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Trafficking in Human Beings as Crime against  
Humanity or Severe Infringement of Human  
Rights

What is the Appropriate Definition for Human  
Trafficking?

Master Thesis  
30 credits (30 ECTS)

Supervisor  
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Master's Programme in International Human Rights Law

Master Thesis

Spring 2011

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# Summary

International criminal law is currently subdivided into international criminal law *stricto sensu* — the so-called core crimes—genocide, war crimes, crimes against humanity and crimes of international concern—the so-called treaty crimes—human trafficking, terrorism, drug trafficking etc.<sup>1</sup>

This research draft suggests that special category of international crimes such as human trafficking can be appropriately relabelled from transnational criminal law into the threshold of either international criminal law as crime against humanity or into international human rights law as violation of human rights with the purpose to find the right and appropriate match for the trafficking in human beings.

For this purpose, this thesis work will outline human trafficking from two perspectives as crime against humanity and as violation of human rights.

Within the threshold of the core crimes in international criminal law the right definition of trafficking in human beings is truly justified. How ?

The current definition of Trafficking in Human Beings as International Transnational Crime does not provide the real and hazardous meaning of human trafficking. The appropriate definition is highly urgent because of the necessity to focus attention on the following issues such as first, process of criminalization of trafficking in human beings, second, individual or state responsibility for trafficking and, third, legal protection of victims of trafficking in human beings as relatively neglected system.

The choice of this issue is very essential from scholar point of view and became the subject of my interest because of the continuing growth and timeless tendency of trafficking in human beings in the world nowadays.

I will show through my legal research that necessity of right definition for this international transnational crime will clarify the real meaning of human trafficking in practice and will assist States to prevent, suppress and criminalize trafficking in human beings.

To make my research the standpoint of interest for reader I will enshrine in this thesis draft besides the main research question the essential aspects of human trafficking in order to show the severity of this crime and necessity to define this international transnational crime either as crime against humanity or as violation of human rights.

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<sup>1</sup> Neil Boister 'Transnational Criminal Law'? *European Journal of International Law*, University of Canterbury - School of Law Vol. 14, No. 5, pp. 953-976, 2003

# Abbreviations

**CERD** Convention on Elimination of All Forms of Racial Discrimination

**CRC** Convention on the Rights of the Child

**ECHR** European Convention on Human Rights

**UN.GIFT** United Nations Global Initiative to Fight Human Trafficking

**ILO** International Labour Organization

**IOM** International Organization for Migration

**ICC** International Criminal Court

**ICTR** International Criminal Tribunal of Rwanda

**NGO** Non-governmental Organization

**OP** Optional Protocol

**UN** The United Nations

**UNHCHR** United Nations High Commissioner for Human Rights

**UNODC** United Nations Office on Drugs and Crime

**UNTOC** United Nations Convention against Transnational Organised Crime

# 1 CHAPTER I

## INTRODUCTION

Human Trafficking as a severe international crime is the inhumane act, which intentionally causes great suffering, or serious injury to body or to mental or physical health. It involves an act of recruiting, transporting, transferring, harbouring or receiving a person through a use of force, coercion or other means, for purpose of exploiting them.

United Nations Office on Drugs and Crime (UNODC), as guardian of the United Nations Convention against Transnational Organized Crime (UNTOC) through the Protocol to Prevent, Suppress and Punish Trafficking in Persons (Palermo Protocol) assists States in their efforts to criminalize Trafficking in Human Beings.

This thesis will outline the legal connection between human trafficking and crime against humanity such as enslavement through the Palermo Protocol and in particular, the Rome Statute of International Criminal Court.

Through the Recommended Principles and Guidelines on Human Rights and Trafficking of the United Nations High Commissioner for Human Rights, I will emphasize the intersection among human trafficking, crimes against humanity and violations of human rights. The research draft will also show the casual link between human trafficking and human rights and will present, which violations of human rights are explicit at each stage of human trafficking through European Convention on Human Rights and Fundamental Freedoms.

This research will describe the legal status and ways of protection of victims and potential trafficked persons through the Council of Europe Convention on Action against Trafficking in Human Beings<sup>2</sup> as essential guidelines for States to fight against human trafficking. Millions of men, women and children are victims of human trafficking for sexual, forced labour and other forms of exploitation worldwide.

The purpose of this legal work is to find the right description of human trafficking from two perspectives as crime against humanity or severe human rights violation in order to raise awareness about the severity of this phenomenon and assist States to struggle against it. To expose the severity of human trafficking with heinous effect, I will first describe trafficking as crime against humanity and finally trafficking in human beings as serious violation of human rights.

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<sup>2</sup> Council of Europe Convention on Action against Trafficking in Human Beings CETS No.: 197 (Warsaw Convention)

## 1.1 Structure

The thesis comprises nine chapters, which will enshrine the main elements and issues of trafficking from perspectives of crime against humanity or violation of human rights.

This draft will first provide The Definition, Structure and Elements of Trafficking in Human Beings and Crime against Humanity in Chapter II.

Next, it will present Definition, Structure and Elements of Trafficking in Human Beings and Violation of Human Rights in Chapter III.

From prospective of crime against humanity and violation of human rights, Chapter IV will describe Historical Background of Trafficking in order to outline the systematic effect of trafficking in human beings. Statistics, International and Regional Trends of Human Trafficking will emphasize the widespread effect of trafficking.

Chapter V will outline the Common Perpetrators and Main Actors of Trafficking in Human Beings, Identification and Tactics of Perpetrators.

Individual Responsibility will present the knowledge and intention of attack on human beings, which will be enshrined in Chapter V.

Chapter VI will also describe State Responsibility and Obligation to Prevent Human Trafficking as international transnational crime.

Identification and Protection of Victims of Trafficking in Human Beings will be outlined in Chapter VI.

Then Chapter VII will enshrine The Core Legislation against Trafficking in Human Beings and its Criminalization. Chapter VIII will summarize three cases from judicial databases of European Court of Human Rights, International Criminal Court and The United States Court of Appeals of District of Columbia in Washington DC in order to show legal facts and arguments in practice enshrined in judicial decisions and judgments in this legal draft.

The Final Chapter will cover Concluding Analysis and Recommendations.

As conclusion I will combine all the factors which had been discussed in thesis and will make some legal analysis and recommendations for international and regional organizations to consider the right definition for trafficking either as crime against humanity or violation of human rights.

## 1.2 Research Question

Is Human Trafficking a Crime against Humanity or Violation of Human Rights?

Which one of these definitions is the right description of trafficking, which can show the severity of trafficking in human beings and may assist States to struggle more effectively against this phenomenon as continuous human trade?

Appropriate definition of human trafficking within the scope of international legislation will increase the awareness about severity of this phenomenon, which affects human life, dignity or health and will make States take into account the serious harm caused by trafficking in human beings.

With threshold of research question, I will show the necessity of right definition of trafficking in human beings.

The Palermo Protocol under Article 3 (a) defines trafficking in persons as:

*“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”;*

According to this definition, we can see the absence of severity in description of this international transnational crime and the necessity to change the current formulation of trafficking in human beings either as crime against humanity or violation of human rights is highly necessary. As the main treaty, which criminalizes trafficking in human beings, Palermo Protocol does not provide the real background of human trafficking as international crime and gave narrow evaluation of trafficking nowadays. For that purpose, I will outline two essential issues as serious and severe problems, which can be easy to resolve if we truly define human trafficking as crime against humanity or violation of human rights. Those issues are the following:

First, criminal responsibility for trafficking in human beings and punishment for this international transnational crime  
Secondly, identification, protection and treatment of victims of human trafficking

The exigency to implement the current definition of trafficking into the scope of more dangerous and serious crimes within the threshold of these



two issues mentioned above will clarify the severity of human trafficking as international transnational crime.

### **1.3 Delimitation**

An attempt to find the right definition for human trafficking as international transnational crime will combine all aspects of human trafficking through the legal analysis of this phenomenon from two perspectives, either as crime against humanity or violation of human rights, which will be the core point of research in my thesis work.

This research will not outline international cooperation and assistance of States in trafficking in human beings. I will present just general analysis of legal work done by States within the struggle against human trafficking.

I also will not concentrate on the status and the rights of women and children as the particular vulnerable groups in each phase of trafficking but only will give some examples of violations of their rights in case of human trafficking through international conventions and treaties.

### **1.4 Methodology**

In this research I have used traditional legal qualitative method which I divide in two parts: first, analysis of law (international treaties and conventions) and second, case law (judicial reviews and judgments) in order to find proper answer to research question presented in this legal draft.

First, this draft will analyse the information enshrined in the following sources of legal arguments and facts:

- The United Nations latest Reports on Trafficking in Human Beings <sup>3</sup> and Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw Convention)
- Articles (Articles 7 1(c), 2(c) and 25) in The Rome Statute of International Criminal Court and European Convention of Human Rights together with Recommended Principles and Guidelines on Human Rights and Trafficking by United Nations High Commissioner for Human Rights will also be enshrined in my research draft.
- Academic Scholar Writings, Legal Opinions and Article Reviews: The purpose of this review tends to provide additional information concerning trafficking, violations of human rights and crimes against humanity such as enslavement.

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<sup>3</sup> The United Nations Reports on Trafficking in Human Beings 2009-2010

Second, analysis of legal facts and arguments in legal practice will be enshrined in the following international case reviews.

➤ **International Case Reviews:** The purpose of this case review is to present the following important decisions and judgments regarding trafficking in human beings. *First*, it will show the unique judgment of European Court of Human Rights, concerning human trafficking as violation of human rights. *Second*, it will outline the first judgment of International Criminal Court regarding human trafficking as enslavement within the threshold of crime against humanity. *Finally*, the outrageous decision of the Court of Appeals of United States of America District of Columbia despite the dismissal of the case, will indicate the proper investigation of the charges considering enslavement, forced labour, which may lead to trafficking in human beings.

As the starting point of growing issue of trafficking in human beings I will emphasize the definition and structure of human trafficking and crime against humanity particularly enslavement and through core analysis of these crimes, try to see their similarities and differences from the threshold of crime against humanity.

## **2 CHAPTER II**

### **HUMAN TRAFFICKING AS CRIME AGAINST HUMANITY**

#### **2.1 The Definition, Elements and Structure of Trafficking in Human Beings and Crime against Humanity**

The internationally recognized definition of trafficking is set forth in Article 3 (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the Palermo Protocol) and in Article 4 (a) of Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw Convention), which supplements the United Nations Convention against Transnational Organized Crime.

#### **Trafficking in Human Beings<sup>4</sup>**

‘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

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<sup>4</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the Palermo Protocol) UNTS I-39574 United Nations, Treaty Series , vol. 2187, p. 3

payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

As we can see from the definition of this international transnational crime under Article 3 of the Palermo Protocol, trafficking consists of three separate elements: (i) *an action* (recruitment, transportation, transfer, harbouring, or receipt of persons); (ii) *a means* (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, or abuse of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person); and (iii) *a purpose* (exploitation). Exploitation is defined to include, at a minimum, exploitation of prostitution, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.<sup>5</sup>

The core element of identification of human trafficking as crime against humanity is not directly enshrined in definition of this crime, which gives us the narrow appreciation of human trafficking indeed. As we will see in practice in this research draft, through the elements, stages, methods and means of this phenomenon, human trafficking has systematic, widespread and heinous effect on humanity or civilian population. In the meantime, the common perpetrators of trafficking, with the direct knowledge to attack, tend to reach the final purpose of trafficking as human exploitation.

The wide appreciation of this international transnational crime to the extent of violations of human rights as such is highly necessary to emphasize the hazardous effect of trafficking in human beings but as we will see further there is an increasing possibility for human trafficking to be defined both as crime against humanity and violation of human rights.

### Crime against Humanity

For the purpose of The Rome Statute of International Criminal Court Paragraph 1 of Article 7 defines: "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:<sup>6</sup>

Crimes against Humanity are serious acts of violence, which harm human beings by striking what is most valuable to them: their life, liberty, physical welfare, health and / or dignity. They are inhuman acts that by their extent and gravity go beyond the limits of morality from country society to international community, which must perceive demand of their

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<sup>5</sup> Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway Anne T. Gallagher Virginia Journal of International Law, Volume. 49:4, 2007, page 798

<sup>6</sup> The Rome Statute of International Criminal Court UNTS No.I-38544(U.N.Doc. A/CONF.183/ 9) United Nations, *Treaty Series*, vol. 2237, p. 319; Doc. A/55/383.

punishment.<sup>7</sup> The crimes against humanity also may transcend from the boundaries of heinous crimes when the individual is assaulted as the humanity comes under attack and is negated.

Now with main description and analysis of enslavement as crime against humanity I will state that trafficking is not a type of enslavement as it is enshrined in The Rome Statute of International Criminal Court but more than just enslavement based on timeless trade of human beings.

Enslavement<sup>8</sup>

Prohibition of Enslavement is recognized as a rule of customary international law and regularly is identified as a legal obligation *erga omnes* and as part of *juscogens*. There are over 27 million people in slavery worldwide and that at its most general level 12.3 million people are trafficked worldwide at any given time (US Department of State, Trafficking in Persons Report, 2010). Freedom from chattel slavery was one of the first rights to be recognized under public international law. Article 7 (2) (c) of the Rome Statute of the International Criminal Court identifies “Enslavement” as a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” The definition of enslavement provided in that instrument is identical to that of slavery as set out in the 1926 Convention (“the exercise of powers attaching to the right of ownership”), with the essential addition of a clause that specifically refers to “the exercise of such power in the course of trafficking in persons, in particular women and children.”<sup>8</sup>

The core element of disposition of enslavement as crime against humanity is the systematic and widespread attack with the criminal intention to act.

As we can see from the definition of Enslavement as Crime against Humanity enshrined in the Rome Statute of International Criminal Court, there are six characteristics of the various “powers attaching to the right of ownership,” the exercise of which give rise to a situation of slavery:

1. the individual may be made the object of a purchase;
2. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner . . . ;
3. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;
4. the ownership of the individual of servile status can be transferred to another person;

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<sup>7</sup> Dan Kuwali “The Conundrum of Conditions for Intervention under article 4(h) of the African Union Act “Essays African Security Review, Volume 17 N 4 December 2008, pages 90-112

<sup>8</sup> Report of the Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude, at 27 n.1, U.N. Doc. E/2357 (Jan. 27, 1953) [hereinafter 1953 Slavery Report supra note 56, at 28.

5. the servile status is permanent, that is to say, it cannot be terminated at the will of the individual subject to it;
6. the servile status is transmitted ipso facto to descendants of the individual having such status.<sup>9</sup>

The first point, which needs to be addressed, is the relationship between trafficking and enslavement. While it may be easy to treat these two acts synonymously, trafficking and slavery are not necessarily the same.<sup>9</sup>

The Core Analysis of Trafficking and Crime against humanity will be enshrined in Structure and Elements of Enslavement as Crime against Humanity and Human Trafficking.

### Structure and Elements of Trafficking in Human Beings

On the basis of the definition given in the Trafficking in Persons Protocol, it is evident that human trafficking is combined with the following:<sup>9</sup>

The Act (What is done)<sup>9</sup>

Recruitment, transportation, transfer, harbouring or receipt of persons

The Means (How it is done)<sup>9</sup>

Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim

The Purpose (Why it is done)<sup>9</sup>

For the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs. Trafficking has a range of exploitative purposes (not just sexual exploitation). It victimizes children, women and men (not just women, or adults, but also men and children) and takes place with or without the involvement of organized crime groups.<sup>9</sup> National legislation should adopt the broad definition of trafficking prescribed in the Protocol.

The legislative definition should be dynamic and flexible so as to empower the legislative framework and emphasize the severity of this heinous transnational crime to respond effectively to trafficking which occurs both across borders and within a country

The following elements of human trafficking can be identified in comparing to the definitions of trafficking and crime against humanity.

*First*, trafficking is carried out with the use of coercion/or a deception. This makes it clear that people cannot be trafficked voluntarily. The definition of trafficking suggests that coercion or deception is used by trafficker, when they are recruiting or transporting people from one place to another.

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<sup>9</sup> Tom Obokata "Human Trafficking, Human Rights and The Nationality, Immigration and Asylum Act 2002 University of Dundee (2003) EHRLR 410

*Secondly*, trafficking entails the element of subsequent exploitation of people, which includes prostitution, forced labour, slavery or servitude.

*Thirdly*, trafficking can take place both within the States and across the national frontiers. However, the scope of the definition of trafficking is constrained in Article 4 of the trafficking protocol, which provides that the offence of trafficking must be transnational in nature.

*Finally*, when international movement is involved, entry to the State can be both legal and illegal in the case of trafficking.<sup>9</sup>

As we can see in each phase of trafficking the widespread, systematic effect of this phenomenon is clearly vivid, which may allow States to re-label trafficking as heinous crime into the threshold of crimes against humanity as the step forward action against trafficking after the adoption of the Palermo Protocol. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (also referred to as the Palermo Protocol) is a protocol to the United Nations Convention against Transnational Organized Crime. The adoption in 2000 by the United Nations General Assembly of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children marked a significant milestone in international efforts to stop the trade in people.<sup>9</sup>

The definition contained in Article 3 of the Trafficking in Persons Protocol is meant to provide consistency and consensus around the world on the phenomenon of trafficking in persons. Article 5 therefore requires that the conduct set out in Article 3 be criminalized in domestic legislation. Domestic legislation does not need to follow the language of the Trafficking in Persons Protocol precisely, but should be adapted in accordance with domestic legal systems to give effect to the concepts contained in the Protocol.

Trafficking in Persons is combined with the ownership and exploitation of vulnerable people within the States or outside of frontiers to make a profit as human trade--be it that of women, children or men, which is enshrined in all three stages of the process of (i) Recruitment (ii) Transportation (iii) Exploitation. In the case of *Kunarac*,<sup>10</sup> The Trial Chamber of the International Criminal Tribunal for the Former Republic of Yugoslavia, held that enslavement as a crime against humanity, included trafficking in human beings. Practical research in this case shows, that trafficking in human beings does not defined as means of enslavement because the trafficker or slaveholder is in a position where he/she exercises rights of ownership over another, uses the other for personal and financial gain, and withdraws the freedom of the individual. As an example we can see the process in forced labour - be it forced commercial sexual exploitation or different forms of economic exploitation. This situation can arise into trafficking with means of enslavement through systematic exploitation.

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<sup>9</sup> Ibid

<sup>10</sup> Prosecutor v Kunarac et al., Case No. IT-96-23-A & IT-96-23/1-A, Judgment, 94 (June 12, 2002);

## Structure and Elements of Crime against Humanity

Having clarified the meaning of the trafficking of human beings under international law, it is now necessary to examine the definition of a crime against humanity. Under Article 7 of the Rome Statute of International Criminal Court, it is defined as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with the knowledge of the attack: The following elements of crime against humanity can be identified in comparing to the definitions of trafficking and crime against humanity. The Attack (Actus Reus) on civilian population must be (i) Widespread; (ii) Systematic; and with (iii) Wilful Knowledge (Mens Rea)<sup>9</sup>

(i) Widespread Attack: To begin with, an "attack against a civilian population" must be widespread. An attack encompasses any mistreatment of civilian population although it must involve "the multiple commissions of acts. The term "widespread" is interpreted to mean the large-scale nature of the act involving a "multiplicity" of victims and therefore isolated acts committed by perpetrators cannot generally be considered as such. Further, a crime may be regarded as widespread when committed by the cumulative effect of a series of inhuman acts or a singular effect of an inhuman act of extraordinary magnitude.<sup>9</sup>

(ii) Systematic Attack: An attack, which applies more than once on civilian population or humanity causing great suffering and disastrous effect is considered with "systematic" effect. The act is also systematic particularly when organized criminal groups are involved.<sup>9</sup>

(iii) Wilful Knowledge of Attack: Another key phrase is "with the knowledge of the attack". This suggests that criminal intent or mens rea is required to establish a crime against humanity.

On this point, the ICTY held that the accused must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known "that there is an attack on the civilian population and that his acts comprise part of that attack or at least that he took the risk that his acts were part of attack which may be committed with personal reasons."<sup>10</sup>

As we can see the definition of Human Trafficking is 'de facto' ownership which allows us to consider that trafficking in human beings and enslavement are very similar in nature. In the meantime, enslavement and trafficking have different methods and purpose of realization of criminal actions in practice.

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<sup>9</sup>Ibid

[http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menu side](http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menu%20side)

<sup>10</sup> Ibid

The elements of Article 7 of the Rome Statute of International Criminal Court have been unanimously interpreted as regard to a very high threshold. The crimes in order to be labelled as crime against humanity and to brought before the ICC must be of extreme gravity-of serious attack on humanity.<sup>11</sup>

Next section will outline the similarities and differences of trafficking in human beings and enslavement as crime against humanity in order to emphasize that human trafficking as such is not only enslavement but also include several means and methods of exploitation of human beings.

## 2.2 Similarities and Differences between Human Trafficking and Crime against Humanity such as Enslavement

CRIMES AGAINST HUMANITY OF ENSLAVEMENT	HUMAN TRAFFICKING
Ownership	Exploitation
Deprivation of Liberty	Fraud, Deception and Abduction
Bartering	Transportation/transfer
Lending	Recruitment
People Sale and Purchase	People Trade

Paragraph 1 (c) of article 7 of the Rome Statute of International Criminal Court defines the enslavement as the crime against humanity. *“Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over one or more persons such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”* But paragraph 2 of the same article gives the wide description of enslavement itself *“enslavement includes the exercise of such power in the course of trafficking in persons, in particular women and children”* with the intentional conduct committed as part of a widespread or systematic attack directed against a civilian population.<sup>12</sup>

According to the provisions of this article, trafficking in persons has already been included in the Rome Statute of International Criminal Court but as one of the elements of enslavement and not as international crime or crime against humanity.<sup>12</sup>

The scope of Human Trafficking from two perspectives as it is stated in summary and will be presented further, has a very wide definition in our society including several crimes in one context but in the meantime the Rome Statute of the International Criminal Court gives a narrow margin of appreciation to human trafficking because enslavement is one of the core ways of trafficking in persons which is not expressly enough to describe what is human trafficking indeed.<sup>12</sup> Clarification between human trafficking and crime against humanity as a form of enslavement is one of the essential

<sup>11</sup> Antonio Cassese "International Criminal Law (Oxford Univ. Press, 2008) pages 65-66

<sup>12</sup> Tom Obokata “Human Trafficking, Human Rights and The Nationality, Immigration and Asylum Act 2002 University of Dundee (2003) EHRLR 410



issues in international criminal law and I will argue that there are the following key differences and similarities between these crimes.

*First*, differences are clearly vivid in their purposes and methods.

The main purpose of enslavement is the deprivation of liberty of human being as ownership. The main purpose of human trafficking is the denial of the right to liberty and security of the individual, the right to freedom from torture, violence, cruelty or degrading treatment the exploitation in forms of sexual exploitation or prostitution, forced labour or slavery.

*Secondly*, enslavement has a narrow margin of appreciation and includes only limited elements of human trafficking and slavery. Unlike enslavement, human trafficking has a wide margin of appreciation and contains various elements of different crimes including slavery.

*Thirdly*, the similarities and differences are actually emphasized in mental and action elements of the severe crime called trafficking in human beings.

The Trafficking Protocol requires that the crime of trafficking be defined through a combination of two constituent elements and not the individual components, though in some cases these individual elements will constitute criminal offences independently. For example, the act of abduction or the non-consensual application of force (assault) will likely constitute separate criminal offences under domestic criminal legislation.<sup>12</sup> In criminal law terms, these two constituent elements can also be identified as the *actus reus*—the material or physical element(s)—and the *mens rea*—the mental element. No conviction may be rendered in the absence of these two criminal law concepts, fundamental to criminal systems around the world.

Actus reus requirements <sup>13</sup>

The *actus reus* or material elements of trafficking in persons vary depending on the legislation of any country. In the case of the crime of trafficking as defined in the Trafficking Protocol, the *actus reus* requirement is split into two parts.

Actus reus requirement

The offence must include any one of the following:

"" Recruiting

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<sup>12</sup> Ibid

<sup>13</sup> United Nations Office on Drugs and Crime (UNDOC), Global Initiative to Fight Human Trafficking ( UN.GIFT) “Anti Human Trafficking Manual for Criminal Justice Practitioners” New York, 2009 pages 4-5

In criminal law terms the *actus reus*—the material or physical element(s)—and the *mens rea*—the mental element—are required for an accused to be found liable for a criminal offence in criminal systems around the world. *Actus reus* refers to the physical component of a crime, the act of committing the crime. United Nations Office on Drugs and Crime (UNDOC), Global Initiative to Fight Human Trafficking ( UN.GIFT) “Anti Human Trafficking Manual for Criminal Justice Practitioners” New York, 2009 pages 4-5

- "" Transporting
- "" Transferring
- "" Harbouring
- "" Receiving a person <sup>13</sup>

Some or all of these terms are likely to have a clearly defined meaning in your domestic legal system.

It must also contain at least one of the following means:

- "" Use of force
- "" Threat of force
- "" Coercion
- "" Abduction
- "" Fraud
- "" Deception
- "" Abuse of power or of a position of vulnerability
- "" Giving or receiving of benefits <sup>13</sup>

#### Mens rea requirement<sup>13</sup>

The mens rea requirement reflects the state of mind of the person charged with an offence. Only those with a sufficient “guilty mind” can be found liable for a criminal offence. In certain jurisdictions and in certain cases, criminal liability may be “strict” (“strict liability” offences).

In criminal law terms the actus reus—the material or physical element(s)—and the mens rea—the mental element—are required for an accused to be found liable for a criminal offence in criminal systems around the world. Actus reus refers to the physical component of a crime, the act of committing the crime. The requisite mental element required in a trafficking in persons case is that the person committed the material act(s) with the intention that the victim be “exploited” (as defined by a country’s domestic anti-trafficking legislation).

The Trafficking Protocol does not define exploitation but gives a non-exhaustive list of forms 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.”* Again, it is important to remember that the Trafficking Protocol obligation to criminalize trafficking in persons does not require that domestic legislation use the precise language contained in the definition of trafficking in persons. As is clear from the Trafficking Protocol, actual exploitation need not occur provided there is a manifestation of intention to exploit the individual. All that is required is that the accused and committed one of the constituent acts, employing one of the listed means for the purpose or, put another way, with the intention that the individual be exploited.<sup>13</sup>

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<sup>13</sup> Ibid (In criminal law Mens rea refers to the state of mind and intent of the person charged with an offence. Only those with a sufficiently “guilty mind”, that is, who acted with criminal intent or knowledge that their actions were wrong, can be found liable for a

criminal offence. In certain jurisdictions and in certain cases, criminal liability may be imposed in “strict liability” offences even in the absence of mens rea.)

After analysing Article 7, it becomes evident that trafficking can fall under the acts other than enslavement. Forcible transfer under Article 7(1) (d) is one example.<sup>12</sup>

The mental element can be proven in a number of ways. It should be noted that the Trafficking Protocol requires that countries only criminalize trafficking in persons when conducted intentionally as per Article 5(1). This speaks to the mental element. However, countries are not precluded from allowing the mens rea requirement to be established on a lesser standard, i.e. via recklessness, wilful blindness or even criminal negligence, subject to the requirements of the domestic legal system. In looking at these elements, it may reasonably be presumed that human trafficking can be elevated to crime against humanity.<sup>13</sup>

Palermo Protocol, as the main treaty against trafficking of human beings, in defining “trafficking in persons”, puts the accent on the control which one person maintains over another person, for the purpose of exploitation. It also finds strong support in the Statute of the ICC, which defines enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such powers in the course of trafficking in persons, in particular women and children” (Article 7(2)(c)).<sup>14</sup>

One of the core elements of crime against humanity along with widespread and systematic effect is the severity of this crime which is widely expressed in illegal nature of human trafficking, in the lack of anti-trafficking legislation in many countries in the world, in the reluctance of victims to denounce their traffickers for fears of repercussions on them and their families, in the low priority given by governments to research activities data collection in this field and in lack of international jurisdiction.<sup>15</sup> In the context of trafficking of human beings, subsequent exploitation can easily be regarded as slavery because the right of ownership is fully exercised and retained when people are exploited in sex, labour and other industries in States of destination. The following acts listed in the Rome Statute may be considered in relation to human trafficking: enslavement, deportation or forcible transfer, sexual slavery and enforced prostitution, and finally the

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<sup>12</sup> Ibid

<sup>13</sup> Ibid

The “purpose of exploitation” is a *dolus specialis* mental element: *Dolus specialis* can be defined as the purpose aimed at by the perpetrator when committing the material acts of the offence. It is the purpose that matters, not the practical result attained by the perpetrator. Thus, the fulfilment of the *dolus specialis* element does not require that the aim be actually achieved. In other words, the “acts” and “means” of the perpetrator must aim to exploit the victim. It is not therefore necessary that the perpetrator actually exploits the victims.

<sup>14</sup> Fausto Pocar “Human Trafficking: A Crime against Humanity”, 2007 pages 6-7

<sup>15</sup> International Organization for migration ‘New IOM Figures on the Global Scale of Trafficking (2001) 23 Trafficking in Migrants Quarterly Bulletin1,1).

catch-all clause, “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” These factors vividly show that human trafficking is not only enslavement under the scope of Rome Statute of International Criminal Court but also includes the range of different and serious violations of human rights which can have a deteriorative or fatal affect on mental and physical health of human beings.<sup>12</sup>

Furthermore, human trafficking is more than enslavement and can be defined as crime against humanity. For emphasizing this statement, I will present the advantages and disadvantages of trafficking and crime against humanity, which from my scholastic point of view are very essential for assisting States to find the appropriate definition for trafficking in human beings analysing positive and negative aspects of human trafficking as crime against humanity.

### **2.3 Advantages and Disadvantages of Trafficking as Crime against Humanity**

*Advantages of Human Trafficking as Crime against Humanity* can be explicit first, in criminalization of trafficking as severe international crime and secondly, the determination of criminal responsibility for this mass atrocity crime. As crime against humanity, trafficking will be easily to suppress and prevent, since the obligation of state to protect will become more urgent than before it has been done. Finally, if human trafficking will be defined as Crime against Humanity, even when the exercise of jurisdiction by ICC International Criminal Court will not be possible, it can serve as basis for the establishment of universal jurisdiction for the purpose of exposing the traffickers as a part of customary international law (jus cogens).

The recognition of human trafficking as jus cogens places upon states the obligation *erga omnes* either to prosecute or extradite the perpetrators of such crimes to a state which is willing to prosecute.<sup>16</sup>

*Disadvantages of Human Trafficking as Crime against Humanity* can actually be seen first, in transnational nature as geographical coverage of trafficking in human beings, secondly, offender and victim identification issues, which stop States to implement Trafficking into the Rome Statute of International Criminal Court as Crime against Humanity such as Enslavement. Finally, the similarity in structure with enslavement. The legal approach of States to define trafficking as core crime is quite cautious, since

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<sup>12</sup> Ibid

<sup>16</sup> MS Bassiouni “Crimes against Humanity” International Criminal Law (second edition), Transnational Publisher, 1999, New York

the slavery has already been included under the title of crime against humanity.

Throughout the process of human trafficking (recruitment, transportation, transfer, harbouring, or/and receipt of persons), traffickers play particular roles. Traffickers in this note indicate “recruiters, transporters, those, who exercise control over trafficked persons, those who transfer and/or maintain trafficked persons in exploitative situations, those involved in related crimes, those who profit either directly or indirectly from trafficking, its component acts and related offences.” Each trafficker contributes at different stages in the human trafficking process, for the purpose of exploitation of the victims for economic or other gain. Traffickers may take on one task or multiple tasks such as recruitment, document forgery, transportation, escorts of victims, bribing public officials, facilitating the transportation and transferring, information gathering, and receiving victims in the destination. Recruiters are often very familiar persons to the victims, such as neighbour, friend, a friend of a friend, boyfriend, acquaintance, and family friend.<sup>17</sup>

In the third Chapter, I will analyse Trafficking of Human Beings from the scope of Infringement of Human Rights and will outline the advantages and disadvantages of such definition.

### **3 CHAPTER III**

#### **HUMAN TRAFFICKING AS VIOLATION OF HUMAN RIGHTS**

##### **3.1 The Definition, Structure and Elements of Human Trafficking and Violation of Human Rights**

The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims. United Nations High Commissioner For Human Rights issued Recommended Principles and Guidelines on Human Rights and Trafficking which clearly describe the connection between trafficking and infringements of human rights. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking.<sup>18</sup>

*Human trafficking or Trafficking in Persons* is the international and transnational crime of displacing people with a view to exploiting them.

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<sup>17</sup> Social Development Notes, Conflict, Crime and Violence No 122/ pages 6-8 December 2009

<sup>18</sup> The United Nations High Commissioner for Human Rights (2002). Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1.

People are lured, moved to a totally new place and used for crimes like prostitution, drug peddling, slavery, and even removal of organs. It involves recruiting, transporting, transferring of persons by means of threat or use of force or other forms of coercion.<sup>17</sup>

*Violation of Human Rights* is a breach, infringement, or transgression of fundamental rights, which humans have by the fact of being human, and which are neither created nor can be abrogated by any government.

To violate the most basic human rights, on the other hand, is to deny individuals their fundamental moral entitlements. It is, in a sense, to treat them as if they are less than human and undeserving of respect and dignity. Examples are acts typically deemed "crimes against humanity," including genocide, torture, slavery, rape, enforced sterilization or medical experimentation, and deliberate starvation.<sup>18</sup>

Subparagraph 2 (c) of the article quoted below, refers to human rights violations as international crimes and emphasizes their serious and widespread nature. The examples given are slavery, genocide and apartheid. Since the draft articles have not acquired the force of an international treaty, their provisions can only be regarded as proposals. At the same time, there is no doubt that article 19, and in particular subparagraph 2 (c), does to some extent reflect current practice. It is also clear from the wording of subparagraph 2 (c) that those grave and widespread human rights violations which can be regarded as international crimes will include not only slavery, genocide and apartheid, but also other human rights violations of comparable gravity.<sup>19</sup>

### Structure and Elements of Trafficking and Infringement of Human Rights

According to Palermo protocol Trafficking in Human Beings is "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 labor or services,

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<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Economic and Social Council Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities "Definition of gross and large-scale violations of human rights as an international crime". Working paper by Mr. Stanislav Chernichenko in accordance with Sub-Commission decision 1992/109 E/CN.4/Sub.2/1993/10/Corr.1 issued on 11 August 1993:  
<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/0fbfa353eea4c65d802567620054f3d0?OpenDocument>

slavery or practices similar to slavery, servitude or the removal of organs. The consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the means set forth above have been used." This internationally approved definition has five elements:

- recruitment (false job offers, kidnapping, buying a person, etc.)
- physical transportation of the trafficked persons
- physical or psychological coercion and/or the deception involved in the offer exploitation of the work of the person as the final objective
- absence of informed consent <sup>20</sup>

The definition of violation of human rights has two essential elements

Willful Mind (Mens Rea)

Willful Action (Actus Reus)

These two elements in combination with aggression, war crimes and crimes against humanity, including genocide, are breaches of International humanitarian law and represent the most serious and hazardous violations of human rights. Trafficking in persons becomes an offence and a violation of human rights when the movement of the trafficked victim is non-consensual and the victim is confined to exploitative or servile work and life. Victims are subjected to coercive and abusive conditions such as forced labour, servitude and slavery, which are crimes, prohibited as human rights violations in international law. <sup>20</sup>

The structure and elements of human trafficking and violation of human rights give us assumption that there is a range of severe violations of human rights within the threshold of trafficking in human beings.

### **3.2 Infringement of Human Rights in Human Trafficking**

Making human rights the centre of all efforts to deal with trafficking, requires identification of the major rights that are involved in trafficking and related exploitation.

It is important to acknowledge that some rights will be especially relevant to the causes of trafficking (for example, the right to life and right against torture and inhuman, degrading treatment); others to the actual process of trafficking (for example, the right to be free from slavery); and still others to the response (for example, the right of suspects to a fair trial). Some rights are broadly applicable to each of these aspects. <sup>20</sup>

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<sup>20</sup> International Organization of Migration" The Nature of Trafficking" Important Points Migration for The Benefit of All <http://www.iom.int/jahia/Jahia/pid/676>

Violations of human rights are both a cause and consequence of trafficking in persons. Accordingly, it is important to place human rights at the centre of any measures taken to prevent, punish and suppress all forms of trafficking in persons.<sup>21</sup>

The first infringement, which will be discussed in this legal draft will be the violation of non-derogable right of victims of human trafficking that so called Right to Life which can be violated by the forms of threat and leads to deprivation of liberty or causing death to the close relatives in family, making them to stay within the threshold of human trafficking and commit any orders of traffickers.

### **3.2.1 Right to Life in Trafficking of Human Beings**

The obligation to suppress and prohibit human trafficking is becoming highly important, when the right to life of trafficked human beings is involved. During the recruitment, as the first stage of transportation to the country of destination and with the purpose of exploitation, as a final stage, right to life of victims of trafficking is endangered by all means. The only guarantee to survive is to commit orders of perpetrators of human trafficking.

As the real vivid example of violation of right to life is abortion of child while being recruited and exploited as prostitute which includes also contagious illness such HIV(AIDS) fatally affecting life and health of victim of trafficking.

Another example of infringement of right to life is threat and action of main perpetrators to harm or kill the relatives or children of trafficked people as threat of reprisals to family members back home. Intersection with human rights and trafficking is particularly seen in human trafficking in the form of sexual exploitation.<sup>22</sup> The question arises how we can protect people in such hazardous situation?

The Most Important Right for Human Being is Right to Life.

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<sup>21</sup> UN OHCHR commentary on Recommended Principles and Guidelines on Human Right and Human Trafficking "The International Legal Framework around Trafficking in Human Beings" New York and Geneva 2010

<http://ec.europa.eu/antitrafficking/entity.action;jsessionid=NZkTNY1ZJQP60t64xnrzpKH7nGvx4p09nCVkrwK1ddBynsKj21bl!-285985297?id=0537bd22-4175-4915-b89f577738665625>

<sup>22</sup> S&M Svengali" Sex Trafficking Case Nukualofa, Tonga (Matangi Tonga, Jan. 11, 2011) – In Tonga, a Chinese national, a woman residing in Nuku'alofa appeared at the Nuku'alofa Supreme Court)



There are some international treaties and conventions, which protect right to life of person as non-derogable human right.

But do they protect people who become victims of human trafficking?

*Universal Declaration of Human Rights (1948) (article 3)*

However, the UDHR did establish important principles and values which were later elaborated in legally binding UN treaties. Moreover, a number of its provisions have become part of customary international law. Article 3 upholds the right to life, liberty and security of the person.<sup>23</sup>

*International Covenant on Civil and Political Rights (1966) (articles 1, 4, 6)*

This main international treaty on civil and political rights, also known as ICCPR, is very specific about the right to life and the death penalty:

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

Article 4 further asserts that states are not able to derogate from the article 6 even in times of a public emergency.<sup>23</sup>

*Rome Statute of the International Criminal Court (1998) (Article 7j)*

Protects the right to life where it amounts to crimes of genocide, war crimes and crimes against humanity. Under the Rome Statute of the International Criminal Court (ICC), killing of persons either by direct murder or by inflicting conditions which bring about their death e.g. deprivation of food, water and medication come under the jurisdiction of the court if they amount to: crimes against humanity if such acts are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (article 7j):<sup>23</sup>

*Convention on the Rights of the Child (1989) (article 37)*

Prohibits the use of the death penalty for persons under 18 at the time of the crime. In addition, a number of other articles are concerned with ensuring the right of survival through the provision of essential food, water, health care etc. necessary for life itself.<sup>23</sup>

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<sup>23</sup> Human Rights Education Associates "Study Guides. Right to Life, Prohibition of Torture and Degrading/Inhuman Treatment, Right to Liberty and Freedom of Movement ; International and Regional Instruments of Protection and Promotion [http://www.hrea.org/index.php?base\\_id=159](http://www.hrea.org/index.php?base_id=159);  
[http://www.hrea.org/index.php?base\\_id=159#instruments](http://www.hrea.org/index.php?base_id=159#instruments);  
[http://www.hrea.org/index.php?base\\_id=134](http://www.hrea.org/index.php?base_id=134);  
[http://www.hrea.org/index.php?base\\_id=134#instruments](http://www.hrea.org/index.php?base_id=134#instruments);  
[http://www.hrea.org/index.php?base\\_id=148](http://www.hrea.org/index.php?base_id=148);  
[http://www.hrea.org/index.php?base\\_id=148#instruments](http://www.hrea.org/index.php?base_id=148#instruments)

*European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR), (Article 2 and 15)* This treaty protects the right to life and stipulates circumstances under which deprivation of life shall not be regarded as contravening this article where it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c) in action lawfully taken for the purpose of quelling a riot or insurrection (article 2). It also does not allow derogation from this principle even in times of emergency except for deaths resulting from lawful acts of war (article 15).<sup>23</sup>

*American Convention on Human Rights (1978) (article 4)*

The American Convention protects the right to life and restricts the situations in which the death penalty can be used. Countries that have not abolished the death penalty the death penalty may be imposed only for "the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime."<sup>23</sup>

The legal instruments and treaties enshrined above, show the protection of right to life of human being but they are not sufficient enough to protect the non derogable right to life of future and potential victims of trafficking in human beings. The reason is that the legal enforcement is not functioned properly due to the blur definition of trafficking in human beings, which hides the real violations of human rights such as right to life. A brilliant example in practice was the first judgment against trafficking in the case of *Rantsev versus Cyprus and Russia of European Court of Human Rights*,<sup>24</sup> where the death of the Russian girl had become the outcome of sexual exploitation as human trafficking and violation of right to life, which will be discussed in this legal draft.

### **3.2.2 Right of Protection and Prohibition against Torture and Inhuman or Degrading Treatment**

The second violation of Human Rights, which can't be separated from the first one is the Infringement of the Right to be protected against Torture and Inhuman or Degrading Treatment. This right is systematically violated by traffickers, when potential victims of trafficking had been abused, beaten, terrorized, coerced and deprived of liberty and freedom. Victims are beings kept in horrible, non-clean and inhuman conditions while they are becoming the subject of exploitation. Prohibition of Torture as a part of customary international law and jus cogens along with right to life, is actually happened and systematically violated in all stages of human trafficking.

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<sup>23</sup> Ibid

<sup>24</sup> European Court of Human Rights *Rantsev v Cyprus and Russia* (Application no. 25965/04) 2010

While being recruited and threatened, victims of trafficking are becoming the subjects of horrification, physical and psychological abuse, which is one of the methods of traffickers to make the purpose of trafficking as exploitation done.

As an example is the child abuse and forced prostitution as a severe form of psychological and physical abuse, which makes child forcibly become a subject of trade by his or her own parents.

Here are the main treaties and conventions, which protect right against torture and inhuman or degrading treatment, which can legally protect victims of trafficking but how they work in practice?

*Universal Declaration of Human Rights (1948) (article 5)*

This fundamental UN human rights document asserts, that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>23</sup>

Several provisions of the Universal Declaration of Human Rights have become part of customary international law, which means that they are binding on all states, regardless of whether the state is a party to the specific universal or regional instrument. *Torture is consequently prohibited by international customary law* whether it is committed on a widespread and systematic basis and, therefore such as trafficking or a crime against humanity, or committed against a single victim. The prohibition of torture is also an obligation for the entire international community, which all states have a right to enforce through the exercise of universal jurisdiction over suspects found in their territory.<sup>23</sup>

As an example of forms of torture and degrading treatment can be the inhuman and intolerable living conditions for trafficked people with absence of cleanliness, which leads to several health issues and even to death.<sup>25</sup>

*International Covenant on Civil and Political Rights (1966) (article 7)*

Torture is prohibited under article 7, which states "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." This provision cannot be suspended or limited even in times of emergency.<sup>23</sup>

*Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment (1984)*. This is the principal UN treaty concerned with torture. It has been adopted by UN General Assembly and came into force in June 1987.<sup>23</sup> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2002)

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<sup>23</sup> Ibid

<sup>25</sup> Frerot v. France (Application no. 70204/01) Judgment European Court of Human Rights, Strasbourg, 12 June 2007

Under article 2, the Optional Protocol sets up an expert body, a Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee Against Torture, to carry out inspection visits to places of detention and to submit confidential reports to the relevant authorities on how to prevent torture and ill-treatment. The Protocol also requires states to establish national bodies to make similar visits to places of detention.<sup>23</sup>

*Convention on the Rights of the Child (1989) (article 37)*

Article 37 of the UN Convention on the Rights of the Child determines that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment" and violations have been registered with the UN Committee on the Rights of the Child.<sup>23</sup>

*Rome Statute of the International Criminal Court (1998) (article 7)*

The Rome Statute specifically prohibits torture under various provisions, giving the International Criminal Court jurisdiction in such cases. If torture, defined as "intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions" (article 7e) is "committed as part of a widespread or systematic attack directed against any civilian population", it constitutes a "crime against humanity" (article 7).<sup>23</sup>

*European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (article 3)* This treaty, determines that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." This is a non-derogable right according to article 15.2, which means that states cannot place restrictions on it even in times of emergency.<sup>23</sup>

*American Convention on Human Rights (1978) (article 5)*

The American Convention stipulates, that "no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person" (article 5.2).<sup>23</sup>

The actual intersection of human rights, trafficking and crime against humanity can be seen in the final judgment of the case of *Jean Paul Akayesu versus Prosecutor (Appeal Judgment)*<sup>26</sup> where Chief Commander of Armed Forces had been charged and accused in murder, crime against humanity as extermination and other inhuman acts as trafficking in human beings.

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<sup>23</sup> Ibid

<sup>26</sup> Jean Paul Akayesu versus Prosecutor (Appeal Judgment) ICTR-96-4-T (1 June 2001)

The Court analysed charges of “enslavement as a crime against humanity” by extensively reviewing the international legal definition of slavery under customary international law. The court confirmed that the core definition from the 1926 Convention applies to enslavement in customary international law, defining the actus reus of enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person.” In a judgment that explicitly recognized the evolution of this definition in international law, the Trial Chamber identified the following factors to be taken into account in properly identifying whether enslavement was committed: “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”<sup>26</sup>

Furthermore Torture as one of the methods of common perpetrators through the forms of sexual, physical or psychological abuse, makes potential victims of trafficking become obedient and stay under control of traffickers through exploitation.

### **3.2.3 Right to Liberty and Security of Person.**

The Violation of the Right to Liberty and Security of Person is the third infringement of Human Rights where human trafficking and enslavement intersect with each other with the purpose of 'de jure' ownership in case of enslavement and 'de facto' ownership in matters of trafficking in human beings. Right to Liberty and Security of Person expressly includes in trafficking in human beings and crime against humanity.

Traffickers all over the world through the means of deception, coercion and threat and methods of recruitment and transportation, try to gain the most important right over the person, which is freedom and, using power and earning money as bait to get the potential 'de facto' ownership of the potential victims of human trafficking for further exploitation. As an actual example of enslavement and deprivation of right to liberty and freedom of movement can be vivid in the fact of possession of travel documents and passport or identity documents of victims by common perpetrators of human trafficking.

The following international and regional instruments determine standards for the freedom of movement for all people:

#### *Universal Declaration of Human Rights (1948) (article 13)*

This is the first international document that recognizes explicitly the right to freedom of movement of persons.<sup>23</sup>

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<sup>23</sup> Ibid

<sup>26</sup> Ibid

*International Convention on the Elimination of All Forms of Racial Discrimination (1965) (article 5)* This convention was established in order to eliminate all forms of racial discrimination. It aims to perform this task by setting down a list of guidelines as to how people should be treated, similarly to other human rights documents. Article 5 states that all people have the right to freedom of movement and residence within the border of the State, the right to leave any country, including one's own, and to return to one's country and the right to nationality.<sup>23</sup>

*International Covenant on Civil and Political Rights (1966) (article 12)* This is the foremost treaty dealing with the civil and political rights. It stipulates that everyone residing legally within a state has the right to choose his/her place of residence and has the right to move around freely. In addition all people also have the right to leave any country including their own and shall not be deprived of the right to enter back into their country.<sup>23</sup>

*ILO Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers within the Community*

This document provides for the full protection of workers within their respective communities or across national borders as with the case of migrant workers. The International Labour Organization (ILO) considers freedom of movement is a fundamental right of workers and their families and the right of freedom of movement requires that equality of treatment shall be ensured by law and common belief in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country.<sup>23</sup>

The potential infringement of right to liberty and security of person is enshrined in the judgment of the United States Court of Appeals for the District of Columbia Circuit based in Washington DC in case of Abdulwahab Nattah versus George W.Bush and L-3 Communications Titan Group's (Titan)<sup>27</sup> where US citizen became the potential victim of forced labour which may lead to trafficking and had been deprived from liberty and freedom of movement by his employment office which also will be discussed in this legal draft.

From these three examples of violations of human rights enshrined above, we can definitely presume that trafficking is a severe trade of human beings

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<sup>23</sup> Ibid

<sup>27</sup> Abdulwahab Nattah versus George W.Bush and L-3 Communications Titan Group's (Titan) Case. United States Court of Appeals for the District of Columbia Circuit Appeal May 28, 2010 No. 08-5119 from the United States District Court for the District of Columbia (Civil Action No. 06-700 (RCL))

based on infringements of human rights affecting life, health, dignity and liberty as well as right to speech and private life.

In this charter table you can actually see human rights and their infringements in case of human trafficking which gives us the reason to think that trafficking in human beings is severe and disastrous violation against human dignity, life, health and freedom.

<b>RIGHTS</b>	<b>INFRINGEMENTS</b>
The right to life, liberty and security	Limitation of liberty; abuse
The prohibition of torture and inhuman degrading treatment	Physical, psychological and sexual abuse
The prohibition of slavery and servitude	Being kept in complete dependence
The prohibition of coercion and compulsory work	Forcing someone to work and perform sexual services
The right to freedom and dignity	Deprivation and limitation of freedom
The right to privacy	Complete absence of privacy
The freedom of thought, conscience and religion	Limitation or refusal
The freedom of expression and speech	Complete absence of freedom of expression; retaliation for such
The right to health	Damage to health, deprivation of basic needs
The right to effective remedy	Absence or rare access to remedy <sup>23</sup>

As we can see from above, violations of non-derogable human rights are inseparable from human trafficking and crime against humanity such as enslavement and can be identified as the core grounds of trafficking to show the heinous degree of human trafficking. It means that trafficking in human beings can be elevated from international transnational crime into both crime against humanity and violation of human rights.

Is it possible to define Trafficking in Human Beings both as Crime against Humanity and Violation of Human Rights?

Next section will outline the advantages and disadvantages of human trafficking as violation of human rights in order to show in what case the definition of trafficking as violation of human rights or as crime against humanity will make it the heinous crime, which has explicitly hazardous impact on human life, liberty and health.

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<sup>23</sup> Ibid

### **3.3 Advantages and Disadvantages of Trafficking as Violation of Human Rights**

*Advantages of Human Trafficking as Violation of Human Rights* can be deployed when it comes to the right to life and right against torture as non derogable human rights and their infringements in Trafficking. As it is defined as part of customary international law, it can be considered by States prior and have privilege among other rights of individuals.

The idea of combination of these two definitions is, to give human trafficking the heinous effect in order to implement it into the threshold of mass atrocity crimes such as crime against humanity. Violations of non - derogable human rights are the essential part of trafficking in human beings in order to reach the final purpose of exploitation.

It means that if there are no violations of human rights occurred in human trafficking, this international transnational crime cannot be elevated to the crime against humanity. Why ?

Violations of human rights such as right to life, prohibition against torture and inhuman or degrading treatment are considered as “lex specialis” in international law prior to any other infringements of customary or legislative norms in international law (jus cogens).

International crime can be defined as crime against humanity if it has widespread, systematic effect and can be committed with the knowledge of attack on civilian population or humanity. In case of trafficking, which is already widespread and systematic due to its transnational nature, there are just these two essential elements (widespread and systematic) of crimes against humanity occurred without showing the real violations of human rights. The violations of non-derogable human rights. can serve as the essential factors for perpetrators who possess the knowledge of attack on humanity (mens rea) to commit trafficking in human beings (actus reus) and to make it severe and heinous. This assumption gives priority to human trafficking if it will be defined both as crime against humanity and as severe infringement of human rights.

*Disadvantages of Human Trafficking as Violation of Human Rights* are the following: *First*, the absence of criminalization of individuals and private sector, which will give the potential and future offenders a chance to hide and escape from individual criminal responsibility for the Trafficking as Serious Violation of Human Rights. *Secondly*, legal protection of victims of trafficking will be very weak and hard to identify, since the criminalization of traffickers as individuals or groups will work only in case of defining human trafficking as core crime and not as violation of human rights.

Next Chapter will analyse historical background of trafficking in human beings and will summarize it with statistics and international and regional



trends of human trafficking to emphasize the systematic effect of human trafficking in the world.

## **4 CHAPTER IV**

### **HISTORICAL BACKGROUND, STATISTICS, INTERNATIONAL AND REGIONAL TRENDS OF TRAFFICKING IN HUMAN BEINGS**

#### **4.1 History of Trafficking and White Enslavement**

This Chapter will outline the systematic and widespread effect of trafficking of human beings and its transnational nature around the world. It will also emphasize that enslavement is one of the types of trafficking enshrined in the history of trafficking and enslavement.

##### **Old Slavery**

History of human trafficking and slavery is indeed very ancient. There is ample evidence that right through ancient times, affluent people kept slaves for physical pleasure or manual labour. Over 400 years ago, Africans were carried over the Atlantic and exported to different parts of the world as bonded labour. Some people believe that human trafficking actually started in the 1700s when small children were exploited for work. These children were made to work for very long hours in factories and coal mines for little or no pay. The children whose parents had taken loans from their employers would be asked to allow their children to work without wages in order to pay off the loan. And usually this would end up as bonded labour where the children would not be allowed to leave even when they turned into adults.<sup>28</sup>

Then there is the other version and opinion that believes human trafficking actually started when African people were brought to the Americas to work as slaves. It is estimated that over 20 million people were forcibly brought from Africa and a staggering 20 per cent died en route due to horrible and unhealthy conditions in the ships transporting them. Right until the second half of the 19th century, slavery was a part and parcel of life in the United States, Russia and Middle East. However, by this time, the slaveholders lost their political clout and influence and slavery started to disappear. Although the British settlers who settled in the New World started the African slave trade, Britain was main country to push for an end to African slave trade.<sup>29</sup>

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<sup>28</sup> Alli Allawi "Human Trafficking: Irag: Case Study "The History of Human Trafficking and Slavery, Septemeber 2010 <http://www.freelegaladvicehelp.com/criminallawyer/trafficking/History-Of-Human-Trafficking-And-Slavery.html> .

<sup>29</sup> Tunde Obadina. "Slave trade: a root of contemporary African Crisis". Africa Business Information Services. <http://www.afbis.com/analysis/slave.htm>. Retrieved 19 September 2010.

## Arab Slave Trade White Slavery

Slave trade, including trade of sex slaves, fluctuated in certain regions in the Middle East up until the twentieth century. These slaves came largely from Sub-Saharan Africa (mainly Zanj), the Caucasus (mainly Circassians), Central Asia (mainly Tartars), Central and Eastern Europe (mainly Saqaliba). The Barbary pirates also captured 1.25 million slaves from Western Europe and North Africa between the sixteenth and nineteenth centuries. In contrast to the Atlantic slave trade where the male-female ratio was 2:1 or 3:1, the Arab slave trade usually had a higher female: male ratio instead, suggesting a general preference for female slaves. Concubinage and reproduction served as incentives for importing female slaves (often Caucasian), though many were also imported mainly for performing household tasks.<sup>30</sup> More generally, the term "White Slavery" variably described licensed prostitution, all forms of prostitution (licensed and unlicensed) and prostitution based on coercion and fraud. In Victorian Britain, campaigning journalist William Thomas Stead, (editor of the *Pall Mall Gazette*) procured a 13 year-old girl for £5, an amount then equal to a labourer's monthly wage (see the Eliza Armstrong case). Panic over the "traffic in women" rose to a peak in England in the 1880s. At the time, "white slavery" was a natural target for defenders of public morality and crusading journalists. The ensuing outcry led to the passage of antislavery legislation in Parliament. The criminal organization Zwi Migdal operated in white slavery and prostitution from the 1860s until 1939.<sup>31</sup> Parliament passed the 1885 Criminal Law Amendment Act, raising the age of consent from thirteen to sixteen in that year. In 1904, the Agreement for the Suppression of the White Slave Trade was signed in Paris and later ratified by some 100 governments. More international agreements followed, and many countries moved toward criminalization by abolishing licensed prostitution. In 1949 was signed The United Nations Convention on Suppression of Trafficking and Exploitation of Prostitution. Concerns about the perceived rise of transnational organized crime and the plight of people living in slavery-like conditions gave rise to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children which first time obliges States to criminalize human trafficking.<sup>32</sup>

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<sup>30</sup> Davis, Robert. *Christian Slaves, Muslim Masters: White Slavery in the Mediterranean, the Barbary Coast and Italy, 1500–1800*. Based on "records for 27,233 voyages that set out to obtain slaves for the Americas". Stephen Behrendt, "Transatlantic Slave Trade", *Africana: The Encyclopedia of the African and African American Experience* (New York: Basic Civitas Books, 1999), ISBN 0-465-00071-1.; Religions – Islam: Slavery in Islam. BBC. Retrieved on 2011-03-08. "Horrible Traffic in Circassia Women—Infanticide in Turkey," *New York Daily Times*, August 6 1856

<sup>31</sup> Cecil Adams, "The Straight Dope: Was there really such a thing as "white slavery"?" January 15, 1999

<sup>32</sup>The History of Human Trafficking PFP ADL-WG 2006, pages 3-5 <http://pfpdev.ethz.ch/SCORMcontent/70633/scos/7/index.pdf>

International and Regional Patterns of Human Trafficking will show the severity of this international crime and will emphasize widespread effect of trafficking enshrined in previous chapters.

## **4.2 International and Regional Trends of Human Trafficking**

I will show and argue that the regional and international trends of trafficking in person present the transnational nature of human trafficking as hazardous phenomenon under the scope of widespread and systematic attack on human beings disastrously affecting on their mental and physical health. Human trafficking is widespread - data taken from the United Nations Office on Drugs and Crime Database on Human Trafficking Trends document the trafficking of human beings from 127 countries to be exploited in 137 countries.<sup>33</sup>

### **1. Middle East and North Africa**

According to UNODC, there is not enough data available in this region to indicate a clear trend or pattern of human trafficking in Middle East and North Africa. Israel, Qatar and the United Arab Emirates are categorized as destination countries for victims who were trafficked from the Eastern Europe and Central Asia region. Victims of human trafficking in the Middle East are also from South and East Asia as well as Africa. The most common form of human trafficking in this region is sexual exploitation and domestic servitude. Children are exploited in prostitution (including child sex tourism), forced marriage, domestic servitude, and street begging and vending.<sup>33</sup>

### **2. Sub-Saharan Africa**

UNODC finds that there is significant intraregional trafficking in West, Central and South Africa. Victims of the West and Central Africa region are trafficked to other neighbouring countries such as Benin, Cote d'Ivoire, Gabon, Ghana, Nigeria, Liberia and Togo but also internally trafficked within the border. In Southern Africa, the victims identified by the state authorizes are from Mozambique, Malawi, the Democratic Republic of the Congo (DRC), Zambia and Zimbabwe as well as from East, South-East and South Asia.<sup>33</sup>

### **3. Europe and Central Asia**

Intra-regional trafficking is the major pattern reported for human trafficking in Europe and Central Asia. UNODC found that almost all of the countries in this region are both origin and destination countries for intra-regional trafficking, except Tajikistan and Turkmenistan which are exclusively countries of origin for trafficking victims. The Eastern Europe and Central Asia region is not a major trans-regional destination, however, victims originating from this region are identified in Western and Central Europe as well as neighbouring Asian countries.<sup>33</sup>

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<sup>33</sup> United Nations Office on Drugs and Crime (UNODC and United Nations Global Initiative (UN GIFT)"Human Trafficking: An Overview?" New York, 2008

The majority of trafficking victims in Europe and Central Asia are adult women, and sexual exploitation is the most common form of human trafficking in this region. However, trafficking for forced labour accounts for over one third of the total number of victims identified by state authorities in Western and Central Europe as well as in Central Asia. Women and men are also exploited in domestic servitude and forced labour in agriculture, construction, fishery, manufacturing, and textile industries. Children are trafficked for the purposes of sexual exploitation, forced marriage and forced begging.<sup>33</sup>

#### 4. South Asia

UNODC's global report indicates that intraregional trafficking affects Nepal and Bangladesh as origins of trafficking victims and India as a destination country. The United States Department of State reports that Bangladeshi men and women willingly migrate to Middle Eastern and South Asian countries for work through recruiting agencies, and the recruitment fees contribute to the placement of workers in debt bondage or forced labour once overseas. Bangladesh and India also experience domestic trafficking. Victims of trafficking in South Asia are mainly adult women and children of both sexes. Trafficking for sexual exploitation is again the most common form of trafficking reported, yet trafficking for domestic servitude and forced labour are equally prominent in the region.<sup>33</sup>

#### 5. East Asia and the Pacific

UNODC reports that East Asian countries exhibit the most complex human trafficking flows as this region has the widest range of trans-regional trafficking between countries of origin and the destination of victims. For example, Thai victims are found in Southern Africa, Europe and the Middle East while Chinese victims are identified in Europe, the Middle East, the Americas and Africa. Intra-regional trafficking is also a major issue as victims from the East Asian countries are largely trafficked to Australia, Japan and Malaysia. They willingly migrate for work in the region and are subsequently subjected to conditions of forced labour in the agriculture, construction, finishing, manufacturing, plantation, and service (hotels, restaurants, and bars) sectors.<sup>33</sup>

Children in this region are often trafficked for the purpose of sexual exploitation, domestic servitude, and forced begging.<sup>33</sup>

#### 6. Latin America and Caribbean

In Latin America and Caribbean, intra-regional, trans-regional and domestic trafficking patterns are reported. At the regional level, Bolivia, then Dominican Republic, Ecuador, Nicaragua and Paraguay appear to be the countries of origin for trafficking victims while Chile, Guatemala, and the East Caribbean countries are mainly destination countries.<sup>33</sup>

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<sup>33</sup> Ibid

If the transnational crime will ever be defined in the Statute of International Criminal Court as international crime, human trafficking should state on the top level of dangerous and severe crimes. According to the international and regional trends of human trafficking the countries of origin transit and destination gave persuasive answer on question does the human trafficking is widespread crime. Information provided in this section has been taken from both the UNODC Global Report on Trafficking in Persons and the US Department of State TIP Report 2009. Based on data gathered from countries in 2007 and 2008, the UNODC Global Report offers a global assessment of the scope of human trafficking and provides an overview of trafficking patterns in different regions. The US Department of State TIP Report covers updated on global trafficking trends during the period of April 2009 through March 2010 and provide an assessment of each government's actions to combat trafficking in persons.<sup>33</sup>

Next Chapter will emphasize the identification of perpetrators and individual criminal responsibility for trafficking in human beings.

## **5 CHAPTER V**

### **MAIN ACTORS AND COMMON PERPETRATORS IN HUMAN TRAFFICKING, INDIVIDUAL RESPONSIBILITY AND STATE RESPONSIBILITY OR OBLIGATION TO PREVENT TRAFFICKING IN HUMAN BEINGS (POLICE AND MIGRATION)**

#### **5.1 Main Actors and Common Perpetrators of Human Trafficking Identification and Tactics**

There are three parties in the process (recruitment, transportation and exploitation) of formulation of trafficking in human beings; first, the main actors of trafficking in human beings as offenders and victims of human trafficking and second, the consumers or buyers of human service of potential and future victims of trafficking as the abettors and suppliers of trafficking in human beings. This consensus completely emphasize the severity of this international transnational crime and the necessity to change the existed definition of human trafficking into the threshold of the more heinous crimes based on violations of human rights.

Trafficking can dealt with both from the demand and supply sides. It is important to discourage the demand that fosters all forms of exploitation of persons and leads to human trafficking. Demand usually refers to the desire for a particular commodity, labour or service, but in the context of human trafficking, the demand is for labour that is exploitative or services that breach the human rights of the person delivering them.<sup>34</sup> It generally refers

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<sup>33</sup> Ibid

<sup>34</sup> United Nations Office on Drugs and Crime (UNODC), Global Initiative to Fight (UN.GIFT) "Human Trafficking Combating Trafficking in Human Beings" A Handbook for Parliamentarians N 16 2009 pages 70 -71

to the nature and extent of the exploitation of the trafficked persons after their arrival at the point of destination, as well as to the social, cultural, political, economic, legal and development factors that shape the demand and facilitate the trafficking process.

Practically, this means that it is often difficult to differentiate between demand for labour and services, which are legal and acceptable (and a natural element of productive markets) and those that are not. The employer of labour or the consumer of services may not be aware that the labour or services are being provided by a person who has been trafficked. Analysis of demand for trafficked persons is thus best undertaken in the context of a wider analysis of certain types of labour or services in which trafficked persons could be exploited.<sup>34</sup>

Within the process of recruitment, transportation and exploitation, trafficking in human beings triggers with three levels of demand

Evidence indicates three levels of demand related to human trafficking:

- Employer demand (employers, owners, managers or subcontractors);
- Consumer demand (clients in sex industry), corporate buyers (in manufacturing), household members (domestic work);
- Third parties involved in the process (recruiters, agents, transporters and others who participate knowingly in the movement of persons for the purposes of exploitation).<sup>34</sup>

Despite the fact that many countries criminalize consumers of certain services of victims of trafficking, they are not considered as the perpetrators of trafficking in human beings.

In this Chapter I will emphasize more the legal nexus between identification and tactics of common perpetrators of human trafficking as one of the actors of trafficking in persons which creates individual criminal responsibility.

Who are the main perpetrators of human trafficking and who takes criminal responsibility for this infringement of human rights?

For clarification of this situation, I will turn to profile of common perpetrators and their tactics in order to show the hidden activities of several entities concerning human trafficking. Common Perpetrators are the individuals, organized groups, gangs or legal entities who are engaged in process of trafficking in human beings as executors, organizers or abettors of this international transnational crime. As offenders, they foster human trafficking through the Actions (recruitment, transportation, transfer, harbouring or receipt of persons), Means (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

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<sup>34</sup> Ibid

payments or benefits to achieve the consent of a person having control over another person) and Demand (consumption of human services and profit) for achieving the final Purpose (Exploitation).<sup>35</sup>

Importantly, Article 9, paragraph 5 of the Trafficking in Persons Protocol states that “States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”

According to the provisions of this Article demand and supply identify the actual perpetrators and consumers of trafficking of human beings and the possibility to punish buyers of human service with the knowledge of commitment of trafficking in human beings.

In order to define individual responsibility in human trafficking we need to know *first*, who committed the crime and second which methods had been used by perpetrators in order to achieve the final purpose of exploitation there are two important factors need to be discussed, first, Identification and next, Tactics of Perpetrators in Trafficking of Human Beings.

#### Identification of Main Perpetrators of Human Trafficking

Human trafficking undermines the safety and security of all nations it involves. Responding to human trafficking requires attention on various stakeholders such as national governments, national government agencies (e.g. law enforcement, immigration, and judiciary departments), the media, corporations/ businesses, academics, and individuals, which are mostly the hidden key perpetrators or organizers of trafficking in human beings.

Before applying to the tactics of main perpetrators the analysis of the profile of common offenders of trafficking will outline the participation of state and non-state actors in trafficking of human beings.

Profile of common perpetrators generally varies:

- *Individuals* may facilitate sale and purchase of minors and children in trafficking domestic violence and child abuse through sexual exploitation, forced labour and slavery) as executors of trafficking in human beings
- *Organized Criminal Groups or Gangs* may facilitate human trafficking with the means of abduction and deception, through assault, harassment, threat and revenge or torture) as organizers of trafficking in human beings
- *Legal Entities and Business Companies* may facilitate human trafficking to persuade, threat and harass potential and future victims with provision of the financial support and accommodation and necessary means (weapons) of threat and torture as abettors of trafficking in human beings

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<sup>35</sup> “Evaluation of United Nations Global Initiative to Fight Human Trafficking” Project number GLOS83 Final Draft, Dahlberg Global Development Advisors in cooperation with the Independent Evaluation Unit (IEU) of the United Nations Office on Drugs and Crime (UNODC) February 2011, Vienna

Perpetrators are usually using the following entities to hide their criminal activities which makes trafficking in human beings as one of the heinous as international transnational crimes in the world.

➤ Governments: Affluent and not so affluent, highly placed individuals in government both military, paramilitary, security, religious, civilians and businesses.

➤ Law Enforcement, Judiciary and Immigration offices: Educated and illiterate, almost anybody who could buy the law enforcement, migration and the judiciary.<sup>36</sup>

These two categories may affect the growth of trafficking in human beings since the main offenders can be hidden under the immunity of protection by States and state actors through political or financial independence with action or omission to prevent or suppress trafficking may involuntarily facilitate the main traffickers in their criminal activities as abetting the process (recruitment, transportation and exploitation) of trafficking.

➤ Private Sector (business and company owners):<sup>36</sup> The common denominator and trigger of these two categories of perpetrators as it states above, is financial ability. Governments may involve in the process of violation of the rights of people who had been trafficked and transferred out of the border. In this case state actors are becoming also one of the participants of trafficking in human beings along with internal and national organizations and individuals who actually commit execution of trafficking in human beings.

As we can see from above, the perpetrators are varied within the power and financial ability. The tactics and methods of perpetrators show the severity of this crime and fatal effect against humanity.

### Tactics of Main Perpetrators of Human Trafficking in International Law

From the first moment of imprisonment, victims of trafficking are exposed to intense physical and mental abuse. In order to break them down to submission, traffickers will beat, starve, isolate and rape victims for as long or as many times as it takes. Some traffickers keep their victims under lock and key. Less blatant techniques are much more common.<sup>37</sup>

The modus operandi (way of operating) of traffickers)

#### Recruitment phase<sup>37</sup>

Usually some kind of trickery:

- Advertisements in newspapers and other media for other employment
- False job offers that promise good salaries
- Promise of a better life

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<sup>36</sup> Social Development Notes, Conflict, Crime and Violence No 122/December 2009, supra note 3, page 9

<sup>37</sup> Task Force on Human Trafficking, "From Beginning to End: The Chain of Trafficking, "Tactics of Perpetrators/Impact on Victims" Jerusalem, Israel



- Bribes for go-betweens - usually someone that the recruited-trusts - boyfriend, girlfriend, relative - to lure the victim. This method is increasing.

Transportation phase:<sup>37</sup>

- Can be smuggled or taken legally across borders
- Held in transit houses once across border.
- Passports and documents confiscated by traffickers.
- Drugged, raped, gang raped at the transition houses to be broken in for prostitution, if being trafficked for the sex industry.

Exploitation phase: <sup>37</sup>

- The small time trafficker sells victims to anyone who needs them.
- Syndicates and triads move victims around internally and internationally
- Victims can be bought and sold over and over.
- Victims are made to work long hours to make the maximum profit for the trafficker.
- Victims can be disposed of when no longer of use to the trafficker.

Methods of controlling victims

Traffickers make use of psychological and financial control, mechanisms which may minimise the need for physical violence.

- Debt Bondage

A debt bond is usually a high figure amounting to thousands of Rands that in no way relates to the actual expenditure incurred by the traffickers.

The traffickers often add their "fees" to the travel costs to create an even larger debt bond.<sup>38</sup>

The trafficker holds the costs of food and accommodation against victims.

- Isolation

Travel documents are confiscated by the traffickers if victims are taken to another country - this robs the victims of their official identity and makes it difficult for them to seek help.<sup>38</sup>

Victims can be kept in places where they cannot speak their mother tongue and are kept away from anyone with similar background. They are often prevented from making any kind of phone call, or sending or receiving any kind of communication.

Victims can be kept locked in rooms for fear they escape.

- Confiscation of documentation and money<sup>38</sup>

The victim has no freedom of movement without proper documentation; without money the victim is trapped

- Blackmail<sup>38</sup>

• If trafficked to another country illegally, traffickers exploit the victims' fear of police and fear of being deported. Convincing victims they will be imprisoned or deported if they are discovered;

- Use of violence<sup>38</sup>

Violence can be physical and psychological to create fear in the victim.

- Use of threat of reprisal against the victims' families.

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<sup>37</sup> Ibid

<sup>38</sup> Counter Trafficking in Persons Desk (CTIP) IOM's (International Organization for Migration) Southern African Counter-Trafficking Assistance Program (SACTAP) page 6-8

Use or threat of violence against the victims or the victims' family or friends; Use or threat of shaming the victims by exposing their circumstances (particularly in situations of sexual exploitation) to family or friends

Control of the victims' money, e.g., holding their income for "safe-keeping." Traffickers are adept in refining and adapting these techniques. Their aim – whether used singly or in combination – is to instill fear and a sense of futility in victims.<sup>38</sup>

The consequences of Trafficking in Persons will emphasize the hazardous effect of human trafficking on individuals and society as such.

For the Country<sup>38</sup>

Trafficking is increasingly being taken over and controlled by organised criminal networks, which leads to the growth / increase in the size and capacity of these organised criminal networks. This poses a range of serious risks to the stability of societies in general, especially the integrity of society, honest labour relations, etc.

For the Individual<sup>38</sup>

Most importantly, at the humanitarian level trafficking inflicts very grave and sometimes fatal harm to victims. Short and long term effects include:

- Diseases and stunted growth in minors
- Ostracised by family and communities
- Loss of moral and spiritual development opportunities
- Drug dependency
- Permanent damage due to physical violence
- Severe psychological damage from premature/forced sexual activity
- Exposure to sexually transmitted diseases and HIV / AIDS
- May be treated as criminals and face difficult re-integration on returning home.

For the Community<sup>38</sup>

Trafficking also has detrimental consequences for the community, as there is a greater presence of criminal organisations and these groups can lead to problems of national security. Repeated violations of national legislation ultimately result in a decline in public confidence in government.

## **5.2 Individual Responsibility in Trafficking in Human Beings**

There are several important implications for the international legal system when it comes to the heinous effect of trafficking in human beings. One of these implications is individual responsibility enshrined in the Rome Statute of International Criminal Court, which states:<sup>39</sup>

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<sup>38</sup> Ibid, pages 8-9

<sup>39</sup> The Rome Statute of International Criminal Court Article 25

“1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime, which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law. ”<sup>39</sup>

According to the provisions of this article under the threshold of trafficking individual responsibility is the criminal liability of individuals who commit, abet or organize this international transnational crime with the purpose of exploitation.

Principle 12 requires States to criminalize trafficking, its component acts and related offences. It is drawn directly from the criminalization under the provision of the Trafficking Protocol (art. 5), which has been described as “*a central and mandatory obligation of all States parties to [that instrument]*”. The European Trafficking Convention contains a similar provision (art. 18).<sup>40</sup>

International transnational law, which regulates provisions concerning human trafficking and other transnational international crimes such as drug

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<sup>39</sup> Ibid,

<sup>40</sup> United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1 (2002).

abuse and as opposed to International Criminal Law does not create individual responsibility under international law and therefore that the States remain the locus of penal power. The Trafficking Protocol belongs to this category of international law. Direct control of the offence of trafficking may become possible at the international level. There are two practical advantages in doing so. First, States may be able to avoid retaliation or corruption in the form of violence, intimidation and bribery perpetrated by traffickers. Secondly, the victims of trafficking are able to participate in the proceedings against traffickers. National criminal justice systems are more vulnerable to these practices as it may be easy for traffickers such as organized criminal groups, to influence them to advance their business of trafficking.<sup>41</sup>

Next section will outline the state responsibility or obligation to prevent suppress and punish trafficking in human beings.

### **5.3 State Responsibility or Obligation to Prevent Human Trafficking**

States may sometimes be reluctant to accept legal responsibility for trafficking and for the violations of human rights that are integral to the trafficking process. They may argue, for example, that the primary wrong of the trafficking and associated harms has been committed by a criminal or groups of criminals and not by the State itself. The State might also argue that it has done everything possible to prevent the harm. Determining whether State responsibility exists in a particular situation when, first, the situation, action or omission is attributable to the State and second, the situation, act or omission is a breach of an international obligation.<sup>42</sup>

The question of whether a particular situation, act or omission can be legally attributed to the State is a matter for the international rules of State responsibility. In some situations, the attribution of legal responsibility can be a straightforward matter because the situation, or the act or omission that led to it, can be directly tied to a public official or institution. Actions (or the inaction) of courts, legislatures, executive bodies and public officials operating in their official capacity are all examples of conduct that are directly attributable to the State (art. 4). Whether the body/official is operating in an “official capacity” will be easily answered in the affirmative where “the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it” (art. 7, commentary, Para 8)<sup>42</sup>

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<sup>41</sup> Tom Obokata “Trafficking of Human Beings as Crime against Humanity; Some Implications for The International Legal System!” page 445, *International and Comparative Law Quarterly* 54 Int'l & Comp. L.Q. (2005)

<sup>42</sup> Commentary of Recommended Principles and Guidelines on Human Rights and Trafficking (N 2 and 12) Office of United Nations High Commissioner, New York Geneva 2010

On 22 February 2001, in case of *Prosecutor versus Kunarac*, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia found *Dragoljub Kunarac* guilty of crimes against humanity on the counts of enslavement, rape and torture as well as violations of the laws and customs of war on the counts of rape and torture.<sup>43</sup>

This is the example of State responsibility through state authorities such as army commander Kunarac who gave orders to annihilate and destroy non serb civilian population From April 1992 to February 1993 in the e area of Foca with the means of enslavement, torture and in human degrading treatment.

Human trafficking from prospective of crime against humanity can be considered as heinous crime because of its gravity and dangerous effect on humanity. Attribution or participation of State in trafficking may be revealed through the state obligation to prosecute, suppress and punish perpetrators of trafficking in human beings." According to Bassiouni: "The prevailing contemporary view is that "crimes against humanity" are those crimes which are committed as part of "state action or policy" for state actors. That view is evident in the use of such contemporary terms as "widespread" and "systematic" which are included in recent formulations of "crimes against humanity."<sup>44</sup>

For that purpose, I will outline the main obligations of States in case of Trafficking in Human Beings.

The very first obligation placed upon the state by the Palermo Protocol is that the state must recognize trafficking as a specific and serious crime. In order to fulfil this obligation, the first step that the state must undertake is to define what actions constitute trafficking. Article 5 of the U.N. Protocol provides that "[e]ach state party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol." Therefore, a state must recognize trafficking, in all its forms, as a specific offense. It is not enough for states to recognize trafficking as a crime; they must also recognize trafficking in persons as a serious crime. In order to recognize trafficking as a serious crime, the penalties for trafficking must reflect the severity of the crime. In order to comply with the international law requirements, a state must recognize trafficking, in the broad definition of the word, to be a crime of a serious nature. Consequently, failure of a state to enact specific anti-trafficking legislation that provides for an appropriate sentence for trafficking, in accordance with the Protocol against trafficking in human beings, constitutes a violation of the state's international obligations.<sup>45</sup>

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<sup>43</sup> Appeals Chamber Judgment of International Criminal Tribunal of the former Yugoslavia in the Kunarac, Kovac and Vukovic (Foca) CVO/ P.I.S./679-E The Hague, 12 June 2002

<sup>44</sup> MS Bassiouni "Crimes against Humanity" International Criminal Law (second edition), Transnational Publisher, 1999, New York supra note 64, pp. 86-87

<sup>45</sup> Mohamed Y. Mattar " State Responsibilities in Combating Trafficking in Persons in Central Asia" pages 169-172

The second international responsibility of the state is to undertake measures with respect to prevention of trafficking in persons. The Palermo Protocol provides that “State Parties shall establish comprehensive policies, programs and other measures to prevent and combat trafficking in persons. Such measures include, but are not limited to, “research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.” In addition, these measures should include steps “to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.” As a part of trafficking prevention, a state must also educate potential victims to the dangers of trafficking. The state must initiate informative campaigns targeting vulnerable or high-risk groups within society. A state is obligated to enact necessary preventive measures as a part of its international obligations. Consequently, failure of the government, or its inaction, in preventing trafficking in persons constitutes a violation of its obligations under international law.<sup>45</sup>

A state’s third international obligation is to protect the victims of trafficking. The Palermo Protocol does not use mandatory language with respect to this obligation. Rather, the Protocol only calls upon the state parties to protect the privacy and identity of victims of trafficking in persons “[i]n appropriate cases and to the extent possible under [their] domestic law.” This can include “making legal proceedings relating to such trafficking confidential.” Further, states parties are only required to “consider implementing measures to provide for the physical, psychological, and social recovery of victims of trafficking in persons”.<sup>45</sup>

Finally, the Palermo Protocol provides that the state parties should merely “endeavour to provide for the physical safety of [such] victims,” provide for “legal . . . measures that offer victims of trafficking in persons the possibility of obtaining compensation for damages suffered,” and only “consider” granting a victim of trafficking residency status. Nonetheless, the Protocol to prevent, suppress and punish trafficking in human beings establishes state responsibility in protecting victims of trafficking. This obligation to protect the victims of trafficking in persons implies that states must treat a trafficked person as a victim, not as a criminal. This means that states must not criminalize the act of the trafficked person and should not penalize the victim for illegal acts, such as illegal immigration or prostitution, as long as these acts have been committed in relation to the act of trafficking itself. It also means that states should not summarily deport the victims of trafficking; instead, they should consider granting them residency status.<sup>45</sup>

According to the Palermo Protocol, a state has the international responsibility to take necessary measures towards repatriating the victims of trafficking.<sup>45</sup> The country of origin “shall facilitate and accept, with due regard for the safety of [the victim of trafficking in persons], the return of

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<sup>45</sup> Ibid

that person without undue or unreasonable delay.” This means that states have a basic duty to assist their citizen and permanent resident victims to return home. In addition, the country of origin “shall agree to issue such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.”<sup>45</sup>

This means that a state has the responsibility to ensure the safe return of the trafficked victim, which includes the issuance of travel documents for the victim, since in most trafficking cases, the trafficker confiscates the victim’s travel documents. This responsibility must also encompass reintegration, since in many cases the community rejects the victim of trafficking. Accordingly, the victim faces threats of reprisals by the trafficker as well as the societal shame of having worked in prostitution. The prevailing societal view that “women who are being trafficked, are only involved in voluntary prostitution” further reinforces this tendency. Consequently, it is social suicide for victims to disclose their trafficking stories as such revelations make it “almost impossible for [them] to be re-accepted and [re]integrate[d] in[to] their communities.” The International Organisation of Migration (IOM) suggests, that “victims’ needs are often overlooked as a result of inadequate knowledge to assist them.” Therefore, to overcome these problems, it is necessary to raise awareness of the problem of trafficking among local law enforcement and social welfare officials.<sup>45</sup>

The state’s responsibility in combating trafficking in persons under the fifth international Palermo Protocol is the obligation to prosecute. While this responsibility is not directly stipulated under the UN Protocol against Trafficking, its existence is implied since effective enforcement of anti-trafficking provisions is not possible without prosecuting the traffickers. Consequently, a state would be in violation of its international obligations where it fails to investigate cases of trafficking or to punish traffickers. In many situations of trafficking, particularly those that are widespread, serious and intractable, there will be some level of direct or indirect involvement by public officials. Direct involvement refers to situations whereby public officials are actually a part of the trafficking process; for example as recruiters, brokers or exploiters.<sup>45</sup>

Examples of complicity in trafficking through less direct forms of involvement include migration as external and police as internal law enforcement facilities as follows:<sup>45</sup>

- Border officials accepting bribes or inducements to permit the passage of persons who may be trafficked;
- Law enforcement officials (including international peacekeeping or international military personnel) accepting favours in exchange for protection from investigation or prosecution;
- Labour inspectorates or health and safety officials accepting bribes to certify dangerous or illegal workplaces;
- Law enforcement or other public officials (including international peacekeeping or international military personnel) maintaining commercial

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<sup>45</sup>Ibid

interests in businesses using the services of trafficked persons, such as brothels; and

- Criminal justice officials, including prosecutors and judges, accepting bribes to dispose of trafficking cases in a particular way.<sup>45</sup>

Public-sector complicity in trafficking, whether direct or indirect, undermines confidence in the rule of law and the fair operation of the criminal justice process. It fuels demand for illegal markets such as trafficking, and facilitates the efforts of organized criminal groups to obstruct justice. Public-sector complicity in trafficking exacerbates victim vulnerability and renders almost impossible the full discharge of a State's obligation to investigate and prosecute trafficking cases with due diligence.<sup>45</sup>

Principle 6 of Principles and Guidelines on Human Rights and Trafficking, United Nations High Commissioner For Human Rights E/2002/68/Add.1 (2002) is directed at States and requires them to use all reasonable efforts to identify, eradicate, investigate and punish public-sector involvement in trafficking.

As we can see the issue of responsibility for trafficking in human being either with individual or state character is quite hidden and to identify the real perpetrator sometimes seems to be impossible. For that reason defining human trafficking as one of the heinous crimes from human rights prospective will give possibility for the human rights norms apply as *ius cogens* in case of individual criminal responsibility of non-state actors and will increase the awareness of states to facilitate direct legal enforcement mechanisms against human trafficking.

## **6 CHAPTER VI**

### **LEGAL STATUS, IDENTIFICATION AND PROTECTION OF VICTIMS OF TRAFFICKING IN HUMAN BEINGS**

Protection of victims as subjects of trafficking in human beings is the core issue which needs to be outlined because treatment of most of the states concerning the legal status of victims is still unclear and even leads to the criminalization of victims in international law, their negative treatment as perpetrators and become the serious obstacle to find real perpetrators of human trafficking as the main actors of this infringement of human rights.

This gap in International Criminal Law can be filled if states will aware of the serious and dangerous effect of trafficking on human beings. The implementation of right definition of human trafficking into the International legislation can lead to decrease of trafficking in humans.

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<sup>45</sup> Ibid



## 6.1 Victims of Human Trafficking, Identification and Status

Victims of human trafficking as one of the main actors of trafficking in human beings, people who are becoming subjects of recruitment, deception, persuasion and abduction, which leads to future exploitation.

The European Convention defines “*victim*” as “any natural person who is subjected to trafficking in human beings “.<sup>46</sup>

Trafficking in human beings is a sensitive and complex issue. Member states of the European Union have not yet formulated harmonized notions either of trafficking or of the fight against it. Only those countries, which have developed structural policies to address the issue of trafficking (for example, Italy, Belgium and the Netherlands) have government-organized protection and assistance programs. Proposed measures have general and minimal characteristics, and apply in all cases.<sup>47</sup>

People, who are traded illicitly and exploited are victims of human trafficking. These people are often vulnerable, as a result of poverty, age, social situation, a handicap, or even because of their marital status.<sup>47</sup> They are often found to be illegal migrants lacking proper working papers or a residence permit (for example, they may hold only a tourist visa, or possess a forged passport, or present themselves, using a false identity, as asylum seekers).

As a result of trafficking most of the victims of this phenomenon possess the psychological pressure and fear of non possibility to escape with self motivation concerning perpetrators as the sole saviour in life. This pressure illness called Stockholm syndrome.

For the purpose of this research draft, now I will outline the legal protection of potential and future victims of trafficking in human beings to present actual legal mechanisms, which tend to protect and defend victims of trafficking.

## 6.2 Legal Protection of Victims of Trafficking in Human Beings

Protection of the victims of trafficking in human beings as one of the main issues against trafficking which includes security, psychological and legal

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<sup>46</sup> The Council of Europe Convention on Action against Trafficking in Human Beings Warsaw, 16 May .2005 Article 4

<sup>47</sup> “Assisting Victims of Trafficking in Human Beings” guidebook, Paris 2003

assistance, rehabilitation and reintegration into society. The first country, which established the protection mechanism for the victims of trafficking, before the main treaty against human trafficking (Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons) had been acted in December 2000, was the United States of America. In October 2000, the Trafficking Victims Protection Act of 2000 (TVPA) (Public Law 106-386) was finally enacted in the Congress of The United States of America. Prior to that, no comprehensive Federal law existed to protect victims of trafficking or to prosecute their traffickers. That is why the example of the United States is unique when it concerns to protection of current and potential victims of trafficking in human beings. Human trafficking is increasingly been committed by organized, sophisticated criminal groups, and is the fastest growing source of profits for organized criminal enterprises worldwide. Profits from the trafficking industry contribute to the expansion of organized crime in the U.S. and worldwide.<sup>48</sup>

### *Trafficking Victims Protection Reauthorization Act of 2003*

In 2003, the Bush Administration authorized more than \$200 million to combat human trafficking through the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA).

The U.S. Department of Health and Human Services has a significant role in implementing the law's victim centred, compassionate approach to finding and aiding the victims of this modern-day slave trade.

Most of countries nowadays started to implement in their national legislation the legal mechanisms for protection, rehabilitation and reintegration of victims of human trafficking but in the meantime, there are a few countries, which have domestic law that protects victims of trafficking. The United States has the most efficient and fast growing mechanism and legal enforcement in case of legal protection of victims of trafficking.

Protection and assistance of victims of human trafficking can include:

#### Identification and Protection of victims<sup>49</sup>

Correct identification of the trafficking victims in order to protect and assist them. According to the convention, the authorities dealing with trafficking should co-operate with each other and be assisted by trained and qualified experts who will help them to identify the victims and to issue residence permits when appropriate. In those cases where there are reasonable grounds to believe that a person has been a victim of trafficking, states are asked to refrain from expelling that person from their territory until the identification process is completed. There are special provisions for child victims who are particularly vulnerable.

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<sup>48</sup> Victims of Trafficking and Violence Protection Act, October 28, 2000 22 USC 7101

<sup>49</sup> Department of Health and Human Services United States of America "Fact Sheet Trafficking Victims Protection Act of 2000

Protection of private life <sup>49</sup>

Private life should be protected through appropriate management of data by the authorities and through the promotion of responsible behaviour of the media as it is essential for the victims' physical safety but also to preserve their chances of social reintegration.

Assistance for the victims of trafficking <sup>49</sup>

The objective is to ensure their physical, psychological and social recovery, and the provision of appropriate and secure housing, medical and material assistance, counselling and information (in particular legal advice) in a language they understand, financial support, employment and training opportunities (including the possibility of obtaining work permits)

As we can see the legal status and protection of victims of trafficking in human beings is very blurred and needs to develop with raising awareness about human trafficking as severe and dangerous phenomenon.

For that purpose, trafficking can be identified either as crime against humanity or as violation of human rights, which will give the potential and future victims of trafficking courage and confidence to identify themselves and testify against common perpetrators of human trafficking for the purpose of strengthening the position of victims of trafficking and their protection.

## **7 CHAPTER VII**

### **THE PALERMO PROTOCOL TO PREVENT, SUPPRESS AND STOP TRAFFICKING IN HUMAN BEINGS, AND NATIONAL IMPLEMENTATION OF LEGISLATION AGAINST TRAFFICKING**

Hereby I will present the scope of criminalization of main offenders of human trafficking and protection of victims of human trafficking through the advantages and disadvantages of the main treaty, which criminalizes trafficking in human beings. The Analysis of Palermo Protocol tends to show, which provisions are positively or negatively affecting criminalization and identification of main perpetrators and protection of victims of trafficking in human beings.

#### **7.1 Palermo Protocol and Criminalization of Trafficking**

The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. It opened for signature by Member States at a High-level Political

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<sup>49</sup> Ibid

Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003. It is the first global legally binding instrument with an agreed definition on trafficking in persons. The intention behind this definition is to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases. An additional objective of the Protocol is to protect and assist the victims of trafficking in persons with full respect for their human rights. According to the recent information from the United Nations office on Drugs and Crime Palermo Protocol has been signed by 117 countries and there were 143 parties.<sup>50</sup>

#### *Advantages of Palermo Protocol*

Palermo Protocol enshrines the following advantages and guidelines for states against trafficking in human beings<sup>51</sup>

- That trafficked persons, especially women in prostitution and child labourers are no longer viewed as criminals but as victims of a crime
- That global trafficking will be answered with a global response. Although organized crime such as traffickers, smugglers, pimps, brothel keepers, forced labour lords, enforcers, and gangs are powerful forces organized cooperation by police, immigration authorities, social service agencies and NGOs is encouraged by this Protocol (Art. 10)
- That there is now an accepted international definition of trafficking and an agreed-upon set of prosecution, protection and prevention mechanisms on which to base national legislation against trafficking, and which can serve as a basis for harmonizing various country laws
- That all victims of trafficking in persons are protected, not just those who can prove force (Art. 3a and b)
- That the consent of a victim of trafficking is irrelevant (Art. 3b)
- That the definition provides a comprehensive coverage of criminal means by which trafficking takes place, including not only force, coercion, abduction, deception or abuse of power, but also less explicit means, such as abuse of a victim's vulnerability (Art 3a)
- That this new international definition of trafficking helps insure that victims of trafficking will not bear the burden of proof (Art 3b)<sup>51</sup>

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<sup>50</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime United Nations, Treaty Series, vol. 2237, p. 319; Doc. A/55/383

<sup>51</sup> Guide to the New UN Trafficking Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime Coalition against Trafficking in Women, North Amherst, USA, 2001

- That the exploitation of prostitution and trafficking cannot be separated . The Protocol acknowledges that much trafficking is for the purpose of prostitution and for other forms of sexual exploitation (Art 3a)
- That it is not necessary for a victim to cross a border so that women and children who are domestically trafficked for prostitution and forced labour within their own countries, are also protected subject to provisions listed in Article 3 of the Trafficking Protocol.
- That the key element in the trafficking process is the exploitative purpose, rather than the movement across a border (Art. 3a)
- That this Protocol is the first UN instrument to address the demand which results in women and children being trafficked, calling upon countries to take or strengthen legislative or other measures to discourage this demand that fosters all forms of exploitation of women and children (Art. 9.5) <sup>51</sup>

### *Disadvantages of Palermo Protocol*

There is universal agreement on the specific means adopted by the Trafficking Protocol. The Trafficking Protocol is the most commonly criticized, for being overly focused on criminal investigation and prosecution. In particular, it is said, that the accord fails meaningfully to protect the victims of human trafficking, who normally are granted access only to discretionary relief under processes that may not be explained to them. Indeed, only a minority of states has adopted mechanisms even to consider the protection of trafficked persons, and these programs generally offer no more than strictly provisional assistance. The Trafficking Protocol’s drafters, moreover, rejected a proposal to require that repatriation of trafficked persons be “voluntary” in favour of a duty on the part of countries of origin to “facilitate and accept” their trafficked citizens back “without undue or unreasonable delay,” albeit “with due regard for the safety of that person.” Similar inattention to the human dimension of trafficking is said also to be evident in the Trafficking Protocol’s failure to move beyond rhetorical support for efforts to address the social and economic phenomena that make people vulnerable to traffickers in the first place.<sup>52</sup>

The Trafficking Protocol’s definition of trafficking is best understood as a four-part notion limited to particular forms of prohibited dealing in persons, implemented by means deemed to be inappropriate, for the purpose of exploitation, and having a transnational character.<sup>52</sup>

*First*, the process orientation of the trafficking definition makes clear that the focus of the Trafficking Protocol is not to prohibit exploitation as such. As in the case of the early nineteenth-century treaties outlawing the “slave trade” (rather than “slavery”), the Trafficking Protocol is limited to prohibiting only specific forms of dealing by which people become

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<sup>51</sup> Ibid

<sup>52</sup> James Hathaway “ The Human Rights Quagmire of Trafficking” Virginia Journal of International Law, Volume 49:1 page 3-11, 2008

exploited, now defined to include “recruitment, transportation, transfer, harbouring or receipt” of persons. *Second*, these forms of dealing in persons are of concern only if they are conducted by inappropriate means, specifically by means of the threat or use of force or other forms of coercion, or 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. *Third*, there must be evidence that the prohibited forms of dealing, implemented by inappropriate means, are directed to exploiting the victim, defined to “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.” *Finally*, there must be a transnational element to the offense— either where it is committed, planned, or controlled, or where its effects are felt.<sup>52</sup>

The trafficking definition thus amounts to a significant retreat from the already agreed upon prohibition of slavery.<sup>52</sup>

*First*, the Trafficking Protocol does not equate “exploitation” (or even the slavery subset thereof) with trafficking but is concerned only with prohibiting forms of dealing which facilitate or lead to exploitation. There is, in consequence, no obligation flowing from the Trafficking Protocol to do anything about the condition of being exploited much less to provide a remedy to exploited persons. This contrasts sharply with the traditional legal understanding of the duty to end slavery, which requires an end to the condition of slavery as such.<sup>52</sup>

*Second*, the trafficking prohibition may even be more constrained than the traditional prohibition of the slave trade, because the “inappropriate means” requirement of the modern trafficking construct— requiring, for example, use of force or coercion—suggests that there is no Trafficking Protocol based duty to prohibit dealings leading to all forms of exploitation.<sup>52</sup>

*Third*,<sup>52</sup> the Trafficking Protocol does not require cooperation to combat all forms of trafficking, but only such trafficking as is “transnational in nature.”

As such, there is no commitment to take action against even forms of prohibited dealing, implemented by inappropriate means, and for the purpose of exploitation unless such dealing occurs in, affects, or implicates more than one state. This final requirement makes clear that slavery or other forms of exploitation that occur entirely within the borders of one country without the involvement of outside parties are beyond the scope of the Trafficking Protocol.<sup>52</sup>

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<sup>52</sup> Ibid

## **7.2 Improvement of Criminalization of Trafficking and National Implementation of Palermo Protocol**

The growing international recognition of human trafficking in 1990's leads finally to the development and adoption by the UN of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially of Women and Children (known as the Palermo Protocol), annexed to the broader UN Convention Against Transactional Organized Crime (2000).

Under this section I will show the example of implementation of human trafficking protocol into the national criminal legislation of my home country, Armenia and the tremendous changes particularly concerning enactment of Human Trafficking into the Criminal Code of Armenia in the Chapter of Crimes against Human Freedom, Honour and Dignity under the special part of section: Crimes against Humanity (Man)

*First*, I will analyse the provisions of Implementation of Palermo Protocol to reveal the main issues of human trafficking in Armenia. *Second*, I will show the changes which has been done through the implementation of the main treaty to criminalize trafficking in human beings into national legislation. *Finally*, I will outline the result of implementation of trafficking under the Crimes against Humanity.

Armenia is a source as well as a transit country for trafficked persons. The destination of these victims is mainly the United Arab Emirates (U.A.E.), Turkey, Russia, as well as Greece and other European countries. As a destination country, several cases have been reported of women from Uzbekistan trafficked to Armenia for sexual exploitation. Trafficking for the purposes of labour exploitation to Russia, Turkey and the U.A.E. has become an increasingly significant problem. There is no conclusive data regarding the number of women trafficked from Armenia, however the European Institute for Crime Prevention and Control (HEUNI) estimates the annual number of Armenian victims of trafficking to be 500-700.<sup>53</sup>

### *The Implementation of the Palermo Protocol*

Armenia has been ratified and signed the Convention against Transnational Organized Crime in May 2003 and Optional Protocol against the Smuggling of Migrants by Land, Sea and Air and Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.<sup>53</sup>

Armenia as a country of origin and transit for human trafficking has noted that despite the advantages of the Palermo Protocol in defining trafficking and providing a law enforcement framework (“rights-based measures”) it is

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<sup>53</sup> Amnesty International “Report on Trafficking in Human Beings 2009, Armenia”

not a human rights treaty but more a transnational cooperation agreement to combat organized crime. Most of the assistance available to victims of trafficking in Armenia is provided by local NGOs and not state authorities. The lack of an enforcement or supervisory mechanism, absence of mandatory protections and guidance in the identification process of victims undermines States political commitment and effectiveness of the Protocol.<sup>53</sup>

*How then violations of human rights can be detected and the perpetrators can be punished?*

Armenia as a patriarchal country with traditions of many decades and here there is no equality between men and women. Within the threshold of this environment Palermo protocol itself does not provide legal protection of human rights of victims, mainly concentrating on criminalization and legal enforcement against trafficking striking out the issue of human rights such as freedom of liberty, expression, right to life, prohibition of torture especially when it concerns to the most vulnerable groups of society, women and children.<sup>53</sup>

*The main issue of Palermo Protocol in Armenia* is the protection and support of victims of human trafficking. The question arises why it is so hard. The answer has been elaborated for many years. It is negligent treatment and lack of protection from state, fear to be prosecuted or deported to the country where they can become trafficked again. The limitation of the Protocol's victim's protection provisions actually undermines the effectiveness of the law enforcement framework. *Another issue* is the definition of human trafficking in Palermo Protocol which has narrow interpretation of law when to apply to human rights. Example determination of victims of trafficking as smuggled migrants. Additionally, force, coercion and purposes of exploitation are other elements that differentiate trafficking from smuggled migrants. Even though this maybe be obvious it is nevertheless difficult to prove without further investigation. "Palermo protocol appear to place the burden of proof squarely on the individual seeking protection (...) [and] nothing in either protocol acknowledges the operational link between smuggling and trafficking".<sup>53</sup> This shows the casual link between human trafficking and human rights within the protection and legal treatment of the victims of trafficking.

Generally, if an individual is considered an irregular immigrant it can be deported whereas a trafficked person as previously noted requires further protection and support. While state parties retain full capacity to decide who is smuggled and who is a trafficked person, the additional protections granted to the latter group are likely to be of limited practical utility". In trafficking, individuals are treated as "victims of crime" with special protective mechanisms.<sup>53</sup>

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<sup>53</sup> Ibid



In Armenia it also has been criticized that the Palermo Protocol suffers from three main errors in law: 1) “the absence of mandatory protections for victims”; 2) failure to provide guidance in the identification process”; 3) “the lack of a review or supervisory mechanism.” The total disregard of the essential actor “the trafficked person” in the Protocol is closely linked to the structural factors that originate human trafficking. This reveals the vicious circle and the distance between on the one hand the UN rhetoric on economic, social and cultural rights and equal and non-discriminatory treatment and on the other hand the lack of enforcement of the provisions of international law which continue to be based upon conceptions of state sovereignty and non-interference, carried out mainly by male UN assemblies. Furthermore, its particular focus on organized crime and penalization of the individual offender does not capture the “whole picture” of trafficking in the sense that it does not address the role of the state or government officials in “committing or tolerating trafficking” and holding them responsible either nationally or internationally.<sup>53</sup>

#### *Significant Changes through Implementation of Palermo Protocol in Domestic Legislation*

In October of 2002, an Inter-Agency Committee comprised of representatives from all relevant ministries and agencies was established by the Prime Minister with the aim of countering Trafficking in persons. The Ministry of Foreign Affairs coordinates the committee while UNHCR, IOM, OSCE, UNDP and ABA-CEELI are present in an observer capacity. In May 5 2002, a decree was issued establishing two commissions for women’s issues, one of which is dealing with trafficking of women. In 2004, the Armenian government approved the 2004-2006 National Action Plan for Prevention of Trafficking in Persons from the Republic of Armenia (NAP) and a Concept Paper on Anti-Trafficking – a document intended to complement the NAP by outlining the objectives, guiding principles and policy priorities for the government’s action to combat trafficking. This decision of the government requires the Inter-Agency Committee to submit semi-annual progress reports to the government. Due to UNHCR’s efforts, refugees were included as a separate group at-risk in the NAP. Upon the initiative from IOM and with the support of the U.S. Bureau of International Narcotics and Law Enforcement Affairs (INL), a pilot project was launched in 2004 to improve investigation and prosecution of human traffickers. Recently in 2010 specialized counter-trafficking unit is also being created within the Armenian police.<sup>53</sup>

#### *Assistance and support to victims*

Most of the assistance available to victims of trafficking in Armenia is provided by local NGOs. The NGO named Hope & Help operates a shelter for victims of trafficking in need of protection. They receive medical, legal

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<sup>53</sup> Ibid

and psychological assistance and are eligible for reintegration assistance in the form of vocational training. Furthermore, through grants from the Open Society Institute Assistance Foundation in Armenia, UNDP and IOM, as of 2004, Hope & Help will participate in a regional anti-trafficking initiative. In the course of the project, Hope & Help representatives will network with Turkish and Georgian NGOs and IOM offices in order to make contact with the Armenian victims of trafficking in Turkey. The identified victims will be interviewed and provided medical and legal advice, as well as help to return to Armenia. The United Methodist Committee on Relief (UMCOR) is also actively engaged in anti-trafficking activities and operates a hotline service. In January 2010, the government enacted legislation (which has been amended in 2011 March) that increased the minimum penalty for convicted trafficking offenders to five years' imprisonment, allowed for the confiscation of assets from convicted trafficking offenders, and exempted trafficking victims from criminal prosecution for crimes committed as a direct result of being trafficked.<sup>53</sup>

While the government did not provide funding for victim assistance in 2009, in March 2010 it allocated approximately \$15,000 to an NGO-run shelter for facility rent. The government continued to implement its national trafficking victim referral mechanism and nearly doubled the number of victims it identified compared with the previous year. The government demonstrated modest progress in combating government officials' complicity in trafficking; however, more should be done to prosecute suspected officials.<sup>54</sup>

### *Criminal code of Armenia 2003*

Armenia's ratification of the Convention against Transnational Organized Crime and of the optional or so called Palermo Protocols in May 2003 was followed by the adoption of a New Criminal Code which includes a specific provision regarding the trafficking of human beings. The 2003 criminal code covers kidnapping and trafficking under Articles 131 and 132 respectively, and penalties range from fines to imprisonment for a maximum of 4 years. Article 168 specifically forbids child trafficking and provides for increased sentences of 3 to 7 years imprisonment. Involvement in trafficking as part of an organized crime group or a death of a trafficked victim is punished with 5 to 8 years in prison. The criminal code is considered to fall short of internationally recognized standards to combat trafficking and smuggling, especially regarding the protection and support of victims. The code does not establish smuggling as a crime nor does it contain a provision reflecting the Saving Clauses of the Palermo Protocols.<sup>55</sup>

Armenia prohibits trafficking in persons for both forced labour and commercial sexual exploitation through Articles 132 and 132-1 of its penal code, which, as amended in January 2010, prescribe penalties of at least five

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<sup>53</sup> Ibid

<sup>54</sup> US Trafficking in Persons Annual Report 2010, Country Narratives: Armenia

<sup>55</sup> Criminal Code of Republic of Armenia 2003

years' imprisonment and up to 15 years' imprisonment – penalties that are sufficiently stringent and commensurate with those prescribed for other serious crimes, such as rape. The government investigated 15 cases of trafficking – including nine sex trafficking and six labour trafficking investigations – compared with 13 investigations in 2008. Armenian courts prosecuted 19 individuals in 12 trafficking cases during the reporting period, compared with eight individuals prosecuted in 2008. Authorities convicted 11 trafficking offenders in 2009 – including eight individuals for sex trafficking and three for labour trafficking – up from four convictions in 2008. All 11 convicted offenders in 2009 were given prison sentences; no traffickers received suspended sentences. Four offenders were given sentences ranging from three to five years' and seven offenders were given sentences ranging from seven to 13 years' imprisonment. As a result of the government's anti-trafficking partnerships with outside parties, approximately 447 government officials received training from anti-trafficking NGOs, international organizations, foreign governments, and the Armenian government on a range of anti-trafficking issues including the application of Armenia's anti-trafficking law and the national victim referral mechanism, investigation techniques, and forced labour.<sup>54</sup>

As we can see Criminal code of Armenia makes the degree of punishment of trafficking higher than other crimes under the crimes against human life and dignity which shows that Armenia takes very seriously human trafficking not only as international crime but also count on severe effect of this heinous crime on society.

Within the threshold of my research question the example of Armenia particularly the Implementation of Human Trafficking as Crime against Humanity into the Criminal Code of the Armenia *first*, decreased the numbers of victims of trafficking, *second*, made easier for the legal enforcement facilities such as police particularly Anti trafficking Police Unit and Migration to prevent, suppress trafficking in human beings and *third*, increased the criminalization of offenders of this crime against human dignity, freedom and honour and persuade the victims of trafficking to testify against traffickers and protect them through legal, medical, psychological assistance, accommodations such as shelters and food provisions.

This implementation diminished the amount of people annually trafficked in Armenia, which is the tremendous step of harmonization between national and international law. The example of Armenia shows that society realized the dangerous affect of crime such as human trafficking only when, it has been implemented into the national criminal legislation under the category of heinous crimes.

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<sup>54</sup> Ibid

## **8 CHAPTER VIII**

### **INTERNATIONAL AND EUROPEAN CASE LAW AS REGARDS TO HUMAN TRAFFICKING**

Analysis of human trafficking from two perspectives as crime against humanity or violation of human rights is truly justified in judicial practice.

The Intersection among human trafficking, crimes against humanity and violations of human rights will be actually emphasized in this Chapter.

Case Law will outline three unique cases from international judiciary for the purpose of clarification of the right definition for the trafficking in human beings, either as violation of human rights or crime against humanity or both within the threshold of this international and transnational crime.

#### **8.1 European Court of Human Rights**

##### **Rantsev versus Cyprus and Russia**<sup>56</sup>

Can the European Court of Human Rights play a role in the protection of the victims of trafficking?

European Court of Human Rights as one of the main guardian of human rights of individuals has the unique decision about the case, which I will present. The Court in this judgment for the first time defined trafficking in human beings from human rights prospective as crime based on violations of human rights such as infringements of right life, freedom, honour and health.

On 7 January 2010, in an historic first judgment concerning cross border human trafficking in Europe, the European Court of Human Rights has found that Cyprus and Russia committed a number of human rights violations. In the judgment, The Court implied that human trafficking is a phenomenon, which is incompatible with values of European Convention of Human Rights and democratic society and finally clarify the core basis of trafficking as violations of human rights, which will gave states opportunity to investigate trafficking and protect potential and future victims of this severe crime.<sup>56</sup>

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<sup>56</sup> Hudoc Legal Database of European Court of Human Rights Summary of Rantsev v Cyprus and Russia (Application no. 25965/04) para 272-282, January 2010

### Outline of the case

The case concerns the death of a twenty - year old Russian woman, Oxana Rantseva, who was trafficked from Russia to Cyprus, a destination country for women trafficked from Eastern and Central Europe for the purpose of sexual exploitation. In Cyprus under the 'artiste' visa scheme, she was subjected to sexual exploitation in a cabaret in the island's largest coastal resort, Limassol. Ms Rantseva was found dead in March 2001 below the balcony of an apartment belonging to an employee of the cabaret, having been taken there from a police station by the cabaret's owner. The police found a bedspread tied to the railing of the balcony on the upper floor of the apartment. An inquest in Cyprus found she had died as a result of injuries sustained when she jumped from the balcony.<sup>57</sup>

The case was brought by Nikolay Rantsev, Ms Rantseva's father. He argued that there was no adequate investigation into the circumstances surrounding his daughter's death, that she was inadequately protected by Cypriot police while she was still alive and that there was a complete failure to punish the individuals responsible for exposing his daughter to the sexual exploitation and ill treatment which ultimately led to her death. He also complained about the lack of access to the judicial process in Cyprus.<sup>57</sup>

The Court found that Cyprus, the State of destination in this case, had not only failed to protect Ms Rantseva from being trafficked or from being unlawfully detained prior to her death, but it had also failed to adequately investigate her death. Russia, the state of origin, was found by the Court to have failed to adequately investigate the way in which Ms Rantseva had been trafficked from its borders. The Court ordered the Cypriot Government to pay Oxana Rantseva's father the sum of Euro 40,000 in damages and the Russian Government to pay a sum of Euro 2,000. In its judgment, the Court clarified the obligations of states in relation to trafficking – whether states of origin, transit or destination – as well as noting the importance of cross border coordination in fighting trafficking.<sup>57</sup>

In describing the nature of human trafficking the judgment states that, 'by its very nature and aim of exploitation [human trafficking] is based on the exercise of powers attaching to the right of ownership. The Court defines enslavement as one of the core methods of trafficking. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions...It is described by INTERIGHTS and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade.'<sup>57</sup>

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<sup>57</sup> The International Centre for The Protection of Human Rights (INTERIGHTS) *Rantsev v Cyprus and Russia*

In relation to Cyprus, the Court found that the regime of 'artistes' visas did not afford practical and effective protection against trafficking and exploitation. It also found that the Cypriot police had failed to make appropriate enquiries of Ms. Rantseva in a situation which gave rise to a 'credible suspicion' she had been trafficked. Accordingly, the Court found that Cyprus had failed to comply with its positive obligations under Article 4. Having previously found a violation by Cyprus of its duty to investigate Ms. Rantseva's death under Article 2 (the right to life), the Court found it did not need to revisit the procedural obligation under Article 4.<sup>57</sup>

In relation to Russia, the Court found there was a failure to effectively investigate the trafficking of Ms Rantseva under Article 4 of the Convention. It stated that there had been no investigation into how Ms. Rantseva had been recruited, and no steps to identify those involved in her trafficking or their methods. It stated that Russia was well placed to investigate the individuals and networks responsible for Ms Rantseva's trafficking and that it had failed to do so.<sup>56</sup> Accordingly it found Russia in violation of its procedural obligations under Article 4. INTERIGHTS was a third party intervener in the case. It submitted a brief highlighting the duty to protect and the duty to investigate, duties, which are clearly outlined in the Court's judgment. The intervention emphasized the importance of an effective legal framework to address trafficking, and was framed in terms of the positive obligations on states to protect individuals against trafficking, as well as setting out the nature of that protection. The Court has clarified the obligations of states in relation to trafficking as well as noting the importance of cross border coordination. From the angle of severity INTERIGHTS had described trafficking as a modern day form of slavery. A panel of five judges of the Grand Chamber decided on 10 May 2010 not to accept the Russian Government's request that the case can referred to the Grand Chamber.<sup>57</sup>

As we can see from this case, it presents the intersection of human trafficking and violations of human rights. First time in history States took responsibility for the death and lack of protection of victim of trafficking (Cyprus) and for not making proper investigation regarding the process of trafficking.(Russia) confirmed the judgment as final.<sup>57</sup>

This example gives us the point to understand that human trafficking is not just international transnational crime but it is a severe crime based on violations of human rights, which can lead to the fatal effect.

Violations of human rights, such slavery and servitude in combined with forced labour (*Article 4 of The European Court of Human Rights*) can lead to Human Trafficking. This may include deprivation of right to life (*Article 2 of The European Convention on Human Rights*) in combined with violations of right against torture or to inhuman or degrading treatment or

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<sup>57</sup> Ibid

punishment (*Article 3 of The European Convention on Human Rights*) and right to liberty and freedom of movement (*Article 5 of The European Convention on Human Rights*).

This case affirmed that European Court of Human Rights can protect the victims of human trafficking with legitimate judgments or decisions and order States to implement the appropriate instruments of legal protection in national legislation such as trafficking victims protection act.

Next, I will present the unique case judgment from of International Criminal Court to show human trafficking from prospective of crime against humanity as inhuman and heinous act.

In this case, the Court for the first time defined trafficking in human beings as other inhuman act under the crimes against humanity along with enslavement, which intersects with violations of human rights such as right against torture and degrading or inhuman treatment.

It's the Prosecutor versus Jean Paul Akayesu (Appeal Judgment)case,<sup>58</sup> which brought the trafficking can be seen from broad perspective of enslavement and distinguished from slavery as in human act causing disastrous effect on human dignity and health.

## **8.2 International Criminal Court**

### **Prosecutor versus Jean Paul Akayesu**<sup>58</sup>

International Criminal Court through the legal and important judgments presents the scope of individual responsibility for the international crimes including crimes against humanity such as enslavement.

#### Outline of the case

Jean-Paul Akayesu, a bourgmestre of Taba in Rwanda was found guilty of genocide and crimes against humanity. He was sentenced to life imprisonment. Jean-Paul Akayesu was born in 1953 in Murehe sector, Taba commune in Rwanda. He served as bourgmestre of that commune from April 1993 until June 1994. Prior to his appointment as bourgmestre, he was a teacher and school inspector in Taba.

#### Charges

As bourgmestre, Jean-Paul Akayesu was responsible for maintaining law and public order in his commune. At least 2000 Tutsis were killed in Taba

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<sup>58</sup> Jean Paul Akayesu versus Prosecutor(Appeal Judgment) ICTR-96-4-T (1 June 2001)

between April 7th and the end of June, 1994, while he was still in power. The killings in Taba were openly committed and so widespread that, as bourgmestre, Jean-Paul Akayesu must have known about them. Although he had, the authority and responsibility to do so, Jean-Paul Akayesu never made any attempt to prevent the killing of Tutsis in the commune or called for assistance from regional or national authorities to quell the violence.<sup>59</sup>

Between April 7 and the end of June 1994, hundreds of civilians sought refuge at the bureau communal (town hall). The majority of the displaced civilians were Tutsis. While seeking refuge at the bureau communal, displaced female civilians were regularly taken by armed local militia and / or communal police and subjected to sexual violence, and often murdered on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence, which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The women lived in a state of constant fear and their physical and psychological health deteriorated as a result of the sexual violence, beatings and killings.<sup>59</sup>

Jean-Paul Akayesu knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Akayesu also facilitated the acts of sexual violence, beatings and murders by allowing it to occur on or near the bureau communal premises. By virtue of his presence during the acts of sexual violence, beatings and murders, Jean-Paul Akayesu encouraged these activities.<sup>59</sup>

On June 1, 2001 the ICTR appeals court upheld the convictions against Akayesu, Kayishema and Ruzindana on all counts.

He was sentenced to life imprisonment.<sup>59</sup>

This was the first conviction for genocide and crimes against humanity after trial before an international tribunal.

This case is the brilliant example of intersection of crime against humanity as trafficking and human rights infringement as violation of right to be protected against torture and inhuman or degrading treatment of victims of widespread, systematic attack organized by the Bourgmestre of Taba Jean Paul Akayesu. He has been found guilty in 9 (nine) charges in murder, extermination as crime against humanity, torture and degrading treatment, sexual exploitation and other in human acts including trafficking in human beings. From this case, we can actually see that, violations of human rights such as torture and degrading treatment, right to life and liberty along with sexual exploitation as human trafficking have been considered as essential elements of crime against humanity which gave us assumption to think that trafficking, despite the similar structure with crime against humanity includes the violations of non-derogable human rights.<sup>59</sup>

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<sup>59</sup> International Justice Tribune, Akayesu Jean-Paul Published on : 1 June 2001 Hague, Netherlands



The last case which I will discuss is the domestic case from judicial practice of The United States Court of Appeals for the District of Columbia Circuit which will show the negligence of state to protect its citizen who has been trafficked in forced labour and become the subject of exploitation by the employment agency which recruited him to work as an interpreter in Iraq.

### **8.3 The United States Court of Appeals District of Columbia**

#### **Abdulwahab Nattah versus George W.Bush and L-3 Communications Titan Group's (Titan) <sup>60</sup>**

The United States Court of Appeals has one of the largest databases of cases concerning trafficking in human beings, forced labour and sexual exploitation and the following case is unique because it was the first time when the citizen of the United States had been trafficked and failed to be protected by his own state because of political pressure and despite the fact that court dismissed the charges against perpetrators, it gave state opportunity to reveal the elements of trafficking in forced labour and to take the necessary means against this disastrous phenomenon.

The elements of trafficking as forced labour are vivid in Abdulwahab Nattah versus George W.Bush and L-3 Communications Titan Group's (Titan) case, where actually has been shown the protection of perpetrators rather than victim of human trafficking. This case of United States Court of Appeals for the District of Columbia concerning the dual citizen of Lybia and United States plaintiff Abdulwahab Nattah who took a job with L-3 Communications Titan Group as an Arabic-language interpreter and had been deceived, recruited and exploited by the Titan Group as Arabic linguist with the forms of human trafficking; bonded labour and enslavement. Deception includes the false information about future high paid employment and luxury houses in Kuwait as a trick in order to persuade him to go to the war zone in Iraq for work. He allegedly stayed in a military camp in the desert, where he was required to share a tent with 40 soldiers, "*eat distasteful food and live in substandard conditions,*" the ruling states. At some point during Nattah's service in Iraq, he suffered a loss of all hearing in his left ear and partial hearing in his right ear, and required medical attention but no one even pay attention on his condition. He was enslaved by its own country. Then U.S Military forced him to work in Iraq as military interpreter on March 20th 2003. Nattah relied also on the president Bush's representations that the war would be swift and would not entail battling an

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<sup>60</sup> Abdulwahab Nattah versus Titan and George W.Bush case. March 31, 2008(Civil Action No. 06-700 (RCL) Appeal from the United States District Court for the District of Columbia (No. 1:06-cv-00700-RCL)

insurgency accepted the offer. Upon returning to the United States, Nattah filed 20 claims against L-3, former President George W. Bush, former Vice President Dick Cheney, former Defence Secretary Donald Rumsfeld and other government employees.<sup>61</sup>

On January 30, 2007, the District Court of Columbia Circuit granted the US government's motion to dismiss Nattah's claims against Bush, Cheney, and Rumsfeld. This case was dismissed with prejudice. The decision of The District Court of Columbia was made on March 31, 2008. The Court granted Titan's motion to dismiss.<sup>61</sup>

The Court decided to dismiss the case because the victim could not identify perpetrators and stated that there were no sufficient evidence to plea of guilty for employer Titan and US president George W. Bush.<sup>61</sup>

The Court of Appeals based in Washington, D.C affirmed the dismissal of the District Court of Columbia Circuit but said that District Court must reconsider Nattah's breach of contract claim against L-3 and his non-monetary claims against former Army Secretary Francis Harvey. Those claims include slavery, trafficking, bonded labour and violations of the right to travel, the Geneva Convention and international law. Plaintiff states that he "objected to his confinement, but that neither the military nor Titan would agree to release him from bondage." That was a deprivation of liberty and enslavement.<sup>61</sup>

This was the first case in the United States when State made its own citizen one of the prisoners of war and a victim of trafficking. This case showed the negligence and omission of the state which actually failed under positive obligation to protect Nattah as a victim of trafficking. Despite the dismissal of this case, because of the absence of identification of potential perpetrators, the Court of Appeals of the District of Columbia, based on persuasive arguments of the plaintiff Abdulwahab Nattah, found the elements of trafficking and enslavement in forced labour, which makes this judgment the point of interest and precedent example of the combination of crimes against humanity, human trafficking and violations of human rights.

The judgments in these three cases, which had been presented in this thesis, outlined the assumption of human trafficking from two perspectives as crime against humanity or violation of human rights.

Through the analysis of judicial practice we can actually presume that human trafficking can be seen both as crime against humanity and violation of non-derogable human rights as such because it has widespread, systematic and *as crime against humanity* and has heinous effect on human life, dignity, liberty and health *as violation of human rights* and strongly fits

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<sup>61</sup> Jeff Gorman "Arabic Interpreter Can Pursue Slavery Claims"  
<http://www.courthousenews.com/2010/06/02/27744.htm>

into the threshold of these two definitions which are the most suitable for this international and transnational crime

## **9 CHAPTER IX**

### **CONCLUSION AND RECOMMENDATIONS**

As conclusion, I will first enshrine the analysis of all legal facts, positive and negative arguments concerning trafficking in human beings as a tremendously growing crime and finally will give the answer to my research question.

*“Is Human Trafficking a Crime against Humanity or a Violation of Human Rights?”*

Which one of these definitions will show the severity of Trafficking in Human Beings and can assist States to struggle against this phenomenon and stop human trafficking as continuous human trade?

#### **9.1 Concluding Analysis**

Human Trafficking as international transnational crime has been outlined in range of international instruments. The international recognition of trafficking as heinous crime or violation of human rights become the challenge for the States in terms of the following issues, which make contradictions and diffuseness between international treaties against trafficking.

- The acts/crimes/abuses covered (slavery, servitude, trafficking, discrimination, violence, rape, forced recruitment into armed forces, forced or exploitative labour, unlawful adoption, inheritance of women, debt bondage, forced marriage, crimes against humanity).
- Geographic coverage (international versus intrastate trafficking); thematic labour)
- Perpetrator identification (traffickers, brothel owners; organized criminal gangs versus individuals); or
- Victim identification (white women, women, children, all persons)<sup>62</sup>

*Crime Identification* as the first issue has been enshrined in this thesis under the Chapters II and III. Through analysis of the definition, structure and elements of trafficking from perspectives of crime against humanity such as enslavement and as violation of human rights, I have presented the

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<sup>62</sup> Alice Edwards “Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor 31 March 2008, pages 51-53

similarities and differences of these international crimes in comparison to the infringements of human rights. This made a legal analysis to clarify the identification of human trafficking as crime against humanity or violation of human rights.

*Geographic coverage* as the second issue which can be an obstacle on the process of recognition of trafficking as crime against humanity or violation of human rights has been enshrined in Chapter IV with the title of historical background and international or regional trends of trafficking (countries of origin, transit and destination);

*Perpetrator Identification* as the third issue has been outlined in this draft in Chapter V as identification and tactics of common perpetrators of trafficking, which gave us the clear picture of preparation and action of traffickers in details as well as the methods they use to reach the purpose of exploitation. Individual Responsibility and State Obligation to Protect against Trafficking are also giving a clear image of criminal paths of main offenders of trafficking in human beings identifying “*mens rea*” as criminal mind or knowledge of attack and “*actus reus*” as criminal action.

*Victim Identification* as the fourth issue has been covered by the Chapter VI with the scope of legal status and protection of victims of trafficking in human beings to show the reasons why people cannot be exposed and testify as victims of trafficking. The transnational nature of trafficking, as it is stated in Palermo Protocol to Prevent, Suppress and Punish on Trafficking in Human Beings gave us opportunity to think about the similar structure of trafficking and crime against humanity as widespread and systematic attack on human beings and how all these issues of trafficking can be fit into the scope of crime against humanity.

In terms of crime against humanity, trafficking comprises geographic coverage and identification of trafficking with the scope of widespread and systematic attack and wilful knowledge of it (*mens rea*) which affects civilians as individuals.

In terms of human rights violation, trafficking enshrines the individual responsibility and identification of offenders and victims of trafficking in human beings with the scope of violations of human rights such as right to life, right against torture, inhuman or degrading treatment, right to liberty and freedom of movement.

In Chapter VII I have presented the advantages and disadvantages of Palermo protocol as new legal instrument, which criminalizes trafficking and critique of a this treaty from perspectives of human rights and crimes against humanity. Human trafficking has been defined in Criminal Code of Republic of Armenia under the Crimes against Humans with the high degree of punishment. This example of improvement in criminalization under national legislation is also enshrined in Chapter VII.

I have outlined International and European Cases and Judicial Practice about Human Trafficking from two dimensions as Crime against Humanity or Violations of Human Rights in Chapter VIII in order to show the necessity for the appropriate definition for human trafficking in practice.

As we can see the Chapters in this research have comprised the different aspects of human trafficking *first* as crime against humanity and *next*, as violation of human rights. How trafficking is conceived may ultimately determine whether an individual is perceived as a victim of crime or a criminal, It may influence whether, a victim is recognized as in need of protection either as a human being at risk of torture or cruel, inhuman or degrading treatment. It may determine whether the abuse is seen as an element of heinous crime against humanity, as serious violence or assault, or as a human rights violation.<sup>63</sup>

Human rights law and its enforcement mechanisms are critically important when it comes to ensuring that national responses to trafficking do not violate established rights or circumvent the obligations that states owe to all persons. Combating contemporary exploitation may not be possible but any serious attempt will require a full arsenal of modern, smart weapons, not just one precious but blunted sword.<sup>63</sup>

As it is stated serious attempt to emphasize trafficking as severe international transnational crime is relabeling human trafficking either as crime against humanity or violation of human rights. With such definition, States and International Organisations will have the broader margin of appreciation concerning violations of human rights, as it has been analysed in each stage of trafficking (recruitment, transportation and exploitation).

As concluding analysis, I will give the final answer to my research question.

*Human Trafficking* can be defined as both *Crime against Humanity and Violation of Human Rights* with widespread, systematic effect and wilful knowledge of attack on humanity or civilian population, which makes it severe international transnational crime disastrously affecting human life, dignity, health and liberty. *The reason is the following:*

The crime can be recognized and seen as crime against humanity if it has heinous, widespread and disastrous effect on civilian population. In case of trafficking, the core grounds of this international transnational crime are serious violations of human rights such as right to life, liberty and prohibition of torture and inhuman or degrading treatment which must be occurred in order to re-label trafficking in human beings as crime against humanity.

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<sup>63</sup> Anne T Gallagher "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway "Virginia Journal of International Law [Vol. 49:4] 2007, 846-848 pages

The definition of Trafficking in Human Beings only as Violation of Human Rights with its heinous effect would give a narrow appreciation of human trafficking as heinous crime as such in comparison to the recognition of trafficking as crime against humanity, which gave the wide appreciation of this transnational crime with widespread and systematic effect on society. This also will suppress the States from wide range of possibilities to identify and to criminalize the potential perpetrators of trafficking. It will also be difficult to provide the strong and secure protection of victims against this phenomenon through the effective external and internal legal enforcement such as migration and police.

That is why Human Trafficking is a Crime against Humanity and a Violation of Human Rights.

In next section, I will make some suggestions and comments to improve the struggling mechanisms against trafficking and raise awareness about how disastrous human trade can become in the future.

## **9.2 Recommendations**

The following recommendations may serve as additional benefit for States in the effective struggle to suppress, prevent and stop trafficking in human beings.

What needs to be done?

*1. Amendment on Criminalization and Punishment with the Right Interpretation of the Palermo Protocol against Trafficking in Persons* – Although the implementation of new UN anti-trafficking Protocol has become the tremendous achievement in the struggle against trafficking, we always need to follow the right interpretation of this Protocol as the main treaty which criminalizes Trafficking in Human Beings. As for instance, Article 5 of the Protocol to Prevent, Suppress and Punish against Trafficking in Human Beings enshrines Criminalization against human trafficking under national legislation and does not give possibility to punish perpetrators of Trafficking under international level, which needs to be amended in Palermo Protocol. Trafficking in Human Beings is international transnational crime with widespread, systematic and hazardous effect on human life, dignity, freedom and health. *The first issue* in case of criminalization against human trafficking under domestic level is the lack of identification of main offenders and absence of testimonies by potential victims of human trafficking which can put the strong and negative impact on humanity. *Second issue* is the degree of punishment under national criminal legislation, which is not high enough to make trafficking as much heinous as it is in practice. Each State should amend the criminal legislation and implement trafficking under the crimes against man affecting human life, dignity, health and liberty as it has defined in the criminal code of Republic of Armenia. Criminal Code defined Human Trafficking as Crime

against Humans, which made State to raise awareness about the disastrous and heinous effect of this transnational crime.

2. *Implementation of the new definition for human trafficking.* The current definition of trafficking in human beings as international and transnational crime does not explicitly define the meaning of trafficking in human beings in practice. The growing trend of human trafficking in the world gives us assumption to consider that as transnational crime it cannot emphasize the severe effect on human life, dignity and health and needs to be re-labelled under the threshold of the more heinous or mass atrocity crimes such as crimes against humanity. The level of severity and harm caused to humanity as such is one the core factors to define human trafficking from International Transnational Law into the scope of International Criminal Law as a core crime against humanity and violation of human rights. States should realize that the change of definition of trafficking is highly necessary because of the assumption in the society that if the definition of the crime is not contained serious or harmful elements, it can be seen as the ordinary crime and the perpetrators sooner and later will be found and punished. In case of trafficking, which has an enormous growing impact nowadays, we must take any possibility to prevent, suppress and stop trafficking and the appropriate definition will allow States to treat human trafficking more seriously and with an immediate response on its occurrence.

3. *Assistance and protection of victims of trafficking in persons*

Assistance and protection of identity and privacy of victims of trafficking in persons which is enshrined in Article 6 of the Palermo protocol to prevent suppress and punish against trafficking. As the one of the core issues to address to international community, the protection of victims under national level is less constructed and needs to be developed in order to maintain the effective protection of current and potential victims of trafficking in human beings. The following steps can improve the legal status and the threshold of protection of victims against human trafficking. *First, it is psychological and medical assistance* which is highly necessary for repatriation and reintegration of victims of trafficking in human beings. *Second, it is criminalization of potential perpetrators*, which is highly essential for the legal status of victims and their protection against human trafficking. *Third, it is legal assistance* which is urgent in case of testimonies given by the victims of trafficking in human beings. This step is followed by the protection and security of victims of this heinous crime because if they testify against the traffickers, they can lose their life or life of their family members. This is the core reason why most of the victims are being silent but if they become aware that effective protection and legal enforcement can secure their livelihood, there is a chance for increase of amount of people who will testify against perpetrators of trafficking in human beings.

As conclusion I want to emphasize that, any attempt, to stop and prevent trafficking in human beings, is highly necessary and the appropriate definition of human trafficking as heinous crime against humanity and may put a strong syllabus on raising awareness of society about severe violations of human rights harming human life, dignity, freedom and health.

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