislation. Evidently, the boundary between one's status as a crime victim, and that as a law-breaker is fine one, and too often blurred.

The principle of non-punishment of victims of trafficking for crimes they have committed in the course, or as a consequence of being trafficked is seen as a way to overcome this tension and ensure that their status of victims of crime prevails. However, a careful analysis of the non-punishment principle enshrined in legal instruments applicable to the Council of Europe and the EU Member States, and its (lack of) application by domestic courts, reveals a number of problems in both its theoretical framing and practical implementa-

17 *R v. N and Le* [2012] EWCA Crim 189.

18 M. Madden Dempsey, 'Decriminalizing Victims of Sex Trafficking', *American Criminal Law Review* 52 (2015), 207.

19 The first universally agreed definition of human trafficking is contained in the Palermo Protocol.

20 R. Plant, 'Modern Slavery: The Concepts and Their Practical Implications' (ILO Working Paper, 5 February 2015), 3. See also UNODC, *The Concept of Exploitation in The Trafficking in Persons Protocol* (2015); B. Heide Uhl, 'Lost in implementation? Human Rights Rhetoric and Violations – a Critical Review of Current European Anti-trafficking Policies', *Security and Human Rights* 2 (2010), 125; S. Marks, 'Exploitation as an international legal concept', in S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, 2008).

tion. The problem lies in both the ambiguous formulation of the principle in international instruments, and in the fact that those in charge of its application are often inclined to give way to interests other than that of victim protection, most notably immigration or crime control.[21]

## 3. Unpacking the Non-Punishment Principle

The Palermo Protocol, the first comprehensive international instrument devoted to the problem of human trafficking, does not contain any reference to the principle of non-punishment of trafficking victims.[22] However, the Working Group on Trafficking in Persons, a body established to make recommendations on the effective implementation of the Protocol, called on State Parties to:

'[C]onsider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.'[23]

A provision introducing the principle of non-punishment of trafficking victims first appeared in the Council of Europe Anti-Trafficking Convention, followed by the EU Anti-Trafficking Directive. More recently, a non-punishment clause was included in the Protocol of the International Labour Organisation (ILO) supplementing the Forced Labour Convention.[24] Nonetheless, this instrument has not yet come into force and any guidance as to its interpretation is still missing. In addition, the principle of non-punishment of human trafficking

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21 The Anti-Trafficking Monitoring Group (ATMG) pointed out to 'a widespread culture of disbelief in the [UK] Home Office decision-making process and how it impacts on the successful identification and support of victims'. ATMG, *The National Referral Mechanism: A Five Year Review* (February 2014), 13. Furthermore, the first GRETA Report on the Netherlands talks of 'the reported climate of mistrust towards possible victims of human trafficking' in GRETA, *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands* (21 March 2014) GRETA (2014) 10, para. 138.

22 According to Anne Gallagher, the Protocol drafters rejected a proposal advanced by the Inter-Agency Group and supported by NGOs, to include a provision protecting trafficked persons from prosecution for status-related offences such as illegal migration, working without proper documentation, and prostitution. A. Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', *Human Rights Quarterly* 23 (2001), 975, 990-91.

23 Report on the meeting of the Working Group on Trafficking in Persons held in Vienna, 14-15 April 2009 (21 April 2009), CTOC/COP/WG.4/2009/2, para. 12.

24 Protocol of 2014 to the Forced Labour Convention, 1930 (Geneva, 103rd ILC session, 11 June 2014) (entry into force: 09 November 2016).

victims has been affirmed in a number of other international and regional instruments but these are of a non-binding nature.[25]

Accordingly, the legal nature and significance of the Anti-Trafficking Convention and the Anti-Trafficking Directive puts these two instruments at the centre of the analysis in this article. Still, these other, non-binding instruments may well assist in clarifying the scope of its application given the limited jurisprudence in the states where the Anti-Trafficking Convention and the Anti-Trafficking Directive apply. The Strasbourg Court is yet to decide a case regarding the application of this clause in a case against the UK.[26]

Article 26 of that Convention prescribes that:

'Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.'[27]

This provision was echoed in Article 8 of the Anti-Trafficking Directive, which stipulates that:

'Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.'[28]

It is immediately noticeable that the wording of these two provisions is substantially different. With respect to the effect of the non-punishment principle, the Anti-Trafficking Convention provides for the possibility of not imposing 'penalties' on victims, whereas the Anti-Trafficking Directive speaks of the entitlement not to 'prosecute' or 'impose penalties' on victims, taking an apparently wider approach, at least based solely on the text of the two provisions. Overall, the Anti-Trafficking Directive shifts the attention to earlier stages in the criminal law chain thereby involving different actors (such as police and public prosecutor service).

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25 UNODC, *Model Law against Trafficking in Persons* (5 August 2009); OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2002) E/2002/68/Add.1; OSCE Guidance.

26 *R v. N and Le* [2012] EWCA Crim 189.

27 Anti-Trafficking Convention, Article 26.

28 Anti-Trafficking Directive, Article 8.

On the other hand, when it comes to the type of wrongdoing a victim might be involved in, the former provision refers to 'unlawful activities' while the latter provision is concerned with 'criminal activities', thus potentially excluding from its scope activities that may contravene legislation other than criminal law, such as administrative law or immigration law.

As to the scope of application of the principle, and especially the link between the victim's wrongdoing and her trafficking experience, the Anti-Trafficking Directive is much more explicit requiring a criminal offence to be committed as 'a direct consequence' of being subjected to human trafficking, whereas such a causal relationship has not been spelled out clearly in the Anti-Trafficking Convention definition.

Both provisions provide just for 'the possibility' of not imposing penalties on, or also not prosecuting victims of trafficking human beings, vested in the competent national authorities. It is yet to be clarified whether this results in the obligation on Member States to simply introduce the 'non-punishment' provision into their respective legislations or whether it also imposes a more concrete obligation on relevant authorities to consider its application in each particular case.

Furthermore, both provisions require a level of compulsion as a prerequisite for applying the principle. Evidently, these differences carry potential for a different interpretation and application of the principle in practice and may lead to significantly different level of protection available to victims in different jurisdictions.

### 3.1. The Rationale of the Non-Punishment Principle and its Relationship with Human Rights Law

The Anti-Trafficking Convention and its Explanatory Report[29] do not offer a rationale for this principle, nor do they identify its conceptual and normative grounding. On the other hand, Recital 14 of the Anti-Trafficking Directive outlines its objective stating that it aims to 'safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators'.

Human rights law has been invoked to explain why trafficking victims ought to be exempted from the operation of the criminal justice system. Thus, the recent OSCE legal and policy guidance on the effective implementation of the non-punishment provision suggests that the non-punishment principle constitutes an 'essential element of a human rights approach'.[30]

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29 *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* (16 May 2005) CETS 197 ('Trafficking Convention Explanatory Report').

30 OSCE Guidance, para. 26.

It does not state however which right, if any, is violated by prosecution and punishment of the trafficking victims for acts which other individuals may justifiably be penalized.

It is worth recalling here the definition of human trafficking and its relationship with human rights law. The first universal definition of human trafficking was established in the Palermo Protocol to the Transnational Organised Crime Convention. According to this widely accepted definition of human trafficking,[31] the act of human trafficking consists of three components: an action; the use of certain means; and the purpose of exploitation.[32] All three elements must exist for trafficking to be established.[33] It is important to stress that exploitation, which is the purpose of trafficking, need not have taken place: it is *intended exploitation* in conjunction with certain action and the means deployed that makes up the trafficking situation.[34] Thus, unlike slavery, servitude and forced labour, which represent examples of *actual* exploitation of victims, the human trafficking *offence* defined in Article 3 of the Palermo Protocol is completed at a very early stage.

It is clear that the origins and legal articulation of human trafficking are closely tied to the law enforcement context even though the later international instruments have put more emphasis on its human rights dimension,[35] with victim protection as one of the most important goals of anti-trafficking actions.

However, human trafficking is *not* specifically mentioned in most of the general human rights instruments. Among those few international instruments that contain explicit reference to human trafficking are the Convention on the Elimination of All Forms of Discrimination against Women,[36] the Convention on the Rights of the Child[37] and the EU Charter.[38] The American Convention

31 The Palermo Protocol, Article 3.

32 For a discussion about the elements see P. Chandran, 'A Commentary on Interpreting Human Trafficking', in P. Chandran (ed.), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis, 2011), 5.

33 In the case of children, it is immaterial whether these means have been used.

34 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* (New York, 2004), para. 33; Trafficking Convention Explanatory Report, para. 87.

35 R. Piotrowicz, 'International Focus: Trafficking and Slavery as Human rights Violations', *Australian Law Journal* 84 (2010), 812, 814; R. Piotrowicz, 'The Legal Nature of Trafficking in Human Beings', *Intercultural Human Rights Law Review* 4 (2009), 175.

36 (Adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) Article 6.

37 (Adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) Article 35.

38 The Charter of Fundamental Rights of the European Union (18 December 2000) 2000/C 364/01, Article 5 (3).

on Human Rights[39] refers to traffic in women (not children or men) within the provision that addresses slavery, servitude and forced labour, while the African Charter on Human and Peoples' Rights[40] prohibits all forms of exploitation and degradation of man without an explicit reference to trafficking. The European Convention of Human Rights (ECHR),[41] the International Covenant on Civil and Political Rights (ICCPR)[42] and the Universal Declaration of Human Rights (UDHR)[43] contain explicit references only to slavery, forced labour and servitude. In fact, a proposal by France during the negotiations of the ICCPR to substitute 'trade in human beings' for 'slave trade', to also cover the traffic in persons, was rejected at the time.[44] While trafficking has regularly been referred to as a form of slavery, the precise contours of that relationship are not settled.[45] Space precludes a more detailed engagement with the conceptual debates on the relationship between human trafficking and slavery in this article. Still, the recent jurisprudence of the European Court of Human Rights in Strasbourg (Strasbourg Court) established explicitly that human 'trafficking itself' engages the ECHR by infringing upon the so called 'absolute' right to free from slavery, servitude and forced labour protected by Article 4.[46] This suggests that trafficking represents an implied *self-standing* prohibition under Article 4 ECHR, which means that even when exploitation has not yet materialized, a person falls within a protective scope of this provision (because it is *intended*, not *actual* exploitation that is required under the Palermo definition). Some scholars, however, disagree with this interpretation arguing instead for reading trafficking in this provision by way of 'progressive interpretation' of the terms

39 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 OASTS No 36. Article 6.

40 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (27 June 1981) Article 5.

41 Article 4.

42 Article 8.

43 Universal Declaration of Human Rights (10 December 1948) 217 A (III) Article 4.

44 M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Kehl, Strasbourg, Arlington, N.P. Engel, 2005), 200. See also UN General Assembly, Draft International Covenants on Human Rights (Tenth Session, A2929, 10 July 1955).

45 OHCHR, Trafficking Principles and Guidelines – Commentary, 20. See also J. Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery', *Human Rights Law Review* 10(3) (2010), 546; R. Piotrowicz 'International Focus: Trafficking and Slavery as Human rights Violations', *Australian Law Journal* 84 (2010), 812; J. Hathaway, 'The Human Rights Quagmire of "Human Trafficking"', *Virginia Journal of International Law* 49(1) (2008), 1; A. Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway', *Virginia Journal of International Law* 49(4) (2009), 78; N.L. McGeehan, 'Misunderstood and Neglected: The Marginalisation of Slavery in International Law', *International Journal of Human Rights* 16 (2012), 436; N. Siller, '"Modern Slavery": Does International Law Distinguish between Slavery, Enslavement and Trafficking?', *Journal of International Criminal Justice* 14(2) (2016), 405.

46 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [282].

slavery, servitude and forced labour and not on its own.[47] This proposal, however, is not without problems, especially given the fact that the concept of human trafficking, unlike that of slavery, servitude and forced labour, does not require actual exploitation to have taken place. According to the proposed argument, therefore, only those victims that have already been exploited, would fall under the protective ambit of Article 4, which is problematic.

Yet, a more important aspect of the Strasbourg Court's ruling in the seminal *Rantsev* case is the pronouncement of states' positive obligations under Article 4 ECHR. These include: a general obligation to establish an adequate legal and administrative framework; a procedural obligation to conduct effective investigations into the credible allegations of human trafficking; an obligation to take operational measures to protect victims, or potential victims, of trafficking; and an obligation to cooperate with each other in cross-border cases.[48]

In framing these positive obligations, the Court made numerous references to the specialized anti-trafficking instruments that contain a much more comprehensive list of duties imposed upon states. However, even though these specific anti-trafficking instruments are undoubtedly focused on *victim protection*, it is questionable whether all victim protection measures contained in these instruments can be considered as *victims' human rights*. This is an important distinction for only the latter ones could be *enforced* against states before international *fora*.[49] The problem of conflating victim protection measures and their (enforceable) human rights is aptly illustrated by Todres who argues that it is unsubstantiated to equate the provision of assistance to victims as establishing a right to assistance:

'One only needs to look at US jurisprudence on health rights. Through programs such as Medicare and Medicaid, the US has long provided health-related services to individuals in need, but the existence of these programs has not equated to recognition of a "right to health" under federal law. In short, when a government elects to provide social services, such action does not necessarily rise to the level of establishing a fundamental right to those services.'[50]

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47 V. Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case', *Netherlands Quarterly of Human Rights* 30(2) (2012), 163, 185.

48 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [282]. See also Stoyanova, 'Dancing on the Borders of Article 4' 2012 (n. 47), 185; R. Pati, 'States' Positive Obligations with respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia', *Boston University International Law Journal* 29 (2011), 79.

49 The problem of conflating victim protection measures and their human rights is aptly illustrated on the example of the US jurisprudence on health rights by J. Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking: A Response to a Labor Paradigm for Human Trafficking', *UCLA Law Review* 60 (2013), 157.

50 *Ibid*., 150.

Thus, only those claims grounded in enforceable human rights instruments could be considered as human rights *obligations*, in the traditional sense. In that respect, the ECHR represents an important mechanism for victim protection offering a concrete tool to victims to act as agents in their own cause through its individual petition system. Importantly, such an enforcement mechanism makes states more wary of being found in breach of their obligations by the binding decision of a supranational court, as opposed to their attitude towards obligations arising out of other international instruments.[51]

In light of that, the link between the non-punishment principle contained in the trafficking-specific instruments and human rights law, and the ECHR more specifically, could be established in two possible ways. First, by considering all obligations placed on states by the specialized anti-trafficking instruments as human rights obligations under the ECHR. Some authors have tried to argue this:

'[F]ollowing the Rantsev judgment, it is now possible to argue that many if not all of the victim-protection provisions in the Convention are also covered by the positive obligations States owe victims (or possible victims) of human trafficking under Article 4.'[52]

However, this option has not yet been acknowledged explicitly in the Strasbourg jurisprudence and it is debatable whether the Court will opt to make the Anti-Trafficking Convention fully justiciable via Article 4 ECHR, not least because that would side-track the official enforcement mechanism the states have chosen for this instrument.[53]

The second possible way of grounding the non-punishment principle in the ECHR is by establishing its link with positive duties *already recognized* and firmly grounded in the ECHR jurisprudence on Article 4 and other rights. Therefore, by prosecuting trafficking victims, states would violate their *existing* human rights obligations, which would in turn be sufficient to ground the non-punishment duty into the human rights law. The question is which concrete human rights obligations would thus be violated by a violation of the non-punishment principle?

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51 This was pointed out by Durieux, who compared the attitudes of the EU Member States towards the 1951 Refugee Convention and towards the ECHR. J.-F. Durieux, 'The Vanishing Refugee', in H. Lambert/J. McAdam/M. Fullerton (eds.), *The Global Reach of European Refugee Law* (Cambridge University Press 2013), 254-255.

52 S. Chaudary, 'Trafficking in Europe: An Analysis of the Effectiveness of European Law', *Michigan Journal of International Law* 33 (2011), 94.

53 The Anti-Trafficking Convention establishes monitoring mechanism that consists of the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties, the latter being linked directly to the Council of Europe's Committee of Ministers thus adding a political dimension to the evaluation process.

Following the lead from GRETA's Second General Report,[54] the OSCE Guidance suggests that:

'The obligation of non-punishment is therefore intimately tied to the State's obligations to identify, protect and assist victims of trafficking, and also to the State's duty to investigate a trafficking situation with a view to identifying the trafficker and seeking to bring the true perpetrator to justice.'[55]

The Guidance, therefore, claims that by prosecuting trafficking victims, states violate two of their obligations under human rights law. First, a duty to to identify, protect and assist victims of trafficking. This is supported by the recent publication of the UN Office of the High Commissioner for Human Rights, which strategically places this principle among the obligation to identify, protect and support victims of trafficking.[56] Secondly, by prosecuting trafficking victims, states violate an obligation to investigate a trafficking situation. In order to confirm the validity of such a claim, it is important to examine first whether these two duties are in fact obligations arising out of the ECHR.

A duty to identify victims of trafficking and to provide them with assistance and support are set out in both the Anti-Trafficking Convention[57] and the Anti-Trafficking Trafficking Directive.[58] While the Strasbourg Court echoed these instruments in the landmark *Rantsev* judgement, this was not done in a straightforward manner. Namely, the Court obliged states to ensure 'the practical and effective protection of the rights of victims of trafficking'. It further noted that the extent of positive obligations arising under Article 4 ECHR is to be considered with the reference to 'measures to prevent trafficking and protect victims' contained in the specialized anti-trafficking instruments'.[59]

This pronouncement is merely a clear and concrete statement of the states' positive obligations under Article 4 ECHR. In particular, does this mean that there is a self-standing duty under Article 4 ECHR to identify a trafficking victim even though such a victim does not need any protection? The *Rantsev* judgement refers to this obligation only in the context of the duties 'to investigate' and 'to

54 Second GRETA Report, para. 58. The Report notes that 'criminalisation of victims of trafficking not only contravenes the State's obligation to provide services and assistance to victims, but also discourages victims from coming forward and co-operating with law enforcement agencies, thereby also interfering with the State's obligation to investigate and prosecute those responsible for trafficking in human beings'.

55 OSCE Guidance, para. 27. See also Second GRETA Report, para. 58.

56 Office of the UN High Commissioner for Human Rights, *Human Rights and Human Trafficking* (Factsheet No. 36, 2014), 12.

57 Anti-Trafficking Convention, Articles 10 and 12.

58 Anti-Trafficking Directive, Article 11.

59 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [284]-[285].

take any necessary operational measures to protect Ms Rantseva'.[60] Nevertheless, even if we take for granted that a self-standing obligation to identify victims of trafficking exists within Article 4 ECHR, this does not necessarily mean that there is a causal relation between an infringement of this duty and the non-punishment principle. Therefore, while a correct victim identification is essential for the provision of services to facilitate their recovery, it does not explain why victims should not be prosecuted or punished for offences they commit themselves.

As for the resulting obligations to provide protection and assistance to identified victims of trafficking, the Strasbourg Court refers to these in the context of taking operational measures to remove a concrete individual from the trafficking situation or a real and immediate risk of being trafficked or exploited. Thus, drawing a parallel with Articles 2 and 3 ECHR,[61] the Court stated that Article 4 too 'may, in certain circumstances, require a state to take operational measures to protect victims, or potential victims, of trafficking'.[62] The test outlined in *Rantsev* reads as follows:

'In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the state authorities were aware, or ought to have been aware, of *circumstances giving rise to a credible suspicion* that an identified individual *had been, or was at real and immediate risk of being, trafficked or exploited* within the meaning of art. 3(a) of the Palermo Protocol and art. 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of art. 4 of the Convention where the authorities *fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.*'[63]

Clearly, this duty is very limited in scope ('to remove the individual from that situation or risk') and is designed to mirror a similar duty first established in the *Osman* case, with respect to the right to life guaranteed by Article 2 ECHR.[64] It is not, therefore, clear how the non-punishment of a trafficking victim would satisfy the condition of removing her from the trafficking situation to satisfy the test laid out by the Court.

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60 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [296].

61 *Osman v. UK* (2000) 29 EHRR 245; *Calvelli and Ciglio v. Italy* [2002] ECHR 3 [55]; *Öneryıldız v. Turkey* (2005) 41 EHRR 20 [63]; *Opuz v. Turkey* (2010) 50 EHRR 28 [128]-[129]; *Kontrova v. Slovakia* [2007] ECHR 419 [49]-[50]; *Kilic v. Turkey* (2001) 33 EHRR 58 [62]; *Denizci and Others v. Cyprus* [2001] ECHR 351 [375]-[376]; *E v. UK* (2003) 36 EHRR 31 [88]; *Z v. UK (2002) 34 EHRR 3* [73]; *M and Others v. Italy and Bulgaria* (App 40020/03) (31 July 2012) [99].

62 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [286].

63 *Ibid.* (emphasis added).

64 *Osman v. UK* (2000) 29 EHRR 245.

Regarding the second duty mentioned in the OSCE Guidance as a basis for the non-punishment principle – the obligation to investigate human trafficking – such a duty is clearly established under Article 4 ECHR.[65] However, although often *connected*, the non-investigation of a trafficking offence and prosecution of victims are *not correlative* – the full investigation of traffickers does not automatically imply that victims should be exempt from criminalization and punishment. Even presuming that a victim has been correctly identified and offered support and assistance to recover from her ordeal, and that a criminal process against traffickers has been initiated, a clear rationale for not prosecuting such a victim for a crime she has committed is still not obvious.

The point of this argument is not to suggest that trafficking victims should be criminalized and prosecuted, but that the arguments for not doing so do not clearly lead to such a conclusion. It seems that the problem lies in the fact that our instinctive response to this question is not accompanied by legal coherence. We all agree that it is *unfair* to treat trafficking victims as criminals, but to develop a framework that squares with the existing legal landscape requires more than our intuitive sense of fairness. It requires a clear set of rules that explains the situations and conditions in which the non-punishment principles applies to the victims of human trafficking. Their identification and the prosecution of traffickers are *prerequisites* for the correct operation of such a framework but these do not substitute for developing a clear guidance on the nature of this principle, its scope and application by national judiciary.

This article offers an alternative reading of how human trafficking may be linked to human rights law and the ECHR, to that offered in the OSCE Guidance. The non-punishment principle may be framed within the *Rantsev* general obligation to establish an 'adequate' legal framework that contains 'the spectrum of safeguards (...) to ensure the practical and effective protection of the rights of victims or potential victims of trafficking'.[66] This would require states 'to *adopt* and/or *implement* legislative measures providing for the possibility of not imposing penalties on victims'.[67] Accordingly, situations where a state has not provided even for a possibility of not imposing penalties on victims in its national legislation will clearly trigger responsibility under Article 4 ECHR. This demonstrates an important interplay between international obligations and national law where the former sets out general guidance and the latter puts this into practice. Accordingly, to comply with the human rights duty, states need to prove they have established an adequate and functioning legal framework in line with their international obligations assumed by ratifying the specialized anti-trafficking instruments but it is for domestic legislature and judiciary to

65 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [288].
66 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [285].
67 Trafficking Convention Explanatory Report, para. 272 (emphasis added).

put this into force. However, putting in place the legal framework is not sufficient to exonerate states from responsibility since governments need to demonstrate that such a framework is functional and is being applied in practice.[68]

Moreover, Article 6 ECHR may also be engaged when victims of trafficking are put on trial without due consideration being given to their trafficking experience. One of the first UK cases dealing with the question of punishment of trafficking victims was concerned with a Nigerian woman who had been detained when seeking to leave the UK on a ferry for France in possession of a false Spanish identity card.[69] She was charged with the offence of possessing a false identity card with the intention of using it as her own, and upon pleading guilty, incurred eight months' imprisonment. Notwithstanding the concerns that she might have been a victim of human trafficking raised during the trial, neither the defence, nor the prosecution paid due consideration to this possibility. Due to these reasons, the Court of Appeal found that 'there was no fair trial'.[70] Evidently, it is worth exploring the potential of using Article 6 ECHR to protect victims of human trafficking faced with criminal prosecution.

Article 6 applies to anyone charged with a criminal offence, the notion of 'criminal charge' being broadly conceived.[71] Importantly, the Strasbourg Court has repeatedly refused to act as the fourth instance court, substituting its own findings of fact or national law for the findings of domestic courts.[72] Rather, the Court is only willing to intervene where the domestic court acted in an arbitrary or unreasonable manner in establishing the facts or interpreting domestic law, thus rendering the proceedings as a whole unfair.[73] Therefore, in situations where a national authority has given due consideration to the *possibility* of applying the non-punishment principle in a concrete case and rejected it, it is unlikely that the Strasbourg Court would intervene in such a choice. This is so because, arguably, the obligation placed on states by the Anti-Trafficking Convention and the Anti-Trafficking Directive is *at best* to consider applying this principle in line with their domestic legislation. According to this reading of the non-punishment clause, in situations when responsible authorities have not even considered the application of this principle in a concrete case, or the

68 See for example *MC v. Bulgaria* (2005) 40 EHRR 20 with respect to the protection against rape.

69 *R v. O* [2008] EWCA Crim 2835.

70 *Ibid*. [26].

71 *Engel v. Netherlands* (1979) 1 EHRR 647; *Öztürk v. Germany* (1984) 6 EHRR 409; *Benham v. United Kingdom* (1996) 22 EHRR 293. See Andrew Ashworth/Mike Redmayne, *The Criminal Process* (4th edn, Oxford University Press, 2010) Ch 13.

72 R. Goss, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* (Hart, 2014), 42-58.

73 European Court of Human Rights, *Interlaken Follow-up: Principle of Subsidiarity* (8 July 2010) paras. 33-39.

principle has not been envisaged in national legislation, the Court may well find a violation of Articles 4 and 6 ECHR. Still, as noted earlier, it may well be that the Anti-Trafficking Convention imposes the obligation of a more limited scope that would bring states into compliance only 'by providing for a substantive criminal or procedural criminal law provision, or any other measure, allowing for the possibility of not punishing victims'.[74] In other words, it is yet to be determined whether the relevant international instruments prescribe that states have to consider the possibility of applying the non-punishment clause in specific, individual cases, or only to provide for the possibility of not punishing or prosecuting victims in their legislation (i.e. a more general obligation).

In any case, while the Anti-Trafficking Convention and the Anti-Trafficking Directive establish a specific duty for Member States to transpose this provision into their national legal systems, they do not charge the Strasbourg Court with supervising its implementation or actual application and it remains to be seen how the Court will approach this problem.

The argument here is that whereas the non-punishment principle plays an important role in victim protection, criminal law and criminal legal theory too need to be considered in order to establish its rationale and articulate rules of its practical application.[75] Thus, although human rights law often underpins the basic guarantees of criminal law and may well intervene in the exercise of discretion by national authorities in order to secure adequate protection,[76] it provides only general guidance as to what aims are to be achieved, leaving criminal law to offer a more detailed guidance. Accordingly, the practical application of the non-punishment principle is principally a matter for national authorities and it should be implemented 'in accordance with the basic principles of every national legal system'[77] with human rights law providing a remedy in situations deemed manifestly unjust or arbitrary.

In sum, human rights law will be engaged in rather extreme situations where either the non-punishment principle has not been even envisaged in national legislation, or domestic authorities failed to give any consideration to the victim's status and/or to the possible application of this principle, thus rendering the trial against her manifestly unfair. However, neither of these two

74 Trafficking Convention Explanatory Report, para. 274.

75 Notably, Article 26 of the Anti-Trafficking Convention places the principle among the provisions dealing with substantive criminal law and not the provisions dealing with the victim protection, as the European Commission wrongly implies in its recent study *The EU Rights of Victims of Trafficking in Human Beings* (2013).

76 *X and Y v. Netherlands* (App 8978/80); *MC v. Bulgaria* (2005) 40 EHRR 20.

77 This approach was, however, criticized as 'unlikely to foster a harmonized implementation of the [Anti-Trafficking] Directive, and more importantly will continue to allow the prosecution of victims of trafficking in some Member States, as well as the denial of their rights' in UN High Commissioner for Refugees, *Prevent, Combat, Protect Human Trafficking: Joint UN Commentary on the EU Directive: A Human Rights Based Approach* (November 2011), 35.

situations will enable the Strasbourg Court to provide answers to a set of questions concerning the application of the non-punishment principle in practice, which are identified in the following section.

### 3.2. Practical operation of the Non-Punishment Principle

Moving the discussion from the theoretical and normative groundings of the non-punishment principle to its practical implementation, this article argued that this requires answering three questions, mainly concerned with various aspects of the relationship between the trafficking act and a resulting criminal offence of a victim.

First, it ought to be determined which *crimes* the non-punishment principle applies to. Does it apply only to criminal offences or to any unlawful activities? With regard to the former, does it apply to any criminal offence or only specific crimes that are known to be related to human trafficking situations, such as illegally crossing a border, prostitution (where criminalized) or street begging? What about more serious crimes including human trafficking itself?

Secondly, what kind of *causal relation* between the trafficking experience and victim involvement in unlawful activities triggers the application of this provision? Furthermore, who bears the burden of proving the link between the trafficking act and the related criminal offence committed by its victim?

Finally, the third question deals with the *effects* of the principle. Does it entirely exclude or just diminish culpability? Is it only relevant at the sentencing stage or does it also require not initiating the criminal proceedings in the first place? Does it apply automatically and who is responsible for its application?

These questions will be examined with reference to the UK legal context. As noted in the introduction, the UK is chosen as a case study because of its jurisprudence available for analysis, and because its recent legislation introduces a new statutory defence for victims of 'modern slavery',[78] which represents a novel approach in Europe, where most of the countries rely on prosecutorial or judicial discretion within general criminal law provisions. This approach is problematic: establishing a specific principle directed at victims of human trafficking would be pointless if they were to be subject to the same protective mechanisms that apply to anyone.

Moreover, by placing the non-punishment principle in the context of existing protective mechanisms (i.e. prosecutorial discretion or a criminal defence such as duress) two sets of criteria begin to play a role. Thus, the criteria that apply to the existing general protective mechanisms are supplemented by the specific criteria that apply to the non-punishment principle alone, which makes the threshold for protection very high.

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78 Modern Slavery Act 2015, Part 5, Section 45.

The Court of Appeal of England and Wales took the serious challenge of engaging with some of the three questions identified at the beginning of this section in *L & Ors* and the following section takes a closer look into its reasoning.[79] Since the judgement was delivered before the adoption of the Modern Slavery Act 2015 (MSA), the analysis of the case will also reflect upon the provisions of the MSA relevant for the questions discussed.

Before the MSA, there were three mechanisms for complying with Article 26 of the Anti-Trafficking Convention (and Article 8 of the Anti-Trafficking Directive) in the UK. These included: the common law defence of duress and necessity; prosecutorial discretion in deciding whether charges should be brought; and the ultimate sanction of the court to stay the prosecution for the 'abuse of process'.[80]

When it comes to the new statutory defence for slavery or trafficking victims in the MSA, three distinctive features characterize the new provision. First, the statutory defence distinguishes between the test that applies to persons aged 18 or over and those under the age of 18. Secondly, the statutory defence does not apply to offences listed in Schedule 4. Thirdly, even though the relevant section of the MSA is entitled 'defence for slavery or trafficking victims who commit an offence', the defence applies only to those victims already subject to exploitation (both adults and minors), which include victims of slavery, servitude and forced or compulsory labour, and victims of 'relevant exploitation' resulting from human trafficking.[81] This is one of the major flaws in the new instrument since clearly victims of trafficking are in need of protection even before the intended exploitation started.

In sum, when it comes to adult victims of human trafficking, three cumulative conditions need to be fulfilled to be able to use the defence. First, the person has to be compelled to commit an offence.[82] Secondly, such compulsion needs to be attributable to slavery or to relevant exploitation.[83] Thirdly, a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.[84]

To satisfy the first condition, compulsion may originate from another person or from the person's circumstances.[85] The Act however does not specify which personal circumstances would qualify as compulsory. As for the second condition, compulsion has to result from either the conduct that constitutes an offence of slavery, servitude or forced labour, or the conduct that constitutes 'relevant

79 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991.
80 *LM and Others v. R* [2010] EWCA Crim 2327 [7]-[11].
81 MSA, Section 45 (1) (c).
82 MSA, Section 45 (1) (b).
83 MSA, Section 45 (1) (c).
84 MSA, Section 45 (1) (d).
85 MSA, Section 45 (2).

exploitation', resulting from an act of human trafficking.[86] In both cases, it is clear that the MSA requires that a person has already been already subject to exploitation, either in the form of slavery servitude or forced labour, or in other forms of 'relevant exploitation' listed in section 3.[87] This is a serious oversight of the MSA because, on its face, it prevents the application of the defence to victims who have been trafficked but not yet exploited. Finally, the statute clarifies the meaning of the 'relevant characteristics' from the third criterion that includes: age, sex and any physical or mental illness or disability.[88]

As for the victims of human trafficking who are under the age of 18 when they commit an offence, the element of compulsion is excluded from the set of requirements,[89] but the law still requires that a person has already been subject to exploitation. It remains to be seen how the courts will interpret and apply Section 45 of the new statute.

Importantly, the new statutory defence under the MSA applies equally to victims of slavery, forced labour and servitude, if they are suspected of committing a criminal offence, regardless of whether they have been trafficked or not. This is a welcome development for it shows that the protection afforded by trafficking-specific instruments has been extended to victims of not-trafficked exploitative practices.[90] Consequently, contrary to a fear that the newfound commitment to the fight against human trafficking is doing so at the expense of concentrating on the exploitation as such,[91] the human trafficking framework has proved beneficial even to those who suffered non-trafficked exploitation.

## 4. The Application of the Non-punishment Principle – the Key Questions

The UK case of *L & Ors v. The Children's Commissioner for England & Anor* will be used as a reference point for discussing three questions identified in section 3.2. as crucial for the application of the non-punishment principle. This judgement dealt with issues raised by four otherwise unconnected cases in which three children and one adult were trafficked to the UK, and were subsequently prosecuted and convicted for drug-related offences (the first three

86 MSA, Section 45 (3).
87 In addition to slavery, servitude and forced labour, these include: sexual exploitation; removal of organs etc; securing services etc. by force, threats or deception; securing services etc. from children and vulnerable persons.
88 MSA, Section 45 (5).
89 MSA, Section 45 (4) (b) and (c).
90 See also Protocol of 2014 to the Forced Labour Convention, 1930 (Geneva, 103rd ILC session, 11 June 2014) (Entry into force: 09 November 2016), Article 4 (2).
91 Hathaway, 'The Human Rights Quagmire' 2008 (n. 45).

applicants), and for possession of a false identity document (the fourth applicant). None of their traffickers have been identified or brought to justice.

The facts of the first three cases are very similar. The appellants were trafficked from Vietnam as minors and were subsequently involved in a sophisticated cannabis growing operation in the UK. In the criminal proceedings before the Crown Court, in none of the three cases was proper consideration given to the question of whether a defendant had been a victim of trafficking. In fact, in spite of serious indications to the contrary,[92] conclusive decisions as to the trafficking status of the first two appellants were only made after they had been convicted, and even after they had served a significant portion of their sentences. In the case of the third appellant, there had been a decision of the UKBA[93] recognizing his status as a victim of human trafficking before he pleaded guilty and the case came up for sentence, but no one in court appeared to have been aware of it.

The fourth case was of a very different nature. The appellant was a native of Uganda, a woman in her mid-30s who, after several years of forced prostitution, had been released by her female trafficker, and given a false passport, which she believed was genuine. She was arrested when she tried to apply for a national insurance number using this forged document and was sentenced to six months imprisonment for possession of a false identity document. Only after she had been released was an attempt made to use the national referral mechanism to assess whether she might have been a victim of trafficking, and the UKBA found that she had indeed been trafficked. One of the questions raised in the appeal was a possible absence of any link between her offence and any compulsion arising out of the fact that she was a victim of trafficking.

The Court outlined the main purpose of its judgement in the very beginning, setting itself to:

'[O]ffer guidance to courts (...) about how the interests of those who are or may be victims of human trafficking, and in particular child victims, who become enmeshed in criminal activities in consequence, should be approached *after criminal proceedings against them have begun*.'[94]

This statement could be read as narrowing down the application of the principle to the cases when criminal proceedings against trafficking victims

92 The first appellant told the arresting officers that he had been relieved to see them and that he had been brought into England in a freezer container after the deeds to his parents' home had been taken as collateral to settle the debt in Vietnam. The third appellant was found by the police barefoot and frightened after the neighbours had alerted the police that they had seen him being removed from the house by a group of men with his hands bound.

93 One of the two UK's competent authorities to make a decision on one's victim status. See text with note 104.

94 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991 [3].

have already begun. However, the reason why the Court limited itself to this moment is given in the preceding part of the same paragraph. The judges noted that 'the court cannot become involved either in the investigation of the case or the prosecutorial decision whether it is in the public interest for the prosecution to proceed'.[95] They made it clear that they did not intend to engage with how the Director of Public Prosecutions would exercise its discretion in deciding whether it was in the public interest for the prosecution to proceed. Importantly, the judgement emphasizes that the Court reviews the decision to prosecute through the exercise of the jurisdiction to stay proceedings:

'The court protects the rights of a victim of trafficking by overseeing the decision of the prosecutor and refusing to countenance any prosecution, which fails to acknowledge and address the victim's subservient situation, and the international obligations to which the United Kingdom is a party.'[96]

Hence, it is clear that the principle is applicable both to the decision to prosecute as well as during the criminal trial, contrary to the somewhat misleading labelling of it as the 'non-punishment' principle.

As a general point, the Court has emphasized that the non-punishment principle could not be interpreted to imply that 'a trafficked individual should be given some kind of immunity from prosecution, *just because* he or she was or has been trafficked, nor for that reason *alone*, that a substantive defence to a criminal charge is available to a victim of trafficking'.[97] Evidently, an automatic exemption from prosecution and/or conviction *just* on the basis of one's victim status is too wide an interpretation of the principle, which courts are by no means ready to accept. What then, according to the Court, are these additional conditions attached to this provision? The remaining part of this section will examine more closely how the UK courts engaged with this question and whether they succeeded in answering it. In particular, further analysis will focus on the way the courts engaged with the three questions identified in the section 3.2. First, which *crimes* does the non-punishment principle apply to (section 4.1)? Secondly, what kind of *causal relation* between one's trafficking experience and victim involvement in unlawful activities triggers the application of this provision (section 4.2)? Thirdly, what are the legal *effects* of the principle (section 4.3)?

The application of the non-punishment principle is, nevertheless, conditional upon correct victim identification. Most problems in applying this principle, as demonstrated by the present judgement, arise because relevant authorities

95 *Ibid.*
96 *Ibid.* [16].
97 *Ibid.* [13] (emphasis added).

have failed to identify defendants as victims of human trafficking.[98] In fact, the identification of trafficked persons continues to be 'one of the main challenges in anti-trafficking work'[99] in general, not just with respect to the application of the non-punishment principle. It is a prerequisite for any further action required by anti-trafficking legislation, regardless of whether the non-punishment provision may be applicable in the given circumstances. Hence, a failure to identify a trafficking victim would mean that his or her fundamental rights will continuously be denied and the prosecution will be denied the necessary witness in criminal proceedings.[100]

On this matter, the UK Court stated that:

'Enough is known about people who are trafficked into and within the United Kingdom for *all those involved in the criminal justice process* to recognize the need to consider at an early stage whether the defendant (child or adult) is in fact a victim of trafficking.'[101]

It is, therefore, clear that before pursuing any further action, the acting official should assess whether an individual might have been a victim of trafficking if sufficient indicators are present.[102]

The Court then moves on to describe a victim identification process in the UK set up by the National Referral Mechanism on 1 April 2009. According to this scheme, a conclusive decision as to a victim's status can only be made by competent authorities.[103] The judges noted that 'although the court is not bound by the decision [of competent authorities], unless there is evidence to contradict

98 The European Commission has explained how victims should be identified by publishing the *Guidelines for the Identification of Victims of Trafficking in Human Beings* (2013).

99 Global Alliance Against Traffic in Women (GAATW), *More 'Trafficking' Less 'Trafficked': Trafficking for Exploitation Outside the Sex Sector in Europe* (Working Paper Series 2011), 18.

100 Trafficking Convention Explanatory Report, para. 127.

101 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991 [26].

102 The European Commission currently funds a project under the ISEC Programme ('Development of Common Guidelines and Procedures on Identification of Victims of Trafficking in Human Beings', EuroTrafGuID), which aims to develop guidelines to better identify victims of trafficking in human beings, taking into account the International Labour Organization and the European Commission, *Operational Indicators of Trafficking in Human Beings* (Results from a Delphi Survey, September 2009).

103 These authorities are the UK Human Trafficking Centre, which is part of the Organised Crime Command in the National Crime Agency and deals with referrals from the police, local authorities, and NGOs, and the Home Office Immigration and Visas (UKBA), which deals with referrals identified as part of the immigration process, for example where trafficking may be an issue as part of an asylum claim. For an overview of a national referral mechanism see www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism, 4 October 2015.

it, or significant evidence that was not considered, it is likely that the criminal courts will abide by it'.[104] Importantly, the appellate judges held that:

'[T]he court may adjourn as appropriate, for further information on the subject, and indeed may require the assistance of various authorities, such as UKBA, which deal in these issues. However that may be, the ultimate responsibility cannot be abdicated by the court."[105]

This effectively means that judges are *allowed* to pursue further investigation and seek evidence regardless, and in spite of the decision of the competent authorities. However, even though the Court did not use the mandatory language to ascribe the responsibility for judges to make further inquiries, the *Rantsev* test speaks clearly of the obligation on the part of all state authorities to 'take appropriate measures within the scope of their powers'.[106] Hence, it appears peculiar that the appellate judges arrived at a conclusion that there was no scope for criticizing the first instance judge who 'throughout the trial, had suspected that the appellant may have been the victim of trafficking, but as the issue was not raised, she had not voiced her suspicions'.[107]

Another question bears particular relevance in the context of the victim identification and the application of the non-punishment principle. Namely, there may well be situations where a victim was no longer subject to the control of traffickers when she becomes known to authorities, as was the case with the fourth appellant. Such individuals are referred to as 'historical victims' – the term used to describe those trafficked persons who are no longer in a situation of exploitation (or at risk of it) at the time when they come to the attention of the authorities.[108] Thus, the question arises as to whether they retain their victim status and whether the victim's status, in general, is linked to their protection needs. Whereas the UK courts initially held that victim status is essentially linked to their protection needs, which is 'is not absolute or never-ending',[109] they changed the approach and considered that a victim status extends 'even [to] a person who was trafficked to the United Kingdom 30 years ago and thereafter managed to create a new life for himself'.[110]

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104 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991 [28].
105 *Ibid*. [29].
106 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [286].
107 *Ibid*. [53].
108 A. Weiss/S. Chaudary, 'Assessing Victim Status' 2001 (n. 4).
109 *R (Y) v. Secretary of State for the Home Department* [2012] EWHC 1075 (Admin).
110 *Nguyen (Anti-Trafficking Convention: respondent's duties)* [2015] UKUT 170 (IAC) (25 March 2015) [46]. See also *R (Atamewan) v. Secretary of State for the Home Department* [2014] 1 WLR 1959.

Evidently, victim identification is a prerequisite for any further action of state authorities, regardless of whether or not the non-punishment principle applies in a particular case.

### 4.1. Types of Offences

Victims of human trafficking may become involved in a range of unlawful activities at various stages of the trafficking process. Thus, the latest US Trafficking in Persons Report identifies theft, illicit drug production and transport, prostitution, terrorism, and murder as crimes that adults and children are forced to commit in the course of their victimization.[111]

The *LM* case explicitly established that 'the obligation under Article 26 [Anti-Trafficking Convention] is one which extends to *any offence* where it may have been committed by a trafficked victim who has been compelled to commit it',[112] although its application is said to be fact-sensitive in any case.

However, the MSA explicitly lists a vast number of offences in Schedule 4 to which a defence contained in Section 45 does *not* apply.[113] These include common law offences,[114] as well as a range of offences prohibited by specific statutes. It is evident that the intention of the UK legislator is to prevent the application of the defence to the most serious crimes. Moreover, the MSA gives broad powers of the Secretary of State to amend Schedule 4 by regulation.[115] This approach is problematic because some of the excluded offences may well be committed in the course or as a consequence of a person being trafficked and/or exploited as documented in the US report. In particular, Schedule 4 excludes the offences of human trafficking, even though it has been well-documented that former victims of trafficking often get involved in the recruitment and abuse of new victims in the process known as the 'cycle of abuse'.[116] In these situations, the courts are left only with the possibility of mitigating the sentence, although the defence of necessity may well be advanced in some of these situations. Accordingly, the fact-sensitive approach established in the *L* case offers a far better solution.

While the MSA identifies offences to which the new defence does *not* apply, when it comes to the remaining broad range of offences where the defence does apply, further clarifications are necessary. In particular, this article argues that the application of the non-punishment principle to different types of offences requires different rules since the compulsion and a causal relationship

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111 US Department of State, *The 2014 Trafficking in Persons Report* (June 2014) 14.
112 *LM and Others v. R* [2010] EWCA Crim 2327 [12].
113 Modern Slavery Act 2015, Section 45 (7).
114 Kidnapping, manslaughter, murder, perverting the course of justice, and piracy.
115 Modern Slavery Act 2015, Section 45 (8).
116 *LM and Others v. R* [2010] EWCA Crim 2327 [14].

between a victim's criminal behaviour and her trafficking experience or exploitation are inherently different. Thus, it is necessary to establish broader categories of the criminal offences to which the non-punishment principle applies, and accordingly, set the rules applicable to each category. Three categories are proposed as follows.

The first category includes 'status offences'[117] that are often instrumental for a trafficking offence to take place. Those offences are related to violations of immigration laws, including using false documents, which facilitate the commission of the trafficking offence, as demonstrated by the fourth applicant's case. This resembles protection from criminal liability offered to refugees and asylum seekers under Article 31 of the 1951 Refugee Convention.[118] Moreover, even if a trafficking victim entered the country legally, she may breach the conditions of entry by overstaying or by violating labour regulations. Therefore, the scope of required protection in such cases is broader than that guaranteed by the Refugee Convention.

The second group of offences are 'purpose offences' – offences that represent the reason why a victim has been trafficked in the first place. These include various exploitative practices, such as shoplifting, street-begging, cannabis cultivation, or prostitution, the commission of which was the sole purpose of the trafficking act. These are, in fact, offences that fall under the concept of 'exploitation of criminal activities' as one of the purposes of human trafficking expressly listed in the Anti-Trafficking Directive's definition. According to the Directive, the term should be understood 'as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain'.[119] Consequently, this group of offences is limited to those that produce some form of financial gain, which could not be attributed to an alleged offender. Therefore, it should not be confused with a situation where a victim commits a lucrative offence with a view to escaping from her situation.

The third group of offences are 'secondary offences' – those seemingly detached from the original trafficking situation. Hence, a victim may commit an offence in an attempt to escape from traffickers, or to sustain her living following the escape. This is a group of offences where a temporal and causal link between trafficking and an offence need to be the most evident for the application of the principle. This group also includes situations where victims of trafficking be-

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117 Inter-Agency Coordination Group against Trafficking in Persons (ICAT), *The International Legal Frameworks concerning Trafficking in Persons* (Vienna, October 2012), para. 3.6.

118 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 150, Article 31. See Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection* (A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, October 2001).

119 Anti-Trafficking Directive, Recital 11.

come involved in trafficking and exploitation of other victims, in order to avoid abuse.

The rules that apply to each of the identified categories depend on a compulsion element and the causal relationship between the victim's criminal offence and her trafficking/exploitation. The next section examines these relationships.

### 4.2. The Link between Human Trafficking and the Victim's Offence

The non-punishment principle is said to apply to crimes that were 'consequent on or integral to the exploitation of which he was a victim'.[120] In other words, a victim may resort to these offences while still under the influence of the traffickers, or as a means to break free from them.

The correlation between the victim's criminal offence and her trafficking experience requires engaging with the problems of causation, coercion and the lack of agency. Namely, the Anti-Trafficking Directive refers to criminal activities which victims 'have been compelled to commit as a *direct consequence* of being subjected to (trafficking)',[121] implying the requirement of a *causal and temporal relationship* between the trafficking and the related crime. While the principle clearly excludes the protection from prosecution or punishment for offences that a person has *voluntarily* committed or participated in,[122] the Anti-Trafficking Directive does not specify the exact nature and intensity of compulsion necessary to trigger the protection.

The Explanatory report to the Anti-Trafficking Convention, on the other hand, notes that:

'[T]he requirement that victims have been compelled to be involved in unlawful activities shall be understood as comprising, at a minimum, victims that have been subject to any of the illicit means referred to in Article 4, when such involvement results from compulsion.'[123]

This statement sounds ambiguous and circular, since the 'illicit means' correspond to those listed as one of the three elements necessary for establishing the trafficking offence in the first place. Hence, the first part of the sentence

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120 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991 [20]. The OSCE Guidance uses the following terms throughout the report: 'violations of the law directly connected with, or arising out of, [the] trafficking situation'; 'offences caused or directly linked with their being trafficked', and 'offences committed in the course, or as a consequence, of being trafficked'.

121 Anti-Trafficking Directive, Article 8. The corresponding provision of the Anti-Trafficking Convention does not contain this qualification.

122 Anti-Trafficking Directive, Recital 14.

123 Trafficking Convention Explanatory Report, para. 273.

seems to imply that once it was established that a person had been trafficked, which includes proving that specific means listed in the trafficking definition were deployed, the immunity from punishment should apply automatically, since the proof of means necessary for establishing the former represents the compulsion required for the latter. This is rather confusing as it would be much simpler not to have included the notion of compulsion as an additional element at all, if it were to be interpreted as one of the necessary elements of a trafficking definition. Still, the statement uses the term 'at a minimum', which implies that other means may well be used to compel a victim to commit an offence, but it does not give any further clue as to what these may be.

Strangely enough, the second part of the sentence, then, contains another reference to compulsion, thus making the whole statement somewhat bizarre. It effectively states that a person is compelled to commit a crime when she was subject to some of the means listed in the trafficking definition, when such involvement results from compulsion.

In order to make sense of this rather unhelpful interpretation of Article 26 Anti-Trafficking Convention, this article makes the following proposition. It argues that distinguishing between the three groups of offences identified in the previous section helps understanding the compulsion requirement and the potential for the non-punishment principle to apply differently in these situations.

Thus, it is useful to refer to the previously explained distinction between criminality that facilitates the execution of the trafficking offence ('status offences'), and the offences that are the purpose of trafficking a person in the first place. The commission of the latter offences is the original reason for trafficking and it represents the form of exploitation. In addition, victims may commit other offences, more or less connected with their trafficking experience ('secondary offences'). This would be the case, for example, when victims escape from the influence of traffickers but appear to have no other choice but to commit further offences. It is also not excluded that victims resort to a criminal lifestyle that is entirely unconnected to their previous trafficking experience.

Distinguishing between these groups of offences helps understanding the compulsion requirement and the potential for the non-punishment principle to apply differently in these situations. Namely, in 'status offences', the means used to commit the trafficking offence also represents an element of compulsion required for the application of the non-punishment principle. In other words, if a victim was deceived by traffickers that she would be given a job in a destination state, and her immigration status would be regular, such deception automatically extends to any criminal offence committed in order to facilitate her arrival at the given destination. Once it is established that a person was trafficked, which also requires establishing that a specific means was used, there is no reason to require additional evidence of compulsion for offences that are effectively contingent upon the trafficking process. Hence, the application of the non-punishment principle should be automatic in such cases.

However, if upon arrival, the same victim is required to engage in unlawful activities, the compulsion requirement may well change. Namely, whether or not a victim was aware that performing these activities is illegal, she might have opposed them because they did not conform to what she had originally been promised she would do, in terms of the type of work or its conditions. In such circumstances, a different form of compulsion may play a role in the assessment. The court or other relevant authority will need to examine the extent to which her will was circumscribed by this new situation. The presumption in favour of her lack of autonomy should be applied in situations where it is clear that the involvement in unlawful activities was the exploitative purpose of trafficking. In such cases, it may well be reasonable to impose the reversed burden of proof, asking a public prosecutor to prove the absence of compulsion. The situation of the first three appellants falls neatly within this category.

Finally, if a victim was found to have been involved in unlawful activities that had no obvious connection with the original trafficking offence, such as those committed when a victim has already escaped the influence of traffickers, the required analysis will be different. It may well be that committing an offence was a means to break free from the traffickers, or once out of their reach, the involvement in criminal activities is due to the perceived absence of meaningful alternatives. The analysis of compulsion in these broadly diverse circumstances ought to be different. Arguably, the more distant the offence is from the experience of trafficking, the requirement of compulsion will be stricter, reaching close to the standards required for the defences of duress or necessity.

Support for the proposed solution may be found in the soft law instruments. Thus, the Parliamentary Assembly of the Council of Europe (PACE) urged the Committee of Ministers to incorporate key amendments into the Draft Anti-Trafficking Convention before opening it for signature, including the recommendation to ensure that each party to the Convention:

'[R]efrains from detaining, charging or prosecuting victims of trafficking in human beings on the grounds that they have unlawfully entered or are illegally resident in countries of transit and destination, or for their involvement in unlawful activities of any kind, when such involvement is a direct consequence of their situation as victims of trafficking (Article 26).'[124]

An almost identical provision is contained in the OHCHR Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking.[125] Both instruments seem to recognize the distinction between different types of crimes and the impact of such a distinction on the operation

[124] Council of Europe, Parliamentary Assembly, Recommendation 1695 (2005).
[125] UN Trafficking Principles and Guidelines – Commentary, 132.

of the non-punishment principle, especially when it comes to the compulsion element.

Therefore, it appears that this provision contains two different rules for different situations. The first is concerned with 'the illegality of their entry into or residence in countries of transit and destination', whereas the second refers to 'unlawful activities' in general. Thus, the former case appears to require states to establish blanket immunity from criminal prosecution whereas the second situation only 'to the extent that such involvement is a direct consequence of their situation as trafficked persons'. Support for such a conclusion may also be found in the OHCHR Commentary, which notes that:

'[T]he non-criminalization principle (...) is not intended to confer blanket immunity on trafficked victims who may commit other non-status-related crimes with the requisite level of criminal intent. For example, if a trafficked person engages in a criminal act such as robbery, unlawful violence, or even trafficking, then she or he should be subject to the normal criminal procedure with due attention to available lawful defences.'[126]

Thus, *a contrario*, blanket immunity would apply to 'status offences'. However, the conclusions in the Commentary with respect to the 'non-status-related crimes' are undesirable, since these crimes too should be exempt from criminal prosecution to the extent that such involvement is a 'direct consequence of their situation as trafficked persons' as noted by PACE. For, otherwise, the sentence 'or for their involvement in unlawful activities' would be entirely unnecessary.

Therefore, while the non-punishment principle should automatically apply on the status offences,[127] when it comes to other unlawful activities, it needs to be established that these were a direct consequence of a trafficking situation, as explained above.

In the UK, the decision in the *LM & Ors* case refers to a 'reasonable nexus of compulsion',[128] specifying that the word 'compelled' in Article 26 of the Anti-Trafficking Convention is clearly not limited to circumstances in which the English common law defences would be established.

Furthermore, the Court in *L* noted that:

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126 *Ibid.*

127 Aliverti argues that the criminalization of immigration breaches is in stark contrast with a number of criminal law principles and that the normative justification of criminal law in immigration matters is weak and it should have no role to play in the enforcement of immigration rules. A. Aliverti, 'Making People Criminal: The Role of the Criminal Law in Immigration Enforcement', *Theoretical Criminology* 16(4) (2012), 426.

128 *LM and Others v. R* [2010] EWCA Crim 2327 [14].

'The culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, (...) because *no realistic alternative was available* to the exploited victim but to comply with the dominant force of another individual, or group of individuals.'[129]

Still, the Court does not elaborate further the appropriate criteria for determining whether a victim had 'no realistic alternative' but to commit an offence. It does not explain whether this should be judged from a victim's standpoint or is an objective assessment.

It remains to be seen how the courts will interpret and apply Section 45 of the Modern Slavery Act 2015, which establishes the new defence outlined in section 3.2.

### 4.3. The Legal Effect of the Non-Punishment Principle – Non-Punishment or Non-Prosecution?

Clarifying the legal effect of the non-punishment principle calls for answers to the following vital questions. Does the principle only exclude imposing penalties on human trafficking victims following the trial? Or, does it call for non-prosecution of victims of trafficking too, once the link between the original trafficking offence and the resulting crime is established? Is there a difference in how different state authorities should apply this principle?

As already noted, there are discrepancies between the provisions of Anti-Trafficking Convention and the Anti-Trafficking Directive when it comes to the legal effect of the non-punishment principle. Whereas the former refers only to non-punishment of trafficking victims, the latter clearly calls for their non-prosecution too, thus seemingly being broader in scope.

PACE expressed concerns about the 'excessively vague' wording of the provision on non-punishment of victims in the Draft Anti-Trafficking Convention, which 'raises doubts as to the genuineness of the will to protect victims who have been forced to commit offences'.[130] It suggested amending the text of Article 26 of the Draft Convention to guarantee that victims of trafficking 'shall not be detained, charged, prosecuted or submitted to any sanction'.[131] Unfortunately, the Anti-Trafficking Convention eventually entered into force without

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129 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991. [13] (emphasis added). In *LM and Others v. R* [2010] EWCA Crim 2327 [14] the court refers to the 'reasonable nexus of compulsion'.

130 Council of Europe, Parliamentary Assembly, Draft Council of Europe Convention on Action Against Trafficking in Human Beings, (26 January 2005) Opinion 253 (2005), para. 9.

131 *Ibid*., para. 14. xv. See also Council of Europe, Parliamentary Assembly, Recommendation 1695 (2005). The problem of victim detention, regardless of their being charged with a criminal offence, was given particular and detailed consideration in the UN Trafficking Principles and Guidelines – Commentary, 134.

significant changes, which, according to PACE, reflected the Member States' desire to protect themselves from illegal migration rather than accepting that trafficking in human beings is a crime and that its victims must be protected.

The analysis so far shows that the non-punishment principle does not apply automatically. Furthermore, the questions of responsibility for its application and how it should be applied in practice are left for states to decide for two main reasons. First, the provisions of the anti-trafficking instruments establishing this principle clearly refer to such a conclusion, due to differences in the basic principles of different national legal systems. Secondly, the analysis of the ECHR and the Strasbourg jurisprudence demonstrates that this instrument provides a limited aid to answering the questions concerning the practical application of the principle.

When it comes to the legal effect of the non-punishment principle in the UK, the *L* case seems to propose a sliding-scale approach:

'In some cases the facts will indeed show that he was under levels of compulsion which mean that in reality culpability was extinguished. If so when such cases are prosecuted, an abuse of process submission is likely to succeed. (...) In other cases, (...) culpability may be diminished but nevertheless be significant. For these individuals prosecution may well be appropriate, with due allowance to be made in the sentencing decision for their diminished culpability. In yet other cases, the fact that the defendant was a victim of trafficking will provide no more than a colourable excuse for criminality which is unconnected to and does not arise from their victimisation. In such cases an abuse of process submission would fail.'[132]

While the UK courts are responsible for upholding this principle at the trial stage, when it comes to exercising prosecutorial discretion whether or not to initiate the proceedings, the Crown Prosecution Service issued legal guidance on human trafficking that outlines this procedure. The guidance lays out steps to be taken by a public prosecutor when considering whether to proceed with prosecuting a suspect who might be a victim of trafficking.[133] Thus, a decision to prosecute is to be based on a three-stage assessment. First, is there a reason to believe that the person has been trafficked? Secondly, if there is clear evidence of a credible common law defence of duress, the case should be discontinued on evidential grounds. Thirdly, even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies

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132 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991 [33].

133 Crown Prosecution Service, 'Legal Guidance: Human Trafficking and Smuggling', www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/, 30 August 2015.

in proceeding to prosecute or not. It remains to be seen how the new statutory defence will shape practice in the coming period.

The solutions found in other Member States to the Anti-Trafficking Convention are far from uniform. According to the latest GRETA General Report, of 35 countries evaluated, 27 did not have specific legislation on the non-punishment provision and relied on general duress provisions or exonerating or mitigating circumstances not specific to trafficking victims.[134] The Report notes that eight countries had adopted specific legal provisions concerning the non-punishment of victims of trafficking, either in their criminal code or in dedicated anti-trafficking legislation.[135] In four of these countries, the non-punishment provision applies to *any offences* related to the fact that the person had been trafficked.[136] In three countries, the application of this provision was limited: in Armenia, to offences of minor or medium gravity; in Georgia, to a list of offences under the Criminal Code and the Code of Administrative Violations; and in Romania, to the offences of prostitution, begging, crossing the border illegally or giving organs, tissues or cells of human origin. In Spain, a proportionality test was applied between the criminal act perpetrated and the means to which the victim was subjected.[137]

However, the legal effect of these diverse provisions establishing the non-punishment principle on a national level is hard to assess because, in reality, the number of victims who benefit from this principle is negligible. Thus, the implementation of the non-punishment principle was identified as one of the ten main areas where GRETA has urged parties to take corrective action.[138] This demonstrates an obvious need to explain its normative grounds and provide specific guidance on its practical operation.

## 5. Conclusion

This article has demonstrated that the non-punishment principle established in recent regional anti-trafficking instruments is a well-intentioned but only partially elaborated provision that requires further clarification and guidance as to both its rationale and practical implementation. These international anti-trafficking instruments give considerable latitude to Member

134 Fourth GRETA Report, 53.
135 *Ibid*.
136 Azerbaijan, Cyprus, Luxembourg and the Republic of Moldova.
137 Fourth GRETA Report, 53.
138 *Ibid*. 31-33. In the first evaluation round of the Convention, GRETA evaluated states' measures using verbs 'urge', 'consider' and 'invite', which correspond to different levels of urgency of the recommendation for bringing the party's legislation and/or practice into compliance with the Convention.

States when implementing the principle in national legal systems. Therefore, there is an obvious need for national legislatures and judiciary to establish its clear boundaries.

On the other hand, the global scale of the trafficking problem, and the required internationally coordinated response to it, emphasized in all anti-trafficking instruments and initiatives until now, calls for a certain level of uniformity that would provide a comparable level of protection to victims worldwide. This equally applies to the non-punishment principle.

To achieve this goal of having a certain level of uniformity in applying the non-punishment principle while allowing national legislations to shape its domestic application according to their respective legal traditions, this article argues for establishing a set of internationally agreed benchmarks that identify relevant questions to be addressed by the national institutions. These should include the following questions proposed in this article: the categories of offences in which the principle applies and whether it applies in the same manner; the causal relationship between the victim's offence and her trafficking experience; and the legal effect of the non-punishment principle. Accordingly, states should be instructed to address these questions on a domestic level, through appropriate legal, policy and practical measures, in order to fulfil their international obligations in this field.

This article discussed the role of human rights law in providing the rationale for this principle and for offering guidance for answering the practical questions concerning its implementation. The analysis demonstrated that the relevance of human rights law is far more modest than has been suggested.

Thus, in light of positive obligations established in the ECtHR's jurisprudence, when a state does not provide for the possibility of non-punishment of trafficking victims in its national legislation, or it cannot prove that such provisions are operational, the Court may be able to find a breach of Article 4 ECHR based on the *Rantsev* obligation to establish an adequate legal and administrative framework. In addition, when a state conducts criminal proceedings against a victim without any consideration being given to her victim status, such a state may also be in breach of Article 6 ECHR and fair trial standards. However, both scenarios deal with rather extreme violations of the non-punishment principle – either by a state not even legislating upon it, or by completely failing to consider it during a criminal trial against a victim of trafficking. Neither of these two situations addresses the substantive questions associated with the application of the principle by national authorities identified in this article.

Furthermore, the non-punishment principle may also be infringed upon *indirectly* by violating a positive obligation to identify a person for whom there are reasonable grounds to believe they are a victim of human trafficking, or by violating a procedural obligation to investigate the crime of human trafficking. However, these are separate obligations and the infringement of the non-punishment principle remains ancillary, albeit no less serious. Also, it has been shown that even if a victim has been identified and an offence investigated

properly, that still does not automatically justify the application of the non-punishment provision.

Evidently, human rights law can only go so far in providing the rationale and guidance as to the practical implementation of this important principle, and the established general human rights obligations need to be 'perfected' and further clarified by reference to domestic and transnational *criminal law*.

Therefore, instead of grounding the non-punishment principle *solely* in human rights law, it should also be seen in light of criminal law principles, which aim to secure law enforcement goals. Accordingly, as noted in the discussed OSCE Guidance '[v]ictims of trafficking are also witnesses of serious crime. The non-punishment provision will, if applied correctly, equally and fairly, enable States to improve their prosecution rates.'[139] Similarly, one of the three objectives of the Anti-Trafficking Directive outlined in Recital 14 explicitly refers to the aim of encouraging victims 'to act as witnesses in criminal proceedings against the perpetrators'. Hence, it would be counterintuitive to prosecute human trafficking victims since this may diminish their willingness to participate in subsequent criminal proceedings.[140] This approach embodies instrumental reasoning, similar to the strategy of granting immunity from prosecution to a person who provides substantial cooperation in the investigation of serious crimes.[141] While human rights language seems far more appealing, it is necessary to recognize the importance of different legal frameworks at play when discussing this novel principle.

In addition to clarifying the question of the foundation of the non-punishment principle, the interaction between human rights law and criminal law is even more important when it comes to answering practical questions concerning its application on a domestic level. Accordingly, while human rights law lays down general guidance as to the goal to be achieved (i.e. victim protection), it is for criminal law to develop specific guidance on the questions identified in this article concerning the practical implementation of this principle. For example, the discussion of the correlation between the victim's criminal offence and her trafficking experience required to establish the 'nexus of compulsion' calls for engaging with the problems of causation, coercion and the lack of agency, all of which are distinctly matters of criminal law. Unfortunately, there has been a limited engagement with these problems by national legislatures and judiciary and an academic consideration of this question has been scarce. While questions of criminal responsibility, causation and sentencing are complex and the legal scholarship in this field is rich, a detailed elaboration on these problems exceeds the scope of this article, which sought to map out critical

139 OSCE Guidance, para. 82.

140 Annison, *In the Dock* 2013 (n. 2), 93.

141 United Nations Convention against Transnational Organized Crime (15 November 2000) UNTS vol. 2225, Article 26 (3).

questions and point to inconsistencies in the current approaches in order to provoke a further debate on this important but under-theorized principle.

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# The victim of human trafficking as offender: A combination with grave consequences

*A reflection on the criminal, immigration and labour law procedures involving a victim of human trafficking in the Dutch Mehak case*

Corinne Dettmeijer-Vermeulen

Luuk Esser*

## Abstract

*For years, S., originally from India, was trafficked and exploited for labour in an Indian household in the Netherlands. At the same time, S. was convicted for the manslaughter of a baby that was also part of the household, which occurred during the human trafficking experience. The case raises important questions about the role of the non-punishment principle in cases where trafficking victims also become the perpetrator. What is more, in this exceptional case the question took central stage as to whether this principle can also be applied when the offence committed falls in the homicide category. This article focuses on these questions and also aims to demonstrate the influence that convictions of trafficking victims can have on other decisions they are subject to.*

## 1. Introduction

This article is devoted to the case of S., a national of India who was trafficked for labour exploitation and worked as a housekeeper for an Indian couple in The Hague (from 1999 to 2006). The couple, consisting of R. and

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*C.E. Dettmeijer-Vermeulen LL.M* is the National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children.
*L.B. Esser LL.M* works as a researcher at the Bureau of the National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children and is affiliated as a PhD Candidate with Leiden Law School. The National Rapporteur advises on measures to combat human trafficking in the Netherlands and on the effects of the policy measures that have been adopted. As a rule, the National Rapporteur does not act in individual cases, but an exception was made in the case of S. because of the important legal issues that arose in that case. An additional factor was that, to this day, S. has still not been granted the rights she is entitled to on the basis of her status as a victim. A Dutch version of this article has been published in the Dutch criminal law journal *Strafblad*. C.E. Dettmeijer-Vermeulen & L.B. Esser, 'Het mensenhandelslachtoffer als dader; een "personele unie" met grote gevolgen', *Strafblad* 3 (2013), 205-214.

P., were convicted of trafficking in human beings in 2007, an offence currently criminalised in Article 273f of the Dutch Criminal Code (DCC).[1]

During the period that S. was exploited in the household, the Indian couple also requested S. to abuse Mehak, a baby girl who also living in the house. These abuses were, according to R. and P., necessary in order to fight the negative consequences of the curse that had taken possession of Mehak. Eventually, the repeated assaults on the life of the baby led to her death. S. thereby became not only a victim of human trafficking, but also faced criminal charges (manslaughter) because of her role in the death of Mehak.

This article reviews some aspects of this exceptional case.[2] First, it will go into more detail about the facts of the case and the precise context in which S. had to perform her work for the Indian couple. Secondly, specific attention is paid to the role of the non-punishment principle in this case and the question as to whether this principle can also be applied in cases where the victim committed manslaughter. In the rest of the article the other legal procedures in which S. played a role are highlighted, such as her asylum procedure and the civil procedure to secure her salary. Thereby this article also focuses on the different legal domains that victims of human trafficking can be confronted with.

## 2. S. and the Mehak case

S. was born in India on 25 December 1986[3] and was around thirteen years of age when she came to the Netherlands at the end of 1999. She

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1 This article consists, in Article 273f paragraph 1, subsection 1 of an almost literal translation of the definition of trafficking in human beings in the United Nations Trafficking in Persons Protocol.

2 This was in fact the first case in the Netherlands that led to a conviction for trafficking in human beings for labour exploitation. Since 1 January 2005, also 'non-sexual' forms of human trafficking are criminalised.

3 There is some debate about S.'s date of birth. During her trial in first instance and on appeal it was assumed to be 20 January 1981. However, the Court of Appeal was not certain of this and found as follows in its grounds for sentencing: 'The suspect arrived in the Netherlands at the end 1999 at a young age (according to herself, just 13 years of age)'. The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410, under 'Grounds for sentencing'. In civilibus, when S. filed a claim for back pay, her date of birth was taken to be 25 December 1986, which means that she would indeed have been around 13 years of age when she came to the Netherlands. In the civil action against her exploiters, this age was not disputed in first instance or on appeal; the respondents agreed that this date of birth should be assumed. This assumption was based on a statement made by S.'s father, and witnessed by a civil-law notary in Delhi, India, that his daughter was born 25 December 1986. Accordingly, this is taken to be her date of birth in the remainder of this article.
For the civil proceedings, see The Hague District Court 21 April 2010 (unpublished) and The Hague Court of Appeal 9 October 2012, ECLI:NL:GHSGR:2012:BX9769 and The Hague Court

moved in with the family of R. and his wife P., who were also originally from India and had been living for some time in the Netherlands with their two children.[4] R. and P. made an agreement with S.'s father that S. would live in their home in The Hague and perform domestic work in the household. In consideration for these services, R. and P. had agreed with S.'s father (who remained in India) that she would earn 3000 rupees (roughly 50 euro) a month.[5]

Five years later, in August 2004, three others joined S.: an Indian couple who also worked as domestic workers and their five-month-old daughter, Mehak. S. worked from early in the morning until late at night performing various household tasks, including preparing meals for each individual member of R. and P.'s family, which the Court of Appeal described in R.'s trial as a 'full day's work'.[6] Besides preparing meals, S. cleaned the house, did the shopping, got the children ready for school and laid out the clothes for R. and P every day. The other housekeeper made a statement that she and S. got up at five o'clock every morning. The Court of Appeal's judgment referred to working days of twenty hours.

R. and P. were prosecuted and convicted for human trafficking, first by the District Court in The Hague, later by the Court of Appeal.[7] In the Court of Appeal's opinion, 'the working days had been (excessively) long, during which the individuals concerned had to be available for work at any moment'.[8] The Court of Appeal found that S. had not been paid, or had been paid very little, for the work – in any case, far less than she should have received according to Dutch standards. S. had no bed of her own, but often had to sleep on a sheet on the ground. She had no money of her own, and what she did receive, she had to spend on groceries for the family. At the same time, she was in a position of multiple dependence on R. and P, and she had no valid residence permit for the Netherlands. Furthermore, S. was physically assaulted by R. Every week she was beaten, sometimes with a stick or a whip. She was sometimes ordered by R. to beat other members of the household staff and was also beaten by them. R. also ordered the housekeepers to report to her if anyone in the household spoke badly about her. The Court of Appeal found as follows:

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of Appeal 5 February 2013, ECLI:NL:GHSGR:2013:BZ5998. In the civil action, the date of birth of 25 December 1986 did not in fact work in S.'s favour, since for persons below the age of 23, the younger they are, the lower the minimum wage is.

4 These facts are taken from the findings on the evidence in the appeal in the criminal case against S. – The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410 – and in the appeals in the cases against her exploiters: The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9406 (the case against R.) and The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9372 (the case against P.).

5 The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9406, under 4.2.

6 *Ibid.*

7 The prosecutor as well as the defence appealed against the decision by the District Court.

8 *Ibid.*

'The victims were in a totally dependent position in relation to the suspects [R. and P.]; they were living illegally in the country, did not speak Dutch, had no financial resources of their own and had (very) little contact with the outside world. The defendant [R.] was therefore guilty of a serious criminal offence by putting her own financial gain and personal comfort first, with no regard for the victims' physical and mental integrity. Experience shows that the victims will continue to suffer psychological and emotional harm from this for a long time to come.'[9]

## Mehak

In addition to human trafficking, this case also involved charges stemming from the death of Mehak, the daughter of the other couple that worked and lived in R. and P.'s house. When Mehak's mother told her that she had killed a snake in India, R. believed that Mehak was possessed by a spirit or was bewitched. From that moment on, Mehak was neglected and systematically mistreated on the instructions of R. On 28 January 2006, R.'s son was competing in a chess tournament. R. blamed Mehak for the games her son was losing at the tournament and instructed S. by telephone to assault Mehak in order to 'secure a victory'. Mehak was tied up and locked in her room. She was seriously assaulted. Her mother beat her on the forehead and cheeks with her fist. Mehak was also beaten with a stick. She was taken to the hospital in the evening, where she died the same night.[10] Mehak was 22 months old.

## The prosecution of S.

S. was prosecuted for her part in the assault of Mehak. After she had been convicted in first instance,[11] the Court of Appeal upheld her conviction for co-perpetration of manslaughter (with respect to the events on 28 January 2006), repeated premeditated assault (with respect to the assaults committed before 28 January 2006) and perjury.[12] With respect to manslaughter,

9 The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9406, under 'Grounds for sentencing'. The court said the same thing in its grounds for sentencing in the case against P.

10 Doctors in the hospital found various (old) bone fractures and abrasions on Mehak. This was the reason why a criminal investigation was launched into what actually happened.

11 S. was convicted of co-perpetration of premeditated gross maltreatment leading to death and perjury. In first instance, the District Court found that (conditional) intent in relation to the death of Mehak had not been proven. The Hague District Court 14 December 2007, cause-list numbers 09/900379-06; 09/655328-07 (unpublished).

12 The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410. S. initially made a false statement to the examining magistrate regarding the events in the house on 28 January 2006. A week later she voluntarily decided to tell the truth. S. admitted that the first statement was untrue. In the appeal in the trial of R. and P., the Court of Appeal declared that it had been proven that they had intentionally addressed S. with the clear intention of affecting her freedom to make a statement as a witness (criminalised in Article 285a DCC).

the Court of Appeal found that it had been proven that S. had repeatedly answered the phone when R. called and passed on instructions, that she herself had beaten Mehak with a stick and that she smeared *sambal* on the baby's lips.[13] The Court of Appeal sentenced S. to a term of imprisonment of five years.[14] The other housekeepers were also convicted for their roles in Mehak's death: her parents were sentenced to six years' imprisonment. In addition to the human trafficking conviction, R. and P. were also convicted of assault. R. was sentenced to eight years in prison: P. (who was found by the Court of Appeal to have played a smaller role in the events) received a two-year prison sentence. R. and P. did not serve their sentences; when the order for their pre-trial detention was lifted, they fled to India.

## The role of the non-punishment principle

The question that takes centre stage in this case concerns the criminal liability of S.: should she be punished for the manslaughter of Mehak? It was apparent that in this case nothing would stand in the way of a prosecution. The complicating factor lies in S.'s victim status and how to take that status into account when making a decision on prosecution or punishment.

In order to motivate states to provide for a possibility of non-punishment in situations where offences were committed by a human trafficking victim in a human trafficking context, multiple legal documents form a so-called non-punishment principle.[15] In short, the non-punishment principle prescribes that states must provide for the possibility not to prosecute or punish victims for illegal or criminal activities that have been carried out in a human trafficking context.[16] The Anti-Trafficking Directive of the EU speaks of not imposing penalties on victims of trafficking in human beings 'for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2' (Article

13 The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410.

14 In first instance, S. was sentenced to a term of imprisonment of three years. On appeal, S. was found to have played a more active role in the maltreatment of Mehak on 28 January 2006. In first instance, the District Court found that S. had given Mehak's mother a stick and passed on instructions issued by R. on the telephone to the mother.

15 See for an extensive treatise of this subject Schloenhardt/Markley-Tower, 'Non-Criminalisation of Victims of Trafficking in Persons – Principles, Promises and Perspectives', *Groningen Journal of International Law* 4(1) (2016); Hoshi, 'The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law', *Groningen Journal for International Law* 1(2) (2013); and Piotrowicz/Sorrentino, 'Human Trafficking and the Emergence of the Non-Punishment Principle', *Human Rights Law Review* 16 (2016), pp. 669-699.

16 Only the Anti-Trafficking Directive does, in Article 8, specifically mentions the opportunity not to *prosecute*. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

2 contains of the human trafficking definition).[17] A central element in this provision is the requirement of compulsion; in order for it to be applicable, a causal link should exist between the crimes committed and the human trafficking context a victim found himself in.

The non-punishment principle in the Anti-Trafficking Directive, as well as the Trafficking Convention of the Council of Europe,[18] and the 2014 ILO Protocol on Forced Labour,[19] only stipulate the obligation to create the *possibility* of non-prosecution[20] or non-punishment, but does not extend to its actual application.[21] In countries where the criminal justice system consists of a so-called 'opportunity principle', which grants the prosecutor discretionary powers when deciding on prosecution, this obligation will be implemented rather easily. In the Netherlands, which has such an opportunity principle, a judge also has considerable freedom when making sentencing decisions and also has the option not to punish at all if he deems that advisable by reason of the lack of gravity of the offence, the character of the offender or the circumstances under which the offence was committed.[22] In addition to the discretionary powers of prosecutors and judges, an appeal to the non-punishment principle could also be embedded in the existing system of defences.[23] Primarily the duress defence comes to mind here. The disadvantage of this route, however, is that, in addition to the requirements of the non-punishment principle, a case should also meet the criteria of the defences concerned, which consequently results in a 'double test'.[24]

In the case of S., an appeal on the non-punishment principle was made in two ways. First, the defence argued that S. was under duress, which can be applied in the Netherlands if there was an 'external force to which the accused could not and would not reasonably stand'.[25] The Court of Appeal ruled the duress defence inapplicable. The serious consequences of S.'s behavior were the overriding factor for the Court. The ruling stated that 'based on the

17 Article 8, Anti-Trafficking Directive.

18 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197.

19 Protocol of 2014 to the Forced Labour Convention, 1930, C029. The Protocol entries into force on 9 November 2016.

20 Again, only the Anti-Trafficking Directive specifically mentions non-prosecution.

21 See also Jovanović, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 3.

22 The so-called 'judicial pardon', laid down in Article 9a DCC.

23 Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (Vienna: OSCE, 2013), 28. See also Hoshi, 'The Trafficking Defence' 2013 (n. 15).

24 Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations* 2013 (n. 23), 28.

25 Supreme Court 9 October 2012, ECLI:NL:HR:2012:BX6734.

breaching of the less than two year-old toddler's (internationally recognised) absolute right to life, S. could be reasonably expected to have sought a possibility of sparing the health and the life of this victim by defying the anger of [R. and P.]'[26] Aside from the defence's appeal to pay attention to the non-punishment principle in the context of duress, the judge was also asked to take the non-punishment principle into account in his sentencing decision and to consider not to punish S. The judge also rejected this:

'The Court rules that the systematic mistreatments of [Mehak] before 28 January 2006 and the manslaughter of [victim] on 28 January 2006 cannot directly be linked to the accused's forced work in the context of the exploitation by R and P. In light of that, and of the gravity of the offences concerned, the non-punishment principle should not be applied'.[27]

The question that arises in this case is whether it should be possible to apply the non-punishment principle even in cases where the victim committed manslaughter. Aside from the possibility, it is also a question of whether it is desirable and if so, whether this should bear consequences for the severity of the criteria that have to be met when applying the principle. As for the question on the possibility of applying the principle in cases where human trafficking victims have committed manslaughter, people have sought for answers in international and European law documents in vain. For instance, neither the Anti-Trafficking Directive nor the Trafficking Convention elaborate upon the offences to which the non-punishment principle applies. The Convention fails to address which crimes the non-punishment principle concerns. Consideration 14 of the Directive seems to merely call the status-offences.[28] In sum, states are left to decide to which crimes the principle is applicable and if it is, whether it extends to manslaughter. In other words, the discussion is not whether the individual states can extend the principle to manslaughter, but whether this is deemed desirable on a national level.[29]

*Prima facie* there seems to be no principal difference between the application of the non-punishment principle in the case of manslaughter and the 'non-

26 The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410.

27 The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410.

28 See also Jovanović, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 4.2.

29 For more information on the freedom given to states to fill in obligations from international law documents regarding human trafficking see L.B. Esser/C.E. Dettmeijer-Vermeulen, 'The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking', *Anti-Trafficking Review* 6 (2016).

punishment' that can be achieved via already existing defences such as duress.[30] Or, as the OSCE has put it, the principle of non-punishment extends to 'any offence so long as the necessary link with trafficking is established'.[31] But the question automatically arises as to what criteria should apply when the non-punishment principle is being invoked in manslaughter cases and how strong the necessary link with human trafficking should be. Intuitively, one would say that the threshold for applying the principle in these cases should be high, thereby doing justice to the seriousness and gravity of the underlying offence. Whether it is desirable to make the application of the non-punishment principle depend on the type of the crime committed is a question that has been explored by Jovanović[32] in her article in this issue. She[33] differentiates between three categories of crimes and believes that each of those categories should apply to different requirements with regard to the 'nexus of compulsion'.[34] When it comes to the third category – that of the 'secondary offences' – the author seems to assume that the highest requirements should be set. Secondary offences concern crimes '[...] seemingly detached from the original trafficking situation'.[35] According to the author these crimes have in common the absence of an 'obvious connection' with the human trafficking experience of the victim. Therefore, she concludes, that the 'analysis of compulsion in these broadly diverse circumstances ought to be different'.[36] And: 'Arguably, the more distant the offence is from the experience of trafficking, the requirement of compulsion will be stricter, reaching close to the standards required for the defences of duress or necessity.'[37]

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30 At least in systems where the defence of duress is applicable to *all* criminal offences. In the Netherlands duress is part of the 'general part' of the criminal code and thereby exceeds to all criminal offences.

31 Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations* 2013 (n. 23), 23.

32 See also Jovanović, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 4.2.

33 See also Jovanović, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 5.

34 See also Jovanović, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017).

35 See also Jovanović, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 4.1.

36 See also Jovanović, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 4.2.

37 See also Jovanović, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 4.2.

Can the manslaughter by S. be framed as a secondary offence? First, it cannot be said that the distance between the offences committed by S. and her human trafficking experience are far apart from a temporal point of view. On the contrary, the assaults on Mehak were committed by S. while being trafficked and exploited for labour. Therefore it is not so much the temporal distance here that explains the absence of an 'obvious connection' with S.'s human trafficking experience, but rather the typological distance between the manslaughter and the human trafficking context.

However, it is undeniable that the human trafficking context in this case – which continued for years – put pressure on S.'s capacity to act. Not without reason the Court of Appeal in the case against her traffickers ruled that S. found herself in a totally dependent position in relation to her traffickers. This, in combination with the fact that S. started working for the Indian couple as a minor and the duration of the human trafficking experience, justifies the question whether the non-punishment principle could also apply to cases in which there seems to be a typological distance between the human trafficking situation and the crimes committed.

A principal starting point should be, in exceptional cases like these, that the manslaughter could reasonably be explained out of the human trafficking context. It therefore seems appropriate to require the existence of a temporal overlap between the human trafficking experience and the manslaughter, i.e. only that manslaughter can be excluded from punishment that was committed by the trafficking victim *during* the human trafficking experience. With regard to the level of compulsion required in these cases, the mere presence of the means established in the case against the traffickers is not enough to justify the application of the non-punishment principle.[38] Whereas the gravity of the means used by a trafficker can play a role in the assessment of the application of the principle, it must also be said that there were no subjective or objective alternative options for the human trafficking victim to act differently. In line with this it seems reasonable to place the burden of proof on the side of the defence. Possible factors that are eligible to take into account when assessing the compulsion element within the non-punishment principle are primarily the severity, duration and frequency of the human trafficking committed against a victim-offender. Another important factor that should play a role is the person of the victim; age can play a role as well as someone's mental state. It is conceivable that years of pressuring someone in a human trafficking context, for instance via (threats of) force and violence or having to be continuously available for work, can ultimately lead to a situation of nearly total serfdom. In these

[38] Means form an essential element of the human trafficking definition, at least when the victim was an adult. See inter alia Article 3(a) of the Trafficking Protocol and Article 2 of the Anti-Trafficking Directive.

situations, it seems at least reasonable to consider the application of the non-punishment principle.

The case of S. demonstrates the practical implementation of the non-punishment principle to a homicide crime like manslaughter. Even though S. committed serious crimes, the years of serfdom and the Court's determination that S. has been in in a 'completely dependent position' make it difficult to determine how she could have defied the anger of her human traffickers. The question remains as to whether the unexpected was expected of S.

## 3. The immigration law procedure

### S. not granted B9 status

The convictions of her traffickers, R. and P., by The Hague District Court on 14 December 2007[39] meant that S. was acknowledged as a victim of human trafficking. Pursuant to Article 3.48 of the Aliens Decree 2000, aliens who are victims of human trafficking are entitled to facilities under the B9 regulation.[40] Briefly, the regulation provides that aliens who are (possible) victims of or witnesses to human trafficking can remain legally in the Netherlands during the investigation and prosecution of the offence in first instance.[41] In addition to the temporary legal residence, the B9 regulation also gives victims the right to facilities such as shelter and accommodation, medical assistance, legal aid and special allowances to support themselves. Thus, even before the individual's status as a victim has been declared proven in a court of law, a person can derive rights from the B9 regulation on the basis of indications that

39 The Hague District Court 14 December 2007, ECLI:NL:RBSGR:2007:BC1761 (case against P.).

40 With the entry into force of the Modern Migration Policy Act on 1 June 2013, the rules for victims and witnesses who report human trafficking are laid down in chapter B8/3 of the Aliens Act Implementation Guidelines 2000. Decision of the Secretary of State for Security and Justice of 28 March 2013, no. WBV 2013/5, containing an amendment of the Aliens Act Implementation Guidelines 2000. Available at https://zoek.officielebekendmakingen.nl/stcrt-2013-8389.html (last accessed on 21 September 2016). Because this case occurred before this law entered into force, the remainder of this article is only concerned with the old regime.

41 Three cumulative conditions that are set out in section 2 of the B9 regulation do have to be met, however. The residence permit for a definite period can be granted if the alien is a victim of human trafficking; if the alien has reported the offence or has otherwise cooperated with a criminal investigation or a trial at first instance of the suspect of a criminal offence as referred to in Article 273f DCC; and if there is a criminal investigation into or trial at first instance of the suspect of the criminal offence reported by the alien or with which the alien has otherwise cooperated. For more information about the B9 regulation, see National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings. Seventh Report of the National Rapporteur* (The Hague: BNRM, 2009), Chapter 5 (B9 and continued residence (B16/7). See also National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings: Ten years of independent monitoring. Eighth Report of the National Rapporteur* (The Hague: BNRM, 2010), 51 et seq.

he is a victim. The policy rules further state that the police must advise a possible victim, if there is even the slightest evidence of human trafficking, of the possibility of reporting the offence or otherwise cooperating with an investigation by the police or the prosecutor into human trafficking. Possible victims are also entitled to a reflection period of up to three months, during which they can consider whether to report an offence and/or cooperate with an investigation.

The Mehak case was a complex criminal case involving a lengthy investigation. Suspects and witnesses in the case made partially false statements to the police and colluded with one another on their statements to law enforcement. The first statement made by S. was also untrue, for which she was convicted in first instance and on appeal (for perjury, under Article 207 DCC).[42] Her later statements, which were partially incriminating, eventually played a significant role in the subsequent convictions for human trafficking and the assaults on Mehak in this case. In its judgment, the District Court found: 'The suspect was [...] the only person who at a certain point started cooperating fully with the investigation and accepted responsibility for her actions.'[43] The Court of Appeal found that S. was 'the first person to provide any insight into the events that had occurred on 28 January [the date on which Mehak died] and the reasons for them, whereby she also incriminated herself.'[44]

Despite the *proven* fact that she was a trafficking victim and the essential cooperation that S. provided for the criminal investigation in the context of the prosecution of R. and P. for human trafficking, she was denied a temporary residence permit under the B9 regulation, notwithstanding repeated requests to be granted one.[45] Nor was any such offer made in March 2008, when she was released after serving the sentence imposed on her in first instance. On 17 March 2008, the day before her release, S. was declared an undesirable alien on the grounds of Article 67 (1) (c) of the Aliens Act 2000.[46] According to the Secretary of State for Security and Justice, S. formed a threat to public policy, since she had been convicted of serious offences. Pursuant to Article 67 (3) of the Aliens Act 2000, being declared an undesirable alien, by definition, precludes the possibility of legal residence. The result was that by virtue of Article 10 of the Aliens Act 2000, S. was not entitled to any allowances, facilities or benefits. During this period, she was also not granted a B9 residence permit and was also denied shelter by the Central Agency for the Shelter of Asylum Seekers (COA), since one of the criteria to qualify for shelter is that a person

42 See the remarks on this subject in footnote 11.
43 The Hague District Court 14 December 2007, 09/900379-06 and 09/655328-07 (unpublished).
44 The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410.
45 What the actual reasons were for not permitting S. a temporary residence permit could not be traced.
46 Decision of the Secretary of State for Security and Justice of 17 March 2008. BNRM is in possession of this letter.

must be living in the country legally.[47] Because she had been declared an undesirable alien, S. had to leave the Netherlands within 24 hours.

## Declaration as undesirable alien

The decision declaring S. an undesirable alien was suspended by the preliminary relief judge of the District Court in The Hague on 24 July 2008.[48] The judge found that the decision had completely failed to address the fact that S. was a victim of human trafficking. The judge found that, in reaching a decision to declare her an undesirable alien, the Secretary of State was required to explicitly consider the interests of S. as a victim of human trafficking and the interests of the Dutch state in combating human trafficking. In the decision on the objection to the declaration as an undesirable alien, in that context it was argued that S. had again been convicted on appeal, and in fact sentenced to an unconditional prison sentence of five years, and that the Court of Appeal had declared the non-punishment principle inapplicable.[49] In the minister's opinion, therefore, the fact that she was a victim of human trafficking did not compel a different decision on her status as an undesirable alien. Nor could this situation lead to the application of Article 4:84 of the General Administrative Law Act, by virtue of which the minister can depart from a policy rule if the application of that rule could have consequences for the interested party that, due to exceptional circumstances, would be disproportionate in relation to the objectives served by that rule. It is noteworthy that the considerations in the decision only referred to the Court of Appeal decision on the non-punishment principle. It was however the status as victim that, in the view of the preliminary relief judge, had to be considered in the decision to declare S. an undesirable alien. That requirement was not met with a reference only to the non-applicability of the non-punishment principle. It is also remarkable that no reference was made to the rights S. should have enjoyed under the B9 regulation as a victim of human trafficking. Furthermore, the decision on the objection failed to consider evidence that S. was traumatised by the circumstances under which she had to work for R. and P. and by the events of 28 January 2006 or the finding that there was little chance of recidivism on her part. In her judgment, the preliminary relief judge had explicitly found that those circumstances must be considered in the decision to declare her an undesirable alien.[50] In short, the context

47 Letter from the Central Agency for the Reception of Asylum Seekers of 24 September 2008.
48 The Hague District Court (preliminary relief judge) 24 July 2008, AWB 08/11247 BEPTDN (unpublished).
49 Decision of the Minister of Justice of 21 September 2010.
50 The Hague District Court (preliminary relief judge) 24 July 2008, AWB 08/11247 BEPTDN, consideration 6.

in which the events of this case took place, as described here, does not seem to have been considered adequately in the decision.

### Asylum procedure

On 21 March 2008, S. was released after serving the sentence imposed on her in first instance. On the same day, she made an application for a residence permit on the grounds of asylum pursuant to Article 28 of the Aliens Act 2000. The application was rejected, however, since, on 17 March 2008, S. had already been declared an undesirable alien.[51] By virtue of Article 67 (3) of the Aliens Act 2000, this makes lawful residence impossible, and consequently also the granting of an application for asylum (Article 10 of the Aliens Act 2000). The Minister of Justice felt that there were no circumstances that would make S.'s repatriation contrary to provisions of international law. In the earlier preliminary decision, 'no credibility whatever' was attached to the fact that S. feared reprisals from R. and P., who had fled to India.[52] In the minister's opinion, the statements she had made on this subject were scant and unclear,[53] even though it had become clear in the trial of R. and P. that there had been contact between them and her father before S. came to the Netherlands and that R. and P. belonged to a higher caste.[54] It is also noteworthy that, in another procedure under immigration law (the application for continued residence after a B9 procedure[55]), it is generally assumed that there are risks attached to repatriating victims of human trafficking if their cooperation with the criminal case has led to a conviction.[56]

In the preliminary decision to reject the asylum application, another argument used against S. was that she had not, immediately on her arrival in the Netherlands in 1999, reported as an immigrant to an official charged with

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51 The Secretary of State for Security and Justice's preliminary decision to reject the asylum application dated 25 September 2009. The final decision by the Minister of Justice rejecting the asylum application dates from 24 September 2010. The decision contains some of the grounds mentioned in the preliminary decision.

52 Preliminary decision to reject the asylum application of 25 September 2009, p. 6.

53 Decision to reject the asylum application of 24 September 2010, p. 3.

54 The Hague Court of Appeal 19 January 2010, *LJN* BK9406, under 4.2; The Hague District Court 14 December 2007, ECLI:NL:RBSGR:2010:BC1761.

55 This is the so-called B16/4.5 procedure based on Article 3.52 of the Aliens Decree 2000 in conjunction with Chapter B16/4.5 of the Alien Act Implementation Guidelines 2000. To qualify for this arrangement, the individual concerned must have been admitted to the B9 regulation.

56 Chapter B16/4.5 under a, Aliens Act Implementation Guidelines 2000. Following the entry into force of the Modern Migration Policy Act on 1 June 2013, the continued residence scheme is included in Chapter 9/9 of the Aliens Act Implementation Guidelines 2000.

border control or the supervision of aliens.[57] S. only reported as an immigrant on 21 March 2008. The human trafficking situation in which S. found herself was not considered in this finding, nor was the fact that she was probably only thirteen years of age when she entered the Netherlands.[58]

## 4. The labour law procedure

In 2010, to secure the salary she had not yet received, S. brought an action to recover back pay from R. and P. If an employment contract has an international component, the question arises as to which country's law is applicable to it. In the Netherlands, this issue is primarily governed by European law, specifically by the 1980 Convention on the law applicable to contractual obligations (the Rome Convention).[59] In the absence of a choice of law by the parties, Article 6 (2) of the Rome Convention provides that, in principle, the applicable law is the law of the country in which the employee habitually carries out the work (the 'place of habitual employment' criterion), unless it appears from the circumstances as a whole that the contract of employment is more closely connected with another country (the so-called 'exception clause'). Although S. performed her work exclusively in the Netherlands, the sub-District Court reached the conclusion that the employment contract 'was so embedded in the Indian culture and legal sphere, and consequently so much more closely connected with India than with the Netherlands, that Indian law is applicable to it'.[60] In other words, in this decision, the context of human trafficking in which the work was performed was taken into account, but the conclusion was to S.'s disadvantage, since the declaration that Indian law was applicable had serious consequences for the amount to which S. was entitled. The Court based its decision on the agreed sum of 3000 rupees (50 euro) a month. Because S. had worked excessively long hours, the number of hours she worked was fixed at twice the number that had been agreed. Consequently, in the court's opinion, S. was owed 144,000 rupees for the two years she had worked excessively long hours. That sum is the equivalent of approximately 2,020 euro.[61]

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57 Pursuant to Article 31 of the Aliens Act 2000.

58 See the remarks regarding S.'s age in footnote 3.

59 Convention on the law applicable to obligations arising from contracts (OJ L 266). The Rome Convention has since been succeeded by Regulation (EU) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ 2008, L 177/6), the so-called Rome I Regulation. The Rome Convention remains applicable to contracts that were concluded before 17 December 2009 (see, after rectification, Article 28 of the Rome I Regulation).

60 The Hague District Court 21 April 2010 (unpublished).

61 Converted using the website www.valuta.nl (last accessed on 21 September 2016).

That judgment was set aside on appeal. The Court of Appeal in The Hague found that Dutch law was applicable since S. habitually carried out the work in the Netherlands.[62] The court ruled that S. had worked 80 hours a week and was entitled to payment for those hours for the period from 1 February 2004 until 1 February 2006, including holiday pay and a statutory interest for the failure to pay within the legally prescribed deadline. The Court of Appeal has since rendered a final judgment in this case and awarded S., in accordance with these principles, a sum of approximately 30,000 euro.[63]

This judgment is to be welcomed from the perspective of the protection of the rights of employees and victims of labour exploitation. It also concurs with the rationale of Article 6 of the Rome Convention, which is aimed first and foremost at providing appropriate protection for employees.[64] In principle, the applicable law is the law of the country where the work is carried out, in order to prevent any discrepancy between terms of employment in the same territory.[65] This is the rationale that has prompted the European Court of Justice to interpret the principle of the country where the work is habitually performed broadly in its case law and not to allow it to be easily thwarted by the exception clause.[66] The decision rendered in first instance by the sub-District Court in this case is difficult to reconcile with that approach. The judgment of the Court of Appeal is also to be welcomed from the perspective of legal uniformity and the principle

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62 The Hague Court of Appeal 9 October 2012, ECLI:NL:GHSGR:2010:BX9769.

63 The Hague Court of Appeal 5 February 2013, ECLI:NL:GHSGR:2010:BZ5998. In fact, it is unlikely that S. will actually be able to collect the wages claimed since R. and P. have fled to India. With the insertion of a new Article 36f (6) on 1 January 2011, the Dutch Criminal Code now provides for the possibility of the state paying the amount to the victim (the so-called advance rule). This is, however, conditional on the claim being dealt with during the criminal proceedings and being awarded by means of an order to pay compensation, which did not happen in this case. Because human trafficking is regarded as a violent or sexual offence, the amount that can be awarded to victims is not subject to a maximum.

64 European Court of Justice 15 March 2011, C-29/10 (*Koelzsch/Luxemburg*), consideration 42: 'It follows that, in so far as the objective of Article 6 of the Rome Convention is to guarantee adequate protection of the employee, that provision must be understood as guaranteeing the applicability of the law of the State in which he carries out his working activities rather than that of the State in which the employer is established. It is in the former State that the employee performs his economic and social duties and, as was noted by the Advocate General in point 50 of her Opinion, it is there that the business and political environment affects employment activities. Therefore, compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed.' See V. van den Eeckhout, 'Navigeren door artikel 6 EVO-Verdrag c.q. artikel 8 Rome I-Verordening: mogelijkheden tot sturing van toepasselijk arbeidsrecht', *Arbeidsrechtelijke Annotaties* 9 (2010), 49-64.

65 Referred to by Bertrams and Kruisinga as the 'equal work, equal rules' principle. They also refer to the 'dominant role' of the *lex locus laboris*. R.I.V.F. Bertrams/S.A. Kruisinga, *Overeenkomsten in het internationaal privaatrecht en het Weens Koopverdrag* (Deventer: Kluwer, 2007), 161.

66 European Court of Justice 15 March 2011, C-29/10 (*Koelzsch/Luxemburg*), consideration 43. See E.K.W. van Kampen, 'De bijzondere collisieregels van art. 6 lid 2 EVO respectievelijk art. 8, leden 2 tot en met 4, Rome I', *Tijdschrift Arbeidsrechtpraktijk* 8 (November 2012), 366-373.

of equality. In criminal law, the Supreme Court ruled in 2009 that, in assessing whether a labour situation involves exploitation within the meaning of Article 273f of the DCC, the frame of reference must be the standards that apply in the Netherlands.[67] The cultural context of the labour situation does not alter that, thus preventing one situation being declared proven as exploitation and another not, depending on the cultural setting.[68] Exploitation has, as it were, been objectified and whether it exists must always be assessed according to Dutch standards. Although this case involved a different legal issue, the cultural context in which the labour was performed should also be put into perspective in this case. A different approach could too easily lead to different terms of employment applying in the Netherlands. It goes without saying that such a situation would impair the protection of employees under labour law, particularly for domestic staff who work under a construction similar to that in which S. was employed in this case. It is precisely the private setting that reinforced the Indian influence in this case, since the relationship with the Dutch labour market disappeared, making her vulnerable to exploitation. Such a situation does not work to the advantage of the employer in criminal law, and should also not do so in the domain of labour law. It is therefore good to see that the Court of Appeal did not uphold the decision of the sub-District Court.

## 5. Current situation

At the time a Dutch version of this article went to press,[69] S. was in detention serving the sentence imposed on her by the Court of Appeal.[70] She is ineligible for conditional release.[71] The director of the penitentiary where she is being held rejected an application for her release under the system of general leave for prisoners because she does not have valid identity papers. This decision was upheld following an objection and, on appeal, the Council for the Administration of Criminal Justice and the Protection of Juveniles endorsed the decision. The appeal in S.'s asylum case resumed in March 2013. In the same proceedings, an appeal was also made concerning the declaration of S.

67 Supreme Court 27 October 2009, ECLI:NL:HR:2009:BI7097;BI7099 (*Chinese restaurant case*).

68 For more information about the influence of cultural factors in cases of exploitation outside the sex industry: A. Bogaerts/H. De Jonge van Ellemeet/J. van der Leun, 'Slavernij-achtige uitbuiting in Nederland en de rol van cultuur', *Proces* 88(5) (2009), 263-278.

69 The middle of May 2013.

70 According to information from the Immigration and Naturalisation Service (IND), S. is expected to remain in detention until 16 August 2013. Letter from the Secretary of State for Security and Justice to the Immigration Chamber in Den Bosch of 5 March 2013.

71 Since 1 April 2012, aliens who are not lawfully resident in the Netherlands are no longer eligible for conditional release.

as an undesirable alien, with a request to suspend that decision.[72] At the beginning of March 2013, it was announced that the Secretary of State for Security and Justice was revoking the decision made on 21 September 2010 on the objection to the declaration that S. was an undesirable alien[73] with a view to making a new decision on the objection. At the same time, the Secretary of State announced his intention of imposing an entry ban on S. The entry ban is the 'successor' to the declaration as an undesirable alien following the implementation of EU Return Directive on 31 December 2011.[74] Because of S.'s involvement in a violent crime, the intention is to impose an entry ban for a period of ten years rather than the customary five years. The Secretary of State does not feel there are any humanitarian or other reasons for not issuing the entry ban or reducing its duration. According to the Secretary of State, even the arguments put forward in the context of the declaration as an undesirable alien provide no pretext for doing so.[75] Reservations about the decision on the objection to that declaration have already been discussed above.

## 6. Resumé

In 2007 and 2010, S. was convicted for her role in the assault on and eventual death of the infant girl Mehak on 28 January 2006. In the period when the acts she was charged with occurred, she was in a situation of exploitation. The Court of Appeal found that she was exploited by R. and P. from the time she arrived in the Netherlands in 1999 until the date on which Mehak died. Although she was acknowledged to be a victim of human trafficking, she was never offered the B9 regulation. Requests to be granted a B9 residence permit were repeatedly denied.

The judgment in first instance in the trial of S., and later on appeal, formed the basis for a series of decisions that were made in her case. It can be seen from the case file that the conviction laid the basis for her being declared an undesirable alien and that that declaration, in turn, formed the basis for the *a priori* rejection of her asylum application. Consequently, S. was never granted the rights she was entitled to as a victim of human trafficking. Furthermore, the decision of the Court of Appeal regarding the application of the non-punishment principle seems to have served as confirmation for the government

72 Information from S.'s lawyer, mr.. B.D.W. Martens in The Hague.
73 Letter from the Secretary of State for Security and Justice of 5 March 2013.
74 For a general discussion of the concurrence of the declaration as an undesirable alien and the entry ban, see The Hague District Court, sitting in Amsterdam, 1 March 2012, ECLI:NL:RBSGR:2012:BV8687.
75 Letter from the Secretary of State for Security and Justice of 8 March 2013.

members responsible in this case that the declaration of S. as an undesirable alien was well-founded and that the asylum application had been correctly rejected. Furthermore, in various decisions little or no consideration was given to the fact that S. was a victim of human trafficking. For example, in the decision on the objection to the declaration of S. as an undesirable alien, the Minister of Justice merely mentioned that the non-punishment principle had not been applied with regard to S. However, that does not detract from the fact that she was a victim and disregards her status as a victim and any rights endowed from that status.

At the end of February 2013, the Secretary of State for Security and Justice stressed that the care of victims is a priority of the current Dutch government and remarked that he regarded care and attention for victims as a 'core value of our rule of law'.[76] The new EU Directive on Human Trafficking[77] is also clear about the protection due to victims of human trafficking: an integrated, holistic and human rights-based approach[78] that ensures that victims are protected to the greatest extent possible.[79] One of the pillars of that protection is preventing *secondary victimisation*, which, to quote Van Dijk et al., is the situation where victims 'through the actions of persons or institutions in the judicial chain have the feeling that they are being victimised for a second time'.[80] In view of the above, the question is whether that protection was provided in S.'s case.

76 Letter from the Secretary of State for Security and Justice of 22 February 2013 (*Visie op slachtoffers*), p. 8. Available at www.rijksoverheid.nl/nieuws/2013/02/22/teeven-ontvouwt-visie-op-slachtofferbeleid.html (last accessed on 21 September 2016).

77 Parliament approved the implementation of this Directive on 2 April 2013.

78 Cf. consideration 7 of the Anti-Trafficking Directive.

79 This also ensues from the case law of the European Court of Human Rights. Pursuant to the *Rantsev* judgment, the Member States of the Council of Europe have a duty to adopt national legislation that is adequate to provide practical and effective protection of the rights of (possible) victims. European Court of Human Rights 7 January 2010, No. 25965/04 (*Rantsev/Cyprus and Russia*). See also National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings* 2010 (n. 39), 38 and M. Boot-Matthijssen, 'Artikel 4 en de aanpak van mensenhandel', *NJCM-Bulletin* 35 (5) (2010), 501-519.

80 J.J.M van Dijk/M.S. Groenhuijsen/F.W. Winkel, 'Victimologie; voorgeschiedenis en stand van zaken', *Justitiële verkenningen* 3 (2007), 9-29.

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# Criminal Liability of Legal Persons for Human Trafficking Offences in International and European Law

Silvia Rodríguez-López*

## Abstract

*The most recent international and European laws against human trafficking require states to impose sanctions against legal entities involved in this crime. They aim to respond to the increasing risks of companies resorting to and benefiting from trafficked manpower. However, in spite of these legal improvements, prosecuting a legal person under trafficking laws still is very difficult. This paper will analyse the different ways in which companies can be, directly or indirectly, involved in human trafficking. Subsequently, it will address the international and European legal response to these patterns of involvement. Finally, the main obstacles that hinder the prosecution and punishment of legal persons liable for trafficking offences will be explained, and several avenues for improvement will be pointed out. Overall, this paper aims to highlight that these difficulties need to be overcome in order to truly guarantee adequate accountability of legal persons that commit human trafficking.*

## 1. Introduction

In recent years, the role of corporations as potential perpetrators of human trafficking has become a matter of growing importance. Cases of powerful multinational corporations being accused of engaging in exploitative practices abroad are often reported in the media, exposing the gravity of the problem and drawing the public's attention to this issue. Indeed, companies' involvement in human trafficking for diverse types of exploitation can be very significant, not only in laundering the profits of the illegal activity, but also in recruiting potential victims and exploiting them. The links between human trafficking and corporations are considered so important that it has been suggested that 'the trafficking industry is consistently growing due to its prevalence in the corporate world'.[1]

Aware of this situation, the most recent international legal instruments against human trafficking, such as the United Nations Convention against

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Silvia Rodríguez-López is a PhD Candidate, Department of Criminal Law, University of A Coruna, Spain.

1 T.M. Parente, 'Human Trafficking: identifying forced labour in multinational corporations and the implications of liability', *Brazilian Journal of International Law* 11(1) (2014), 148.

Transnational Organized Crime (UNTOC),[2] the Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention),[3] and Directive 2011/36/UE on preventing and combating trafficking in human beings and protecting its victims (EU Trafficking Directive),[4] require states to impose sanctions against legal entities involved in this crime. However, the prosecution of human trafficking cases against corporations is still very rare.[5] The European Commission reported in a study published in 2015 that, despite the fact that most Member States have relevant legislation in place, only one conviction was mentioned in the 23 GRETA (Group of Experts on Action against Trafficking in Human Beings) reports.[6] Reaching a corporation under a trafficking statute is nowadays very difficult or even impossible.[7]

Several factors can explain this lack of accountability. From a political point of view, the lack of criminal prosecution of the powerful has been justified because of the necessity of capitalising accumulation, enhancing the interests of the capitalist state, and elevating the national well-being of all citizens.[8] In this sense, the personal and professional relationships, as well as the financial and other aligned interests between corporate representatives and government authorities should not be overlooked as a factor influencing political will in relation to the prosecution of corporations.[9] From a legal perspective, the principle that corporations cannot commit crimes (*societas delinquere non potest*) was universally accepted until very recently. Nowadays, some countries still do not recognise the concept of corporate criminal liability as consistent with their domestic legal principles, and even when states do recognise it, such liability is limited to certain attribution models, types of legal persons or criminal offences.[10]

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2 New York, 15 November 2000, 2225 UNTS 209.

3 Warsaw, 16 May 2005. CETS No.197.

4 [2011] OJ L 101/1.

5 See more in TRACE Project (Trafficking as a Criminal Enterprise), Deliverable 6.5_ Final Report (April 2016), 18; A. Feasley, 'Eliminating Corporate Exploitation: Examining Accountability Regimes as Means to Eradicate Forced Labor from Supply Chains', *Journal of Human Trafficking* 2(1) (2016), 16.

6 European Commission, *Study on Case-Law on Trafficking for the Purpose of Labour Exploitation* (Luxembourg, 2015), 83.

7 S.C. Pierce, 'Turning a Blind Eye: Corporate Involvement in Modern Day Slavery', *The Journal of Gender, Race & Justice* 14 (2011), 578.

8 G. Barak (ed.), *The Routledge International Handbook of the Crimes of the Powerful* (London and New York: Routledge, 2015), 1.

9 ICAR, *The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases* (October 2016), 1.

10 A. Saraiva-Leao, 'Corporate Criminal Liability for Human Trafficking in the UE: a Legal Obligation for Member States?', Master's Thesis, Uppsala Universitet, Autumn Term 2015, 63.

This paper will explore the multiple ways in which companies can engage in human trafficking nowadays, and the legal response offered to this problem by international and European law. It is important to clarify from the beginning that, despite focussing on human trafficking, this paper will inevitably make reference to exploitation, as the purpose and, therefore, an integral element of trafficking.[11] Thus, the first section will address the role of legal persons as potential perpetrators of human trafficking, analysing the three elements of this crime: act, means and purpose. Secondly, this paper will address the international and European legal response to these patterns of involvement, primarily from the perspective of criminal law. Finally, the third section will study the factors that hinder the punishment of legal persons involved in human trafficking, and suggest possible improvements to guarantee adequate accountability.

## 2. Corporations' Involvement in Human Trafficking

According to the internationally recognised definition offered by the Palermo Protocol, which has served as the basis for European anti-trafficking instruments,[12] human trafficking is a process that requires three elements: act, means and purpose. The 'act' element includes the recruitment, transportation, transfer, harbouring or receipt of persons.[13] The 'means' element refers to the use of threats, force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or giving or receiving payments or benefits to achieve the consent of a person having control over another person. The purpose is the exploitation of the person, including, at least, sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[14] As this definition shows, human trafficking is a complex crime that can occur in several different forms. Likewise, corporations' involvement in human trafficking can be very diverse, since they

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11 As Gallagher points out 'the concept of trafficking in international law does not just refer to the *process* by which an individual is moved into a situation of exploitation: It extends to include the maintenance of that person in a situation of exploitation. Accordingly, it is not just the recruiter, broker, or transporter who can be identified as a trafficker, but also the individual or entity involved in initiating or sustaining the exploitation'. A. Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010), 47.

12 It is necessary to keep in mind that European anti-trafficking instruments have expanded the definition of trafficking provided by the Palermo Protocol. This has been reflected in European national legislation too. The new actions and forms of exploitation included in European law will be indicated as each element is analysed.

13 Directive 2011/36/EU adds the exchange or transfer of control over persons to the actions of human trafficking.

14 Directive 2011/36/EU includes, on top of the types of exploitation foreseen in the Palermo Protocol, the exploitation of criminal activities and begging.

can commit any of these actions, using any of these means and for any kind of exploitation.

The multiple ways in which corporations can commit the acts of trafficking can be classified in three different categories. The first one involves the most obvious cases, which occur when companies directly and willingly recruit victims, transport them, provide them with the required documentation required to be moved to the place where they will be exploited, and obtain benefits from that exploitation.[15] Examples of these conducts are the frequent, and perhaps most stereotypical, cases of women recruited, transported and sexually exploited by a brothel. The UNODC Case Law Database includes several cases following this pattern; although in none of them did the legal person face any accountability, only natural persons were charged with human trafficking. For instance, in 2012 a Danish court considered two men, who ran a brothel, guilty of human trafficking for recruiting women in Thailand, picking them up at the airport, depriving them of their passports and transporting them to the brothel where they would be forced to work as prostitutes, while being subject to threats of violence against them or their families or being reported to the police for illegal residence.[16] A similar case occurred in Spain, where the owner and manager of a night club deceived and transported two Belorussian women to a brothel where they were told they would have to work as prostitutes to pay their 'debt'.[17] In the most egregious cases, companies are created specifically as an instrument to commit this crime and launder the obtained benefits.[18] A good example can be found in Argentina, where labour inspectors reported in 2013 that a cooperative had been used 'to give an appearance of legitimacy to the criminal business which consisted in the exploitation of workers [56 victims] for the production and sale of clothing'.[19]

The second category includes cases of companies that hire trafficked workers supplied by third parties, both domestically and abroad. This may occur when companies resort to subcontracting, recruitment agencies and temporary employment agencies to hire workers, and these agencies use fraudulent recruitment practices such as lying about working conditions, the location or nature of the job, which may eventually constitute human trafficking. The UNODC reports that recruitment agencies might 'engage in coercive recruitment prac-

15 M. Hoff/K. McGauran, *Engaging the Private Sector to End Human Trafficking. A Resource Guide for NGOs* (Amsterdam: La Strata International, 2015), 55.
16 UNODC Case Law Database, Hjoerring City Court Judgement 22 August 2012, DNK014.
17 UNODC Case Law Database, Cesar et al., ESP003.
18 EUROPOL, *The THB Financial Business Model. Assessing the Current State of Knowledge* (The Hague, 2015), 7-8.
19 UNODC Case Law Database, Case No. 3692/13, ARG064.

tices, including debt bondage, isolation, surveillance, withholding of money, violence, and threats of violence and of denunciation to authorities'.[20] Several cases were reported in the UNODC Case Law Database of employment agencies used to lure young women abroad, convincing them to sign contracts to work as dancers or waitresses to finally end up being exploited as prostitutes in a brothel.[21] There are also examples of recruiters involved in human trafficking for the purposes of exploitation in agriculture.[22] In these cases, neither the employment agencies nor the brothels faced any kind of liability. These practices are especially common in sectors where 'there is a seasonal demand for workers, when workers and employers do not speak the same language, or where aspiring workers need to travel long distances (including across borders) to reach the job site'.[23] The Odebrecht case in Brazil exemplifies this tendency. The said multinational construction company was charged with engaging in trafficking of Brazilian nationals in Angola through abuses committed by its subcontractors.[24]

The third category covers companies' involvement in human trafficking when their products, services or facilities are used in the trafficking process. This can occur in the hospitality, tourism and transport sectors.[25] For example, it may affect airlines or shipping companies used to move the victims, and hotels used to host them.[26] Corporations can also be involved when trafficking victims are exploited at their properties such as bars, nightclubs, brothels, factories and construction sites, among others.[27] With the increasing importance of new technologies, internet advertisers or dating sites, for instance, might facilitate sex trafficking even if they do not have a direct relationship with the traffickers.[28] *US v. Marvin Chavelle Epps* illustrates how companies might indirectly facilitate trafficking. In this case, a man recruited a 16 year-old girl through a website to exploit her as a prostitute. He used another website to advertise the victim for sexual exploitation in a hotel, and he took the victim to a tattoo parlour to have

20 UNODC, *The Role of Recruitment Fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons* (Vienna, 2015) 6.
21 In this sense, for example: UNODC Case Law Database, *Ministerio Publico v. Jose Luis Castro Sosa,* CHL001; and *Chile v. Nelly Viviana Condori Nicolas*, CHL002.
22 UNODC Case Law Database R.G. 40262009, ITAx023.
23 UNODC, *The Role of Recruitment* 2015 (n. 20), 6.
24 Processo No. 10230-31.2014.5.15.0079. 2ª Vara do Trabalho de Araraquara.
25 P. Hunter/Q. Kepes, *Human Trafficking & Global Supply Chains: A Background Paper* (2012), 13.
26 Hoff/McGauran, *Engaging the Private Sector* 2015 (n. 15), 57.
27 EUROPOL, *Trafficking in Human Beings in the European Union* (The Hague, 2011), 6.
28 A.W. Shavers, 'Human Trafficking, the Rule of Law and Corporate Social Responsibility', *South California Journal of International Law & Business* 9 (2013), 64.

his street name tattooed on her arm. Neither the hotel, the websites nor the tattoo parlour reported the case, despite the victim's youthful appearance.[29]

Concerning the 'means' element, companies can also use different techniques to carry out trafficking. Some companies use violence or coercion to force workers to stay in a job, for example by threatening them with physical harm or even death if they try to escape.[30] However, the abuse of a position of vulnerability of the victim is more common in a global post-crisis context.[31] That is to say, companies might take advantage of economic, social, cultural, environmental and/or political conditions that increase the susceptibility of an individual or group to being trafficked.[32]

Finally, when it comes to address the 'purpose' element of trafficking it is necessary to clarify what is understood by 'exploitation' for the purposes of this paper. Neither the Palermo Protocol nor the EU Trafficking Convention or Directive define 'exploitation', instead they provide an open-ended list of exploitative practices. It is assumed that the definitions of some of these practices, such as forced labour or slavery, contained in other international instruments are applicable.[33] However, other practices, such as the exploitation of the prostitution or others, have not been internationally defined.[34] Thus, in the absence of definitions, the UNODC provides some general criteria to identify exploitation as imposing 'particularly harsh or abusive conditions of work' on someone, which are 'inconsistent with human dignity', taking '*unfair* advantage' of their situation or vulnerability.[35] Taking these guidelines into account, corporations' involvement in human trafficking can potentially include any type of exploitation, from sexual exploitation to removal of organs. However, there are certain economic sectors that are particularly prone to this crime. Due to the specific nature of the tasks performed, agriculture demands temporary labour, long working

29 UNODC Case Law Database, *United States v. Marvin Chavelle Epps*, USA046.

30 Organization for Security and Cooperation in Europe (OSCE), *Ending Exploitation. Ensuring Business do not Contribute to Trafficking in Human Beings: Duties of States and the Private Sector*, Occasional Paper Series no. 7 (Vienna, 2014), 16.

31 Global Migration Group (GMG), *Fact-Sheet on the Impact of the Economic Crisis on Trafficking in Persons and Smuggling of Migrants* (2009), 1.

32 See more about the abuse of a position of vulnerability in UNODC, *Abuse of a position of vulnerability and other 'means' within the definition of trafficking in persons* (New York, 2013).

33 UNODC, *The Concept of 'Exploitation' in the Trafficking in Persons Protocol* (Vienna, 2015), 24. Thus, for instance, the International Labour Organization (ILO) Convention concerning Forced or Compulsory Labour, adopted in Geneva at the 14th ILC session on 28th June 1930, is generally taken into account to consider 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily' as one of this forms of exploitation (Article 2).

34 *Ibid.*, 23.

35 *Ibid.*, 21-26. Also UNODC, Model Law against Trafficking in Persons, UN Sales No. E.09.V.11 (2009).

hours and hard conditions. Furthermore, because of the tremendous competition over costs in the sector, employers tend to increasingly hire migrant workers, some of whom have an irregular status.[36] All these factors can make companies in the agricultural sector vulnerable to being involved in human trafficking. Similarly, companies are at risk of resorting to trafficked workers in the construction sector. Building cannot be outsourced and often involves arduous and dangerous work. On some occasions, workers (either domestic or migrants) are tied to one employer without the right to leave or are subject to unlawful deductions from their wages.[37] Other industries featured regularly in reports on human trafficking include mining, logging, textiles, hospitality, transportation and domestic service.[38]

## 3. International and European Legal Response to Companies' Involvement in Human Trafficking

The idea that corporations should face liability for crimes related to human trafficking is not new. It goes back to the Nuremberg Trials, where the court explored the possibility of punishing German companies that used slave labour made available by the Nazis during the Second World War.[39] This dilemma has continued through the years while states have kept trying to find an adequate response to the diverse offences described in the previous section. Nowadays, there is increasing acceptance of the idea that corporations should be held somehow liable for human trafficking offences. This is the position held in international and European anti-trafficking instruments.

### 3.1 International Law

The first reference to corporate liability for human trafficking in an international legal treaty can be found in the United Nations Convention against Transnational Organized Crime (UNTOC), the provisions of which also apply to its supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).[40] Generally, corporate liability has been considered especially important in instruments

36 Hunter/Kepes, *Human Trafficking* 2012 (n. 25), 16-17.
37 *Ibid.*, 18.
38 European Commission, *Study on Case-Law* 2015 (n. 6), 24-25; Parente, 'Human Trafficking' 2014 (n. 1) 151-152; Hunter/Kepes, *Human Trafficking* 2012 (n. 25), 19.
39 A. Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations', *Berkeley Journal of International Law* 91(20) (2002), 122.
40 According to Article 1 of said Protocol, it supplements the UNTOC and both instruments should be interpreted together.

against organised crime, which has affected not only human trafficking but also other manifestations of this form of criminality such as environmental crimes, corruption and even terrorism.[41] Thus, Article 10 of the UNTOC obliges each State Party to adopt the necessary measures to establish the liability of legal persons in three cases: for participation in serious crimes involving an organised criminal group; for offences established by States Parties as they implement Articles 5 (participation in an organised criminal group), 6 (money laundering), 8 (corruption) and 23 (obstruction of justice); and for any Protocol to which the state is or intends to become a party (Article 1, para. 3, of each Protocol). Therefore, human trafficking, as defined in Article 5 of the Palermo Protocol, is one of the offences for which legal persons may face liability.

According to the UNTOC, states' obligation to provide for the liability of legal entities is mandatory only to the extent that this is consistent with its legal principles. The UNTOC recogises that different legal systems adopt diverse approaches to the liability of legal persons. In some states corporate criminal liability may only apply to certain offences and in others it simply does not exist. Thus, there is no obligation to establish criminal liability, although such liability can also be civil or administrative.[42] In any case, the discretion given to states is not absolute. On the one hand, they must guarantee that such liability shall be without prejudice to the criminal liability of the natural person who has committed the offence. On the other hand, whatever type of liability is chosen, it must ensure that legal persons are subject to effective, proportionate and dissuasive sanctions, whether they are criminal or not. In line with this, it has been pointed out that criminal liability is believed to have a more deterrent effect. This is partly due to the stigmatisation that follows criminal sanctions, which can be very costly, and partly because it can encourage companies to adopt more effective management and supervisory structures.[43]

Given the high possibilities of private employment agencies engaging in human trafficking, as explained in the previous section, another international legal instrument is worth mentioning here. The ILO Convention concerning Private Employment Agencies (No. 181)[44] compels Member States to adopt measures in order to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory.[45] In addition, it forbids

41 M. Mattar, 'Corporate Criminal Liability: Article 10 of the Convention against Transnational Organized Crime', *Journal of International Affairs* 66(1) (2012), 108-109.
42 UN, Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime (New York, 2004).
43 *Ibid*., para. 240; Pierce, 'Turning a Blind Eye' 2011 (n. 7), 597-598.
44 Adoption: Geneva, 85th ILC session (19 June 1997).
45 Article 8.

private companies from charging direct or indirect recruitment fees,[46] which are alleged to increase vulnerability to trafficking and exploitation.[47] Overall, this treaty offers guidance for states to design a legal framework that includes penalties (administrative or criminal) for abusive practices, and ultimately avoid risks of trafficking.[48]

Although both international instruments could be seen as a positive advance at the time of adoption, when human trafficking was not even criminalised as such in many national legislations, they are not enough to tackle the challenges posed by this form of criminality nowadays. First, because their scope of application is more limited than the reality of cases. The ILO Convention No. 181, besides not having been widely ratified, applies only to registered recruitment agencies.[49] The Palermo Protocol, for its part, is limited to transnational offences in which an organised criminal group is involved,[50] so it could not apply to domestic trafficking. Moreover, the obligation to find corporations liable for human trafficking is too general and leaves many questions open. The following European legal instruments have tried to lighten the legal response to this phenomenon.

### 3.2 European Law

Both the Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention) and Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (EU Trafficking Directive) require Member States to establish liability of legal persons for human trafficking.[51] Again, the form of liability imposed on corporations can be criminal, civil or administrative, but it must ensure that sanctions are effective, proportionate and dissuasive.[52] Both European legal instruments clarify that the offence has to be committed by a natural person, acting either individually or as part of an organ of the legal person, for the benefit of the company. A natural person can be someone with a leading position within the legal person, or another person, without a managerial position, acting under the authority of the former. In the first case, the person must have power of representation or authorisation to take decisions

46 Article 7.
47 UNODC, *The Role of Recruitment* 2015 (n. 20), 7.
48 ILO, *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislation and Law Enforcement* (Geneva, 2005), 33.
49 As defined in Article 1.
50 Article 4.
51 Articles 22 and 5, respectively.
52 Articles 23.2 and 6, respectively.

or exercise control within the legal person.[53] In the second situation, the crime must have been made possible by a lack of supervision or control by the person in a leading position.[54]

Thus, the system adopted by the EU instruments against human trafficking includes elements of both the vicarious liability[55] and the identification models.[56] It follows the identification model because the company is criminally liable for the acts committed by managers, directors and other employees with certain responsibilities. Nevertheless, the vicarious liability model, or *respondeat superior,* is also present since the legal entity is liable for the criminal acts committed by any of its employees or agents, as long as they have acted within the scope of their employment, and for the benefit of the company. In any case, the vicarious liability model is moderated by the idea of supervision. In order to find a corporation liable for human trafficking, the offence must have been committed due to a lack of supervision or control by the person in a managerial position. This connects with the third model of attribution, the organisation model, which bases criminal liability on the deficits in the organisational structure of the legal person or its business ethics.

Furthermore, both instruments require States Parties to consider criminalising 'the use of services which are the object of exploitation [...] with the knowledge that the person is a victim of trafficking in human beings'.[57] Thus, companies could be prosecuted for their involvement in human trafficking when it cannot be demonstrated that they have directly committed the crime.

The EU Trafficking Directive offers one clear advantage over previous legal instruments. It defines what a legal person is for the purposes of applying liability for human trafficking offences. The definition offered is consistent with other EU instruments approximating rules in relation to criminal corporate liability. They simply indicate that a legal person is any entity having such status

53 Articles 22.1 and 5.1, respectively.

54 Articles 22.2 and 5.2, respectively.

55 According to the vicarious liability model or *respondeat superior*, the corporation is liable for the criminal acts committed by any of its employees or agents, as long as they have acted within the scope of their employment, and for the benefit of the company. For more about attribution models in the EU, see G. Vermeulen et al., *Liability of Legal Persons for Offences in the EU, European Commission*, IRCP-series vol. 44 (Apeldoorn: Maklu Publishers, 2012), 58. Thus, for example, if an agent recruits workers to be subject to labour exploitation within the company, abusing their position of vulnerability, the legal person would also be punished for human trafficking.

56 According to the identification model, the acts committed by managers, directors and other employees with certain responsibilities are actually considered acts of the corporation. See, for instance, Vermeulen et al., *Liability of Legal Persons* 2012 (n. 55), 11. This means that if the directors of a company commit or tolerate human trafficking, the corporation would also be held liable.

57 Articles 19 and 18, respectively.

under the applicable national law, except for states or other public bodies in the exercise of state authority and for public international organisations. Hence, Member States' definitions of a legal person in their domestic legal systems will determine when and how corporations can be held criminally liable for trafficking. It has been suggested that a wider definition of 'legal persons' with regards to liability for trafficking offences should be reconsidered to include public legal persons.[58] This would be consistent with many Member States' domestic legal systems, which do consider public entities to be legal persons subject to criminal responsibility, and, more importantly,[59] with the EU trafficking instruments that recognise public sector complicity in trafficking as an aggravated circumstance.

European law has further developed the general obligation contained in international law, and has established minimum standards concerning liability of legal persons that Member States must comply with. An analysis of the implementation of these legal texts in national legislations is beyond the scope of this paper. However, GRETA reports are useful instruments to depict levels of compliance.[60] In summary, GRETA urges Albania and Ukraine to modify their legislation, welcomes the efforts made by Belgian authorities, and overall stresses the need for involving businesses in anti-trafficking action.[61] This is also the general suggestion made by the European Commission in the EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, which proposes the establishment of a private sector platform, the so-called European Business Coalition against human trafficking, which would develop guidelines in cooperation with businesses and other stakeholders, to reduce demand and prevent human trafficking in high-risk areas.[62]

## 4. Main Obstacles Applying Criminal Liability to Legal Persons Involved in Human Trafficking

As stated before, the prosecution of legal persons is a relatively recent issue that brings about a wide range of difficulties that are being exten-

58 A. Saraiva-Leao, 'Corporate Criminal Liability' 2015 (n. 10), 32-33.
59 Vermeulen et al., *Liability of Legal Persons* 2012 (n. 55), 40-46.
60 GRETA, *5th General Report on Greta's Activities* (Strasbourg, 2016); GRETA, *Compilation of relevant extracts from GRETA Reports concerning the implementation of the Convention on Action against Trafficking in Human Beings*, Working document, 23 June 2014.
61 *Ibid.*, 18, 55-57.
62 European Commission, EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, COM (2012) 286 final (Brussels, 2012), 8.

sively tackled by law makers and academic literature. This section will focus on those specific obstacles that are more likely to arise in human trafficking cases.

### 4.1 Problems Derived from Subcontracting and Complex Corporate Structures

The main challenge of applying criminal liability to legal persons in the context of human trafficking is represented by the complicated structure adopted by corporations nowadays. Many corporations have tried to increase their profits by producing more and cheaper products, and to do so, they have resorted to outsourcing, offshoring and subcontracting practices, both nationally and abroad.[63] Corporations normally operate through several separate units: a parent company that has control over the management and operations of another/other companies; and secondary companies, subsidiaries or subcontractors of the former entity. Usually, the subsidiaries do not act for themselves but as directed by the parent company.[64] In such contexts, it is difficult to demonstrate the connection between the parent corporation and the agent who committed the crime, who might have been directly hired by one of the subsidiary companies.[65] In fact, most EU Member States recognise parent-subsidiary structures in their national laws, but not all of them have the legal possibility to hold the parent companies criminally liable for the activities of the subsidiary.[66]

One possible solution to overcome this difficulty is applying new liability theories to allow courts to examine the dependency factors and establish the connections between the employee and the parent company.[67] The so-called 'economic realities test', originally used in labour law, has been suggested as a new theory in order to determine if the corporation could be liable as a joint employer, together with the contractor. This test evaluates factors of actual dependency based on true economic reality factors, instead of limited indicia of control and authority of the employer over the employee.[68]

Several courts all over the world have had to deal with this problem and have used different reasonings to find both the corporation and the subcontractor

63 J. Konov, 'Piercing the Veil's Effect on Corporate Human Rights Violations & International Corporate Crime', *Munich Personal REPEC*, archive no. 35714 (Goettingen, 2012), 8-13; N.G. Bang, 'Unmasking the Charade of the Global Supply Contract: A novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases', *Houston Journal of International Law* 35(2) (2013), 286; Hoff/McGauran, *Engaging the Private Sector* 2015 (n. 15), 18.

64 Bang, 'Unmasking the Charade' 2013 (n. 63), 275.

65 Pierce, 'Turning a Blind Eye' 2011 (n. 7), 590.

66 Vermeulen et al., *Liability of Legal Persons* 2012 (n. 55), 44-46.

67 Bang, 'Unmasking the Charade' 2013 (n. 63), 275.

68 *Ibid.*, 256-322.

liable. The paradigmatic case with regard to the joint liability of legal persons for trafficking offences is the so-called *Carestel* case.[69] Carestel Motorway Services, a company based in Belgium, subcontracted Kronos sanitärservice, a German company, to hire employees to clean toilets in a motorway rest area. These workers, irregular migrants who came from Eastern Europe and could not speak Dutch, English, French or German, worked fifteen hours per day, seven days a week for several weeks in a row, without breaks, receiving a very low salary. An employee from Kronos would drive them to a rest area in the morning and pick them up in the evening to take them back to the house where they lived, which belonged to the company. The Court found that these facts constituted human trafficking according to Belgian law, and convicted four agents of Kronos, as well as both legal entities: Kronos and Carestel. In this case, Carestel was sanctioned even though the natural persons who committed the crime were not its direct employees. The Court considered that a commissioning company, which has outsourced tasks to third parties, and at a certain point becomes aware of the unacceptable working conditions that are imposed on the workers of this third party, yet does not decide to end the contract, is an accomplice to this exploitation.[70]

### 4.2. Extraterritorial Application of Corporate Criminal Liability

In such a context of global and complex structures of subsidiaries and subcontractors, companies usually operate beyond the limits of national jurisdictions. Human trafficking might be committed in the developing countries where the subsidiaries or the recruiters work, thousands of kilometres away from the parent company.[71] Furthermore, there may be multiple victims, as well as suspects, across various regions and countries, which might hinder prosecution. This legal challenge, described as a 'governance gap' by the International Corporate Accountability Roundtable (ICAR), creates an environment in which corporations are able to commit human trafficking with little accountability for doing so.[72]

The EU Trafficking Directive establishes that, in order to ensure effective prosecution of international groups whose centre of activity is a Member State and which carry out human trafficking in third countries, jurisdiction should be established when the offender is a national of a Member State, and the offence is committed outside the territory of that Member State. Jurisdiction *could* also

69 Decision of the First Instance Court of Gent, 19th Chamber, on 5 November 2012. Case No. 2012/3925.
70 *Ibid*.
71 UNODC, *The Role of Recruitment* 2015 (n. 20), 15.
72 ICAR, *The Corporate Crimes Principles* 2016 (n. 9), 9.

be established when the offender is a habitual resident of a Member State, and when the victim is a national or a habitual resident of a Member State.[73] Moreover, aware of the links between trafficking and corporations, the Directive gives states the opportunity to extend jurisdiction over offences committed outside its territory if the offence is committed for the benefit of a legal person established in its territory.[74]

It is worth mentioning at this stage, from a comparative perspective, the US Trafficking Victims Protection Act (TVPRA), which constitutes one of the most influential anti-trafficking legal instruments. Although the TVPRA did not provide for extraterritorial application when it was first passed in 2000, it has been subsequently amended in 2005 to expand jurisdiction for offences committed by US government personnel and contractors in a foreign country, and in 2008 to US citizens who travel abroad to commit, attempt to commit or conspire to commit human trafficking crimes. Since 2008 the TVPRA applies to corporations that financially benefit from trafficking, even if the violation occurred abroad or was perpetrated by a subcontractor.[75]

Allowing states to punish corporations that benefit from human trafficking offences committed abroad is undoubtedly a positive measure to prevent and fight against this crime. However, several aspects related to the extraterritorial jurisdiction of legal persons still remain. For instance, the Directive does not clarify whether non-EU companies that benefit from trafficking abroad can be prosecuted in Europe if the natural person (the company's agent) who perpetrated the crime to benefit the company is a national of a Member State. Similarly, it does not explain whether jurisdiction can be asserted over non-EU companies, managed by non-EU nationals, which traffic European victims. Above all, the main shortcoming is the lack of a binding provision that obliges states to prosecute legal persons involved in human trafficking.

Even when there are grounds for exerting jurisdiction over offences committed abroad, law enforcement authorities may be reluctant to do so, since they would have to overcome certain additional procedural hurdles before prosecution.[76] The ICAR points out that, when it is legally or practically impossible to assert jurisdiction, law enforcement authorities should refer the case to appropriate authorities in another relevant jurisdiction as soon as possible, and cooperate and offer support to the investigation.[77]

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73 Para. 16.
74 Article 10.2b.
75 18 U.S.C. §§ 1589, 1595-96 (2012).
76 ICAR, *The Corporate Crimes Principles* 2016 (n. 9), 9-10.
77 *Ibid.*, 11.

### 4.3 Evidentiary Issues

One of the reasons why law enforcement authorities might be reluctant to prosecute corporations for human trafficking cases are the difficulties in investigating and gathering evidence. Apart from the general difficulties in prosecuting human trafficking and corporate crime separately, there are some specific evidentiary challenges that arise in these cases. When the legal person's role in human trafficking is limited to the recruitment stage (for example, labour agencies), or when the actual exploitation does not occur, it is very difficult to prove that the corporation's agent knew about the intended exploitation.[78] Consequently, it is difficult to demonstrate that human trafficking existed.

The lack of inter-institutional and cross-border cooperation and coordination, the inadequate training of practitioners, the lack of resources, the difficulty in locating and identifying victims, and corruption are some of the factors that impede an adequate evidence-gathering process that allows for corporations to be held accountable for trafficking.[79] In order to solve these problems, practitioners should try to use evidence other than victims' testimonies, such as the testimonies of other persons, documentary evidence, and evidence gathered by special investigative techniques.[80]

Moreover, when multinational corporations are involved it might be necessary to analyse complex corporative documents and large amounts of data, which are difficult to navigate. ICAR points out that it is necessary to counteract the imbalance between corporate actors, who are unwilling to cooperate and difficult to penetrate evidentially, and who have better financial, legal and technical resources, and law enforcement agencies seeking to hold them accountable.[81]

### 4.4 Sanctions

As explained above, the UNTOC and the European Trafficking Convention simply establish that the sanctions against legal persons must be effective, proportionate and dissuasive. The EU Trafficking Directive goes one step further by establishing that those sanctions shall be fines, and may be other measures including: '(a) exclusion from entitlement to public benefits or

78 UNODC, *The Role of Recruitment* 2015 (n. 20), 16.
79 *Ibid.*, 56.
80 *Ibid.*, 73.
81 ICAR, *The Corporate Crimes Principles* 2016 (n. 9), 53.

aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) judicial winding-up; (e) temporary or permanent closure of establishments which have been used for committing the offence'.[82]

The only compulsory penalty is a monetary fine. Other possible sanctions are optional, considering the particular case and the prominence of the legal person's role in trafficking. In order to modulate the penalty, judges should evaluate the effectiveness of the sanction in deterring the crime, and its social and economic consequences, particularly for the legal person's employees. According to these criteria, judicial winding-up, which means totally losing legal personality and the ability to carry out any kind of activity, should only be imposed in the most serious cases.

The most frequently used sanction is a fine, which is sometimes characterised as criminal, sometimes as non-criminal and sometimes as a hybrid.[83] The monetary fine chosen is usually proportional to the benefits that the company obtained from the criminal activity. The extensive use of proportionate fines has been justified in order to confiscate the huge profits generated by human trafficking, aiming to eliminate the incentives that lead companies into these practices. Nevertheless, it cannot be forgotten that this should not be the main objective of a fine, since other law enforcement measures like seizures specifically suit this purpose. Moreover, determining the exact amount of the fine might be challenging, since the proportional fine sentence requires quantifying the illicit benefits obtained. Normally, the benefits from trafficking are obtained from exploitation, not directly from trafficking, since trafficking can occur even if the intended exploitation does not actually exist. Therefore, when the exploitation does not take place or when it is carried out by a third party, the proportional fine should be replaced by a day fine.[84]

Beyond that, the very use of the fine as the preeminent sanction for legal persons, regardless of its category, has been criticised for its inability to incentivise corporations to change their internal organisation and implement measures to prevent crimes in the future.[85] Hence the importance of non-monetary

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82 Article 6.

83 UN, *Legislative Guide* 2004 (n. 42), para. 257.

84 A day fine is calculated according to a convicted individual's financial status.

85 In this sense, for instance, John C. Coffee considers that corporations will not always refrain from engaging in criminal activities fearing the economic loss caused by fines. He argues that, when the corporate managers seek to maximise their individual positions rather than the company's benefits, a monetary fine is far less of a deterrent than would be expected. Therefore, non-pecuniary penalties that threaten the managerial autonomy of those controlling the firm are supposed to have more deterrent and 'rehabilitative' benefits. See J.C. Coffee Jr., 'Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions', *American Criminal Law Review*, 17 (1980), 469-70.

sanctions. The closure of establishments which have been used for committing the offence, at least temporarily, is particularly welcome, since it prevents companies from engaging in or perpetuating human trafficking, for example for the purposes of sexual exploitation in the hotel, restaurant and entertainment industries. Furthermore, alternative sanctions should also be explored, such as publishing the sentence,[86] prohibiting the legal person from advertising activities or products related to the crime, compelling it to engage in community services to repair the damage caused and prevent similar offences,[87] or imposing some sort of corporate probation.[88]

## 5. Conclusions

Human trafficking is a complex crime that can occur in multiple ways. Likewise, corporations' involvement in trafficking can also be very diverse. This paper has shown that legal persons can potentially commit any of the acts of trafficking, using any of the foreseen means, and for any kind of exploitation. Aware of this reality, the most recent international and European anti-trafficking instruments include, for the first time, provisions to find legal persons liable for human trafficking offences. Although the legal instruments that have been studied in this paper mainly establish general obligations or guidelines for states, they represent a much needed first step in order to punish companies that are involved in the so-called modern day slavery business.

These legal provisions, which might seem simple in a preliminary analysis, lead to multiple obstacles when applied to real cases. This may explain why, despite the fact that most Member States foresee corporate liability for human trafficking, prosecutions are still very rare. Difficulties in prosecuting legal persons for human trafficking are accentuated in the current context where most companies operate globally and through complex structures. In addition, even when the legal person is actually found guilty, it is difficult to find an adequate sanction that incentivises the company to change its practices and prevent human trafficking in the future.

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86 Concerning the pros and cons of publicity as a sanction on corporations, J. Andrix, 'Negotiated Shame: An Inquiry into the Efficacy of Settlement in Imposing Publicity Sanctions on Corporations', *Cardozo Law Review* 28(4) (2007), 1857-90.

87 R. Gruner, 'Beyond Fines: Innovative Corporate Sentences under Federal Sentencing Guidelines', *Washinton University Law Review* 71(2) (1993), 261-328.

88 M.H. Levin, 'Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?', *Fordham Law Review* 52 (1983), 637-62.

States have an obligation, an opportunity and a challenge to overcome these difficulties when implementing the guidelines set out in intentional and European legal instruments in national legislations. Regardless of the nature of the sanction imposed, which can be administrative, civil or criminal, they must pursue a common rationale: if companies risk any kind of loss for their involvement in human trafficking and exploitation, they will be more cautious, and the demand for trafficked workforce will drop. In doing so, they need to take into account that criminal liability may be one possible way of punishing the most serious cases. However, not only criminal law, but also civil law, migration law and human rights law have a very important role to play in order to deal with these practices. Essentially, there is a crucial need to recognise the role that companies play, not only as perpetrators of human trafficking, but also as preventers, in order to guarantee that trading in people's dignity and freedom is no longer a worthwhile and profitable business.

## References

Andrix, J., 'Negotiated Shame: An Inquiry into the Efficacy of Settlement in Imposing Publicity Sanctions on Corporations', *Cardozo Law Review* 28(4) (2007), 1857-90.

Bang, N.J., 'Unmasking the Charade of the Global Supply Contract: A novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases', *Houston Journal of International Law* 35(2) (2013), 256-322.

Barak, G. (ed.), *The Routledge International Handbook of the Crimes of the Powerful* (London and New York: Routledge, 2015).

Coffee, J.C. Jr., 'Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions', *American Criminal Law Review*, 17 (1980), 419-578.

Decision of the First Instance Court of Gent, 19th chamber, on the 5 November 2012. Case No. 2012/3925.

European Commission, *Study on Case-Law on Trafficking for the Purpose of Labour Exploitation* (Luxembourg, 2015).

European Commission, EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, COM (2012) 286 final (Brussels, 2012).

EUROPOL, *The THB Financial Business model. Assessing the Current State of Knowledge* (The Hague, 2015).

EUROPOL, *Trafficking in Human Beings in the European Union* (The Hague, 2011).

Feasley, A., 'Eliminating Corporate Exploitation: Examining Accountability Regimes as Means to Eradicate Forced Labor from Supply Chains', *Journal of Human Trafficking* 2(1) (2016), 15-31.

Gallagher, A., *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010).

GRETA, *Compilation of relevant extracts from GRETA Reports concerning the implementation of the Convention on Action against Trafficking in Human Beings*, Working document, 23 June 2014.

GRETA, *5th General Report on Greta's Activities* (Strasbourg, 2016).

Gruner, R., 'Beyond Fines: Innovative Corporate Sentences under Federal Sentencing Guidelines', *Washinton University Law Review* 71(2) (1993), 261-328.

Hoff, M. & K. McGauran, *Engaging the Private Sector to End Human Trafficking. A Resource Guide for NGOs* (Amsterdam: La Strata International, 2015).

Hunter, P. & Q. Kepes, *Human Trafficking & Global Supply Chains: A Background Paper* (2012).

ICAR, *The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases* (October 2016).

ILO, *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislation and Law Enforcement* (Geneva, 2005).

Konov, J., 'Piercing the Veil's Effect on Corporate Human Rights Violations & International Corporate Crime', *Munich Personal REPEC*, archive no. 35714 (Goettingen, 2012).

Levin, M.H., 'Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?', *Fordham Law Review*, 52 (1983), 637-62.

Mattar, M., 'Corporate Criminal Liability: Article 10 of the Convention against Transnational Organized Crime', *Journal of International Affairs* 66(1) (2012), 107-22.

OSCE, *Ending Exploitation. Ensuring Business do not Contribute to Trafficking in Human Beings: Duties of States and the Private Sector*, Occasional Paper Series no. 7 (Vienna, 2014).

Parente, T.M., 'Human Trafficking: identifying forced labour in multinational corporations and the implications of liability', *Brazilian Journal of International Law* 11(1) (2014), 148.

Pierce, S.C., 'Turning a Blind Eye: Corporate Involvement in Modern Day Slavery', *The Journal of Gender, Race & Justice* 14 (2011), 577-600.

Processo No. 10230-31.2014.5.15.0079. 2ª Vara do Trabalho de Araraquara.

Ramasastry, A., 'Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations', *Berkeley Journal of International Law* 91(20) (2002), 91-153.

Saraiva-Leao, A., 'Corporate Criminal Liability for Human Trafficking in the UE: a Legal Obligation for Member States?', Master's Thesis, Uppsala Universitet, Autumn Term 2015.

Shavers, A.W., 'Human Trafficking, the Rule of Law and Corporate Social Responsibility', *South California Journal of International Law & Business* 9 (2013), 39-88.

TRACE Project, Deliverable 6.5_ Final Report (April 2016).

United Nations, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (New York, 2004).

UNODC, Model Law against Trafficking in Persons, UN Sales No. E.09.V.11 (2009).

UNODC, *Abuse of a position of vulnerability and other 'means' within the definition of trafficking in persons* (New York, 2013).

UNODC, *The Role of Recruitment Fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons* (Vienna, 2015).

UNODC, *The Concept of 'Exploitation' in the Trafficking in Persons Protocol* (Vienna, 2015).

UNODC Case Law Database, Hjoerring City Court Judgement August 22 2012, DNK014.

UNODC Case Law Database, Cesar et al., ESP003.

UNODC Case Law Database, Case No. 3692/13, ARG064.

UNODC Case Law Database, *Ministerio Publico v. Jose Luis Castro Sosa,* CHL001.

UNODC Case Law Database, *Chile v. Nelly Viviana Condori Nicolas,* CHL002.

UNODC Case Law Database, R.G. 40262009, ITAx023.

UNODC Case Law Database, *United States v. Marvin Chavelle Epps,* USA046.

Vermeulen, G. et al., 'Liability of Legal Persons for Offences in the EU, European Commission', IRCP-series vol. 44 (Apeldoorn: Maklu Publishers, 2012).