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Human Trafficking:  
Analysis of Belarusian legislation  
on Human Trafficking in the  
scope of International Human  
Rights Law

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# Summary

The paper, titled “Human Trafficking: Analysis of Belarusian legislation on Human Trafficking in the scope of International Human Rights Law”, aims to discuss the gradual development of Human Trafficking Law, since its beginning up to nowadays, thus trying to show the main shifts in Human Trafficking Law, different approaches, conceptions and definition and analyze the Belarusian national mechanism combat human trafficking.

Why my choice has fallen on Belarus? Because, this country is good for the following reasons: Belarus, being placed on crossroads of West and East, is a transit country, but, at the same time, it is a country of acceptance. Besides this, Belarus, as a former Soviet republic, is a bright example of the contemporary legislation of so called CIS countries. It is remarkable that being a component part of Continental-European legal system these countries have to some extent unique legal systems, which also can be described as a subsystem in continental law.

Subsequently, the paper provides an overview of the Human Trafficking issue in Belarus, through the historical, geopolitical and legal perspectives. Specifically, the paper shows the legal background of combating Human Trafficking in Belarus and analysis such legal documents, as The Constitution, Criminal Code of Republic of Belarus, and different legislative acts and decrees of different governmental bodies.

Ultimately, in the paper Belarusian national legislation compared with international law. And through this comparison shows the lacks or, why not, advantages, of the former one.

# Preface

I want to thank Lund University and Raoul Wallenberg Institute, which made possible for me to study through grants at the Master's Programme in Human Rights and Humanitarian Law in Lund.

I would like to thank my contact person in Belarus, Maksim Karpenok, who helped to collect information regarding Belarusian legislation and case statistics and Varser Karapetyan, who was my guru, helping to overcome legal difficulties in understanding the material and provided everyday moral support.

Special thanks for my Master Thesis Supervisor Ida Elisabeth Koch for being in constant contact with me and for providing me with useful advices, enriching my knowledge and skills in legal writing and research.

Last but not least, many thanks to family and friends.

# Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ENP	European Neighborhood Policy
ENPI	European Neighborhood Partnership Instruments
EU	European Union
GRETA	A Group of Experts against Trafficking in Human Beings
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGO	Intergovernmental organization
ILO	International Labour Organization
IMO	International Organization for Migration
OECD	Organization for Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
OHCHR	United Nations Office of the High Commissioner for Human Rights
NGO	Non-governmental organization
TEU	Treaty of European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNHCR	United Nations High Commissioner for Refugees

# 1. Introduction

Human Trafficking is a relatively new and, at the same time, quite old phenomenon in the history of the development of human society, as in different periods it has different forms, different names or titles, different content etc. But in any case, its essence is unchangeable, which are selling-purchasing or other acts towards a human being by another human being for the purpose of exploitation, combined with rough violation of basic human rights<sup>1</sup>. Of course, this is a quite general or, maybe, even vague definition, but the above mentioned elements are necessary and sufficient conditions which make Human Trafficking as it is. So, in other words, Human Trafficking is the same as slavery or other later forms of human exploitation, which changed its name, maybe perception and forms, but in its essence it is still could be considered as the same phenomenon. So, having, this brave statement, we unintentionally are facing with another question: did it become more severe or more “human”, what successes does the humanity have in combating Human Trafficking, or, even more, did it succeed or not?

So, the main question can be formed as the following: what has been changed, and if something is changed, then to what extent and in what directions. In this sense I would like to start with the perception of this phenomenon, as, my opinion, this is the main shift, which international community has done: slavery or trafficking is not considered any longer to be legal, rational or natural. And, then, as something contradictory to the nature of human being, it requires respective treatment in the form combating Human Trafficking by legal, political and other forms.

Human Trafficking phenomenon has been researched permanently and not only by lawyers. As something dynamic it changes all the time and

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<sup>1</sup> This statement is very arguable in the sense that in ancient times, when slaves were considered to be not the subjects, but rather the objects of the law, without almost any rights and freedoms, equal to the legal status of goods. But if as a starting point we take the notion that all human beings are created equal by their birth and this notion was valid also in ancient times, and the unequal treatment was the result of subjective perception only and never as an objective condition, so in this context the statement, given by us above, is still valid.



never loses its actuality, even more nowadays it becomes more and more actual due to the efforts of international community in combating Human Trafficking. So, as I have already mentioned Human Trafficking has been researched by legal scholarship. Especially notable the following authors, which in their works have tried to show generally or sometimes just different aspect of this phenomenon<sup>2</sup>. In his groundbreaking book, *Disposable People*, Kevin Bales describes the differences between modern-day slavery and the old slavery, concluding that holding people in slave-like conditions is far more profitable today than it was, when the sale of human beings was conducted in open markets and slaveholders invested relatively large sums of money to buy and legally own people to work land or for other forms of servitude<sup>3</sup>. More broadly, some activists, such as Amnesty International, look at human trafficking through the lens of ‘human rights’, which overlaps with a focus on slavery. Most frameworks incorporate reference to various violations of human rights during the trafficking process<sup>4</sup>. Castles Stephen and Miller Mark in their book, *The Age of Migration*, places greater emphasis on migration as a key dynamic, but set within wider globalization processes, and human trafficking is viewed as one form of migration<sup>5</sup>.

Thus, we can see, human trafficking is a complex, multi-faceted problem that intertwines issues of law enforcement, border control, gender, crime, security and human rights”<sup>6</sup>. I am absolutely agreed with statement of Trafficking in Persons Working Group<sup>7</sup> “an internationally coordinated response which targets the specific dynamics of each aspect is one possible

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<sup>2</sup> These researches have their reflection not only on the development of the legal scholarship, but had their reflection on legal arrangement process.

<sup>3</sup> K. Bales, (rev. ed.). *Disposable people*. Berkeley: University of California Press (2004).

<sup>4</sup> M. Buckley, ‘*Public Opinion in Russia on the Politics of Human Trafficking*’, *Europe-Asia Studies*, 61: 2, 213 — 248, (2009).

<sup>5</sup> Castles Stephen and Miller Mark J. *The Age of Migration*. Basingstoke: Macmillan (2003).

<sup>6</sup> A. Amiel. ‘Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation’ (2006). *Buffalo Human Rights Law Review* 5, 28.

<sup>7</sup> In March 2008, the TC Beirne School of Law at The University of Queensland (UQ) set up a research project to provide a complete and comprehensive analysis of the phenomenon of trafficking in persons, especially women and children, and of the exploitation of foreign workers in the sex industry and other forms of forced labour in Australia.

approach to overcoming the complexity and confusion surrounding current conceptualizations of human trafficking under international law”.

## 1.1 Purpose of the Study

In this thesis I would try to show the gradual development of Human Trafficking Law, since its beginning up to nowadays, thus trying to show the main shifts in Human Trafficking Law, different approaches, conceptions and definition<sup>8</sup>. Of course, all these processes are determined by historical, geopolitical conditions and to some extent reflect the changes in real life.

Thus, a second and third chapter of my thesis is an attempt to understand and explain historical and contemporary conceptualizations of trafficking in persons. My first research question is focused on *how international instruments in the areas of slavery, prostitution, labour and human rights have influenced the framework within which trafficking in persons is discussed and addressed on the international and regional level, and by consequence, domestically*. In this thesis the starting point in formation of Human Trafficking Law is International Prison Conference in 1895 and through whole 20 century, ending by UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, entered into force on 29 September 2003. Besides the analysis of international legal documents chronologically, I would try to show the shifts in definitions, conceptions *etc.*

In the fourth and fifth chapter of the thesis, I am going to focus on the legislation of Republic of Belarus on Human Trafficking. Why my choice has fallen on Belarus? Because, this country is good for the following reasons: Belarus, being placed on crossroads of West and East, is a transit country, but, at the same time, it is a country of acceptance. Besides this, Belarus, as a former Soviet republic, is a bright example of the

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<sup>8</sup> Term human trafficking, like many extensive phrases that minimize or conceal complex problems, falls short of any obvious definition.

contemporary legislation of so called CIS countries<sup>9</sup>. It is remarkable that being a component part of Continental-European legal system these countries have to some extent unique legal systems, which also can be described as a subsystem in continental law.

So, first of all I would try to show general remarks on the Human Trafficking issue in Belarus, through the historical, geopolitical and legal perspectives. Further, I am going to show the whole legal background of combating Human Trafficking in Belarus. And in the scope of the later I am going to analyze such legal documents, as The Constitution, Criminal Code of Republic of Belarus, and different legislative acts and decrees of different governmental bodies. But, what is more important we are going to compare Belarusian national legislation with international law. And through this comparison to show the lacks or, why not, advantages, of the former one. As it is not secret international law is becoming into reality or into implementation mainly through the adoption of its policy or itself by national legislation and is protected by law enforcement policy of national states. Thus, my second research question is *how current legal and legislative means to combat human trafficking in the Republic of Belarus, correlate with the legal framework of International Law.*

## 1.2 Delimitations

My study will mainly focus on women, though this does not ignore the fact that many cases involve trafficking of male. Due to the complexity of trafficking, covering trafficked children in this research would be beyond the bounds of this thesis. However a clear limitation not including children, i.e. usually those under the age of 18, is not possible, partly because work focusing on trafficking cover both women and children and use phrases like “young women”.

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<sup>9</sup> The Common wealth of Independent States (further to be referred to as “CIS”) (*Russian: Содружество Независимых Государств, СНГ*, tr. *Sodruzhestvo Nezavisimyykh Gosudarstv, SNG*) is a regional organization whose participating countries are former Soviet Republics, formed during the breakup of the Soviet Union.

Since human trafficking is a hidden problem, the police departments and NGOs were unable to provide accurate figures on the number of Belarusians being exploited. An attempt was made to find out if there had been an increase in the number people being trafficked from the Belarus, during the last 5 years, though it was not possible to find any accurate estimates.

Due to the high volume of information on human trafficking in the world, the main focus is on trafficking within the borders of Europe.

### **1.3 Method**

In order to achieve the aim of performing analysis in the development of human trafficking understanding, as well as specific issue of the effectiveness of international law to combat human trafficking implementation in Belarusian legislation, I have primarily based the research on traditional legal method systematizing and interpreting applicable law, relevant literature and articles, treaty articles, guide-lines and other non-binding documents of the EU institutions.

Quantitative information was derived from the International Organization for Migration (further to be referred to as “*IOM*”) International Labour Organization (further to be referred to as “*ILO*”) caseloads regarding assisted victims of trafficking, countries of destination, and formal law enforcement cooperation. Here it should be mentioned that, while official statistics indicate a downward tendency in the number of victims identified in criminal prosecution cases, such statistics do not necessarily reflect the actual scale of trafficking. Due to the latent nature of the phenomenon of human trafficking, the actual scale of trafficking inhuman beings around the world and, in this context, in Belarus (as either a source, transit or destination country) is difficult to measure.

### **1.4 Terminology**

Finding the right words to describe the crime remains a persistent challenge in combating human trafficking. Most formulations used to describe

trafficking focus on the trade or buying and selling of people, or they mean something closer to ‘smuggling’, which relates specifically to movement over borders. These words, including the word trafficking in English, may not adequately capture the most important aspect of the practice: exploitation<sup>10</sup>. Thus, Russian phrase ‘*torgovlya lyudmi*’, translates to ‘*trade of people*’.

A focus on movement would ignore those people who are trafficked within their own countries, regions, or towns; a focus on trade or buying and selling does not highlight the fraud or coercion often involved in human trafficking. It excludes the many victims who are never “bought” or “sold” but rather “self-present” to exploiters who then traffic them and victims who are otherwise deceived or defrauded into a form of servitude<sup>11</sup>, therefore these limited characterizations may lead to confusion in creating effective legislation or policies to prosecute offenders and protect victims of human trafficking.

Human trafficking, in essence, is a modern-day form of slavery. It involves exploitation and forced servitude. To recognize and address all forms of human trafficking, the language used to discuss it should focus on the harsh reality of victims’ suffering and the horrific crimes of perpetrators<sup>12</sup>. Personally, I prefer the term “modern-day slavery” because I think it better describes the victims’ experience and what the perpetrators do. On this thesis, however, I use the two terms interchangeably, in part because more people are familiar with the term “human trafficking” than the term “modern-day slavery”<sup>13</sup>.

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<sup>10</sup> Office to Monitor and Combat Trafficking in Persons. Trafficking in Persons Report (2009), <<http://www.state.gov/g/tip/rls/tiprpt/2009/123128.htm>>, visited on 1 of May 2011.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> The phrase ‘modern-day slavery’, though, can be problematic, since one may connect slavery with physical bondage. Victims of modern-day slavery are sometimes held in physical bondage, but are often held by emotional, financial and psychological chains.

## 2. History of development of Human trafficking Law: Human Trafficking as a legal phenomenon and definition

### 2.1 The origin of Human trafficking Law and definition

Separate forms and elements of trafficking in persons formed the basis of existence and prosperity of many countries in different historical eras and socio-economic formations, starting from the slave states of ancient Egypt, Greece and Rome<sup>14</sup>.

Since then, mankind has made a big step forward in development, both technical and intellectual; in the development of public attitudes towards human beings, social order and state.

Nevertheless, despite the fact that a slave-owning system as a fact of the formation became a thing of the past, slavery has not disappeared, on the contrary, it began to appear in new forms, appropriate to the contemporary conditions of existence of society. Many people trafficked nowadays live under conditions equal to those experienced by slaves in former times. However, it is important to note that severe forms of contemporary exploitation are about slave-holding, rather than slave-owning, meaning that people can no longer be owned in a legal sense<sup>15</sup>.

As an international problem human trafficking began to form at the boundary of 19-20 centuries. Distinguishing features of that time was a significant development of industrial production and transport. However,

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<sup>14</sup> V.V. Marchouk. 'Criminal and legal assessment of the recruitment of people for exploitation', Pravo Belarusi (2002) pp. 68-74.

<sup>15</sup> The prohibition on slavery forms part of *jus cogens*, together with the prohibition against race discrimination, the prohibition against genocide, and latterly against torture. *Jus Cogens* are the rules within customary international law which have a special status above treaty-based law or even other customary law. According to Article 53 of the *Vienna Convention on the Law of Treaties* "These norms are seen as fundamental to the maintenance of international legal order".

these circumstances and uneven development of world economy entail serious consequences, such as a growth of migration flows<sup>16</sup>.

One of the 'streams' in these flows was trafficking of women from Eastern Europe for prostitution in the Middle East, South and North America. In many respects this was promoted by the absence of serious legal prohibitions on prostitution in most European countries and USA. By the end of 19 century trade in human beings began to get signs of a well-functioning international system<sup>17</sup>.

If one were to consider the long history of the 'abolition of slavery' in international relations, the epochs could be set out as such: the nineteenth century would be characterized by the move to abolish the slave trade; while the twentieth century could be divided into two- three distinct phases: the dominance of colonial powers and abolition of slavery (1920-1945); the decline of empire and the abolition of servitudes (1945-1966); and the post-colonial era and the development of the political term 'slavery-like practice'(1966-1998)<sup>18</sup>.

The twenty-first century, for its part, is poised to move beyond the political to once more emphasize the legal basis of the 'abolition of slavery', but this time by holding individuals responsible under international criminal law, as opposed to States under general international law or international human rights law<sup>19</sup>.

According to Prof. *Claude d'Estree* the term 'human trafficking' has become a term of art to mean modern and contemporary slavery and forced labour, including, but not limited to, the commercial sex trade, agriculture, manufacturing, domestic servitude, tourist industry and child soldiers. It is

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<sup>16</sup> Marchuk, *supra* note 14.

<sup>17</sup> N.I. Retneva. 'International legal measures to combat trafficking in women at the turn of the XIX-XX centuries'. *Bulletin of the Academy of Ministry of Internal Affairs of the Republic of Belarus*' № 2 (6) (2003), p.51-53.

<sup>18</sup> Dr. Jean Allain. *Trafficking Women and Children after the End of Slavery: Historical and Contemporary Perspectives from Africa and Beyond*. Queen's University of Belfast. 11th Joint Stanford-University of California 19-21 March 2009. Law and Colonialism in Africa Symposium, <[lawvideolibrary.com/docs/mobilization.pdf](http://lawvideolibrary.com/docs/mobilization.pdf)>, visited on 1 March 2011.

<sup>19</sup> Claude d'Estree. 'Human Rights and Human Trafficking', *Josef Korbel School of International Studies* (2008), <<http://www.du.edu/korbel/hrhw/researchdigest/trafficking/Introduction.pdf>>, visited on 1 May 2011.

somewhat of a misnomer as human trafficking indicates a process that leads to slavery and not slavery itself<sup>20</sup>. As an example, a person who is smuggled into a country may be working in violation of that country's domestic laws, but he/she is free to accept or reject job offers. On the other hand a person who is trafficked into a country is forced to work without compensation and has no freedom of choice in his/her job selection. Some would also argue that the term '*human trafficking*' is too antiseptic and legalistic and avoids the emotional and historic impact of calling the problem what it is – slavery. Organizations like the United Nations go to great lengths to avoid using the term “modern slavery” or “modern-day abolitionist”<sup>21</sup>.

## **2.2 International Anti-Slavery Conventions**

The definitions contained within international slavery law have, to a large extent, transferred understandings of exploitation to the framework of trafficking in persons.

### **2.2.1 League of Nations International Slavery Convention by 1926**

Gradually a prohibition of the institution of slavery itself developed, culminating in the *League of Nations International Slavery Convention*<sup>22</sup>, ratified on September 25, 1926 (further to be referred to as “*Slavery convention*”). *Slavery convention* committed to achieve in a short period complete abolition of slavery. According to the convention, slavery is “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised” (Article 1.1). Including “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange

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<sup>20</sup> Claude d'Estree. 'Human Rights and Human Trafficking', *Josef Korbel School of International Studies* (2008), <<http://www.du.edu/korbel/hrhw/researchdigest/trafficking/Introduction.pdf>>, visited on 1 May 2011.

<sup>21</sup> *Ibid.*

<sup>22</sup> Corin M., Schloenhardt A. '*The Evolution Of Trafficking In Persons In International Law*' (2010) The University of Queensland, Brisbane, Australia, pp. 6-7.



of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves” (Article 1.2). Convention took a narrow approach defining slavery, distinguishing between slavery and forced labour<sup>23</sup>.

In order to understand ‘slavery’ definition in a modern world, as there could be no rights of ownership for one person over slavery; this focuses on the core of the crime—that is, the objectification of human beings—is “reducing a person to a status or condition in which any or all of the powers attaching to the right of property are exercised”<sup>24</sup>. In other words, a person is a slave if any other person can, by law or enforceable custom, claim such property in him as would be claimed if he were an inanimate object; and thus the natural freedom of will possessed by a person to offer or render his labour or to control the fruits thereof or the consideration there from is taken from him<sup>25</sup>.

This convention is highly important in the development of human trafficking legislation, since I have already mentioned, it was the first attempt to determine the ‘trafficking’. However, the *Slavery Convention* did not define the status of victims of trafficking and did not contain a mechanism for cooperation between countries and monitoring mechanism; these issues are going to be elaborated on later.

Key provisions of these international conventions have been further developed in international instruments adopted by the United Nation (further to be referred to as “UN”).

### **2.2.2 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery by 1956***

So, on 30 April, 1956 the UN conference of Plenipotentiaries adopted a *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and*

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<sup>23</sup> Jean Allain. ‘A Legal Consideration ‘Slavery’ in Light of the Travaux Préparatoires of the 1926 Convention’. Wilberforce Institute for the Study of Slavery and Emancipation, 23 November 2006, pp.6-8

<sup>24</sup> *Ibid.*, pp.6-8

<sup>25</sup> *Ibid.*, pp.6-8

*Institutions and Practices Similar to Slavery* (further to be referred to as “*Supplementary Convention*”), which significantly expanded on the general understanding of slavery, given in Slavery Convention. In accordance with *Supplementary Convention* “Practices similar to slavery” shall include debt bondage, serfdom, servile forms of marriage and the exploitation of children and adolescents.

Supplementary Convention in Article 1 defines ‘*Debt bondage*’<sup>26</sup> as “the system by which a person is kept in bondage by making it impossible for him or her to pay off his or her real imposed or imagined debts”<sup>27</sup>. ‘*Serfdom*’ shall mean “the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his or her status”<sup>28</sup>. What is notable is that the servitude is prohibited by, among other instruments, e.g. the Universal Declaration of Human Rights adopted on December 10, 1948 (furthered to be referred to as “*Universal Declaration*”) and the International Covenant on Civil and Political Rights adopted on December 16, 1966<sup>29</sup> (further to be referred to as “*ICCPR*”), but none of these international instruments contains an explicit definition of servitude. As such, the term ‘servitude’ is generally understood as separate from and broader than slavery, referring to “all conceivable forms of dominance and degradation of human beings by human beings”<sup>30</sup>. So, mainly, we can state

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<sup>26</sup> *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, <<http://www2.ohchr.org/english/law/slavetrade.htm>>, visited on 10 May 2001.

<sup>27</sup> An example of a criminal law definition of “debt bondage” is: “Debt bondage means the status or condition that arises from a pledge by a person:“(a) of his or her personal services; or “(b) of the personal services of another person under his or her control; as security for a debt owed, or claimed to be owed, (including any debt incurred, or claimed to be incurred, after the pledge is given),by that person if:“(a) the debt owed or claimed to be owed is manifestly excessive; or “(b) the reasonable value of those services is not applied toward the liquidation of the debt or purported debt; or “(c) the length and nature of those services are not respectively limited and defined.”(Source: Australia, Criminal Code Act 1995, section 271.8)

<sup>28</sup> Supplementary Convention, *supra* note 19.

<sup>29</sup> *International Covenant on Civil and Political Rights*  
<<http://www.hrweb.org/legal/cpr.html>>, visited on 10 May 2011.

<sup>30</sup> A. Gallagher. ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’, *Virginia Journal Of International Law*. Vol. 49:4, pp. 803-804.

that the practice of modern understanding of servitude is based on the interpretation of Article 2 of Supplementary Convention<sup>31</sup>.

Furthermore the Supplementary Convention defines, that “Forced or servile marriages” shall mean any institution or practice in which:

- (i) A woman [person] or child without the right to refuse is promised or given in marriage on payment of a consideration in money or in kind to her [his] parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family or his clan has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person.

In this definition the Supplementary Convention refers to the practice of forced or servile marriages in relation to women only.

Similarly to the Slavery Convention, the Supplementary Convention did not establish a monitoring mechanism. Thus, Article 8 of the Convention contains only a general obligation for States Parties to cooperate with each other and with the UN and to communicate to the Security-Council any provision adopted to implement the Convention<sup>32</sup>.

However, the Supplementary Convention require States Parties to consider as a criminal offence the transportation or attempt to transport slaves from one country to another and to free every slave who takes refuge on board one of their vessels<sup>33</sup>. The criminalization of the abolition of slavery was reversed by almost universal moral conviction of the practice. Important to notice, that there has existed this level of moral outrage in relation to the traffic in persons. This potentially problematises the reliance

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<sup>31</sup> In its 2005 judgment in the case of *Siliadin v. France* the European Court of Human Rights defined servitude as: “An obligation to provide one’s services that is imposed by the use of coercion, and is to be linked to the concept of slavery.”(ECHR, 26 July 2005, No. 73316/01).

<sup>32</sup> C. Morcom, A. Schloenhardt, *The Evolution of Trafficking in Persons in International Law*. The University of Queensland, Brisbane, Australia (2010), pp. 8-11, <<http://www.law.uq.edu.au/documents/humantrafficking/legislation/Evolution-of-Int-Law-relating-to-Trafficking-in-Persons.pdf>>, visited 1 May 2011.

<sup>33</sup> *Ibid.*, pp. 8- 11.

on criminalization provisions within the international human trafficking framework<sup>34</sup>.

It's necessary to analyze the development of the international anti-slavery legislation, since the emphasis on the sex sector of trafficking can lead to misconception that trafficking equals to prostitution<sup>35</sup>. We can face with the same misunderstanding in the case of emphasis on the other sectors, such as forced labour, debt bondage and slavery. In this sense it's important to mention that, in my opinion, although trafficking includes all of these elements, but never identifies just with one of them<sup>36</sup>.

But as we can see from this early definition and condemnation of slavery and practices similar to slavery grew both the international human rights movement and the international anti-trafficking framework. Similarly, the criminalization approach to slavery is also evident within the human trafficking laws. Hence, the principles which founded and governed the adoption of international anti-slavery laws were transmuted into the framework of the similar, but distinct phenomenon of the trafficking in humans<sup>37</sup>.

## 2.3 International Anti-Prostitution Conventions

International anti-prostitution conventions greatly contributed to current conceptualizations of trafficking in persons. In actuality, these instruments were constituted by an initial recognition of the traffic in women and children, and to some extent did succeed in developing an international framework to combat trafficking in persons for the purpose of commercial sexual exploitation<sup>38</sup>.

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<sup>34</sup> C. Morcom, A. Schloenhardt, *supra* note 25.

<sup>35</sup> *Trafficking v. Prostitution* will be discussed further on.

<sup>36</sup> There are different points of view regarding correlation of these elements, as an example, the International Labour Organization maintains that forced labour is the umbrella category for slavery, debt bondage and human trafficking. Others argue that a 'new slavery' is the umbrella category for forced labour, trafficking and debt bondage, e.g. anti-slavery activist Kevin Bales. And U.S. government's attitude that trafficking is the umbrella category for forced labour, debt bondage and slavery.

<sup>37</sup> C. Morcom, A. Schloenhardt, *supra* note 25.

<sup>38</sup> *Ibid.*

Thus, for comprehensive and detailed understanding of ‘*human trafficking*’ as a legal phenomenon from all the perspective, one needs to go back to its historical evolution through decades and to show its development in the frame of commercial sexual exploitation, starting point of which in my opinion can be considered International Prison Conference in 1895. The outcoming of the conference was the formation of an international commission, studying sex trafficking.<sup>39</sup> Later in June, 1899 the first international congress gathered to oppose white slave traffic in London. 120 delegates from various nations attended the congress, where resolutions were adopted to create a permanent organization to be known as the International Congress. As a result of its activity, on May 18, 1904 in Paris the International Congress passed the first comprehensive agreement designed to address the white slave traffic: “*The International Agreement for the Suppression of the White Slave Traffic*” (further to be referred to as “*Agreement by 1904*”)<sup>40</sup>. This document can be considered as the first step in separating trafficking from a moral offence to a criminal one<sup>41</sup>.

### **2.3.1 The International Agreement for the Suppression of the White Slave Traffic**

Primarily, the Agreement by 1904 aimed at obliging Contracting Parties<sup>42</sup> to collect information on the procurement of women and girls for ‘immoral purposes’ abroad and also to implement controls to identify those involved.

Later, the above mentioned agreement requires each of the participating governments to keep watch, especially in railway stations and

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<sup>39</sup> Retneva, *supra* note 10.

<sup>40</sup> *The International Agreement for the Suppression of the White Slave Traffic*, Opened for signature 18 May 1904, 3 Stat.1979, (entered into force 18 July 1905). <<http://treaties.un.org/doc/Publication/UNTS/Volume%201009/volume-1009-C-11-English.pdf>>, visited on 1 May 2011.

<sup>41</sup> T.D. Matveyeva. ‘Slavery in the 21th century’. *Mezhdunarodnaya zhishn.* No. 2. (2002) p.28.

<sup>42</sup> The Agreement was between: “His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the German Emperor, King of Prussia, in the name of the German Empire; His Majesty the King of the Belgians; His Majesty the King of Denmark; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of Italy; Her Majesty the Queen of the Netherlands; His Majesty the King of Portugal and of the Algarves; His Majesty the Emperor of all the Russias; His Majesty the King of Sweden and Norway; and the Swiss Federal Council”.

ports of embarkation, for persons in charge of women and girls destined for an immoral life<sup>43</sup>.

These early treaties are profoundly sexist and paternalistic, and focus on repatriation as the ultimate remedy<sup>44</sup>.

The practical result of the Agreement by 1904 was the establishment of relevant authorities of national committees. Such committees have been established in the Russian Empire. For example, in Vilna and Minsk have been formed local committees of the Russian Society for Women protection. It is notable that the Minsk Committee of the Society for the Women Protection mainly carried out preventive work among girls in local brothels<sup>45</sup>.

So the *Agreement by 1904*, put the main emphasis on the protection of victims of trafficking rather than the punishment of traffickers, and due to the later circumstance it was not considered to be very effective.

### **2.3.2 International Convention for the Suppression of the White Slave Trade**

The *International Convention for the Suppression of the White Slave Trade* of 1910 expanded on the Agreement by 1904. This convention is also known as the “*Mann Act*” (further also to be referred to as “*Mann Act*”), named after Congressman James Robert Mann<sup>46</sup>, who authored it. Aside from expanding on the previous Agreement by 1904, this convention also had a shift in emphasis, turning away from the original concern of the

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<sup>43</sup> Article 2.

<sup>44</sup> John Cerone. *The Human Rights Legal Framework Applicable to Trafficking in Persons and Its Incorporation into UNMIK Regulation 2001/4*, 7. *The Yearbook Of International Peace Operations* 43 (2002).

<sup>45</sup> L.N. Kalinkovich, I.L. Petrik. *Trafficking in Human Beings in Republic of Belarus*. International Organization for Migration (2004), pp. 8-10.

<sup>46</sup> James Robert Mann served in the U.S. House of Representatives from 1897 to 1922. Mann, an Illinois Republican, sponsored three pieces of legislation that enlarged the power of the federal government to regulate the economy and the nation's morals. *Read more: James Robert Mann - Act, Federal, Law, Chicago, White, and Food*, <<http://law.jrank.org/pages/8422/Mann-James-Robert.html#ixzz1LT0BTOOM>>, visited on 10 April 2011.

trafficking of white immigrant women, and instead focusing on the trafficking of native-born women within the United States<sup>47</sup>.

Notably, the *Mann Act* also makes clear that the consent of the victim will not render the conduct beyond the scope of the treaty. So, Article 1 of the *Mann Act* requires to punish those who, “[i]n order to gratify the passions of another person, [have] procured, enticed or led away, even with her consent, a woman or a girl under age, for immoral purposes, regardless of which country the offence was committed in”. Hence, by criminalizing conduct even where the victim has fully consented, in the absence of means that would vitiate consent, these early treaties essentially take an abolitionist approach to the prostitution. Indeed these treaties are more tightly focused on the abolition of prostitution than on the elimination of trafficking per se.

Nonetheless, the treaties are principally concerned with transnational conduct. Thus, *the Mann Act* broadened the 1904 definition by including trafficking within national borders<sup>48</sup>.

These regulatory efforts were supplemented by the *International Convention for the Suppression of the Traffic in Women and Children*, adopted by 30 September 1921 (further to be referred to as “*Convention by 1921*”)<sup>49</sup>.

### **2.3.3 *International Convention for the Suppression of the Traffic in Women and Children***

*The Convention by 1921* was concluded under the auspices of the newly established League of Nations<sup>50</sup>.

The *Convention by 1921* partially extended the provisions of the two previous instruments; it applies to “traffic in children of both sexes”<sup>51</sup>, as

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<sup>47</sup> A. Schloenhardt. ‘*International Conventions Relating to Trafficking in Persons*’ (2009). The University of Queensland, Brisbane, Australia, pp. 2-4.

<sup>48</sup> Cerone, *supra* note 36.

<sup>49</sup> For Soviet Social Republic of Belarus it came to force on 21 May, 1948.

<sup>50</sup> The League of Nations was established as it mentioned in its covenant that “in order to promote international co-operation and to achieve international peace and security”. For more information, *see*

<[http://www.pbs.org/wgbh/amex/wilson/filmmore/fm\\_nations.html](http://www.pbs.org/wgbh/amex/wilson/filmmore/fm_nations.html)>, visited on 11 of May 2011.

<sup>51</sup> Article 2.

well as adult females, and raised the age limit for protection regardless of consent from 20 years to 21 completed years of age<sup>52</sup>.

### **2.3.4 International Convention for the Suppression of the Traffic in Women of the Full Age**

The next international legal document, which maintained as a focus the prohibition of transnational prostitution, was *International Convention for the Suppression of the Traffic in Women of the Full Age*, by October 11, 1933<sup>53</sup> (further to be referred to as “*The Convention by 1933*”)<sup>54</sup>.

The convention was employed under the League of Nations and reiterated the desire to secure more completely the suppression of the traffic in women and children. This convention followed up on the recommendations contained in the Report to the Council of the League of Nations by the Traffic in Women and Children Committee on the Work of its Twelfth Session<sup>55</sup>.

In the comparison of the earlier legal documents the *Convention by 1933* inter alia extends on the following issues. So, Article 1 of the convention includes in punishable requirements also “attempted offences”, and within the legal limits, “acts preparatory to the offences in question”. Besides, the term “country” is widened to include the colonies and protectorates of the parties concerned, as well as the territories under them.

Speaking about the expansion of the understandings, as we saw above, the changes also applied to “gender” issue: it refers not only to women and girls, but also to male children, thus we can see the conception of the trafficking ‘victim’ developed. Further, these Conventions explicitly connected the traffic in women and children with exploitation in the sex

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<sup>52</sup> Article 8.

<sup>53</sup> International Convention for the Suppression of the Traffic in Women of Full Age, October 11, 1933, 150 L.N.T.S., *entered into force* August 24, 1934, <<http://www1.umn.edu/humanrts/instree/women-traffic.html>>, visited on 11 January 2011.

<sup>54</sup> Followed by protocols of 1947 and 1949.

<sup>55</sup> A. Schloenhardt, *supra* note 39, pp. 3.



industry, thereby creating a lasting conception of the link between trafficking and prostitution<sup>56</sup>.

### **2.3.5 United Nations' Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others**

Following increasing awareness and acceptance, that prostitution should not merely be a matter of domestic regulation, we can see adoption on 2 December, 1949 of the *United Nations' Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (further to be referred to as "*The Convention by 1949*"), which was the first legally binding instrument, attempting to consolidate and extend the scope of the four previous white slave traffic agreements and of the League of Nations 1937 draft convention, adopting an abolitionist approach<sup>57</sup>.

Thus, the preamble of the convention, invoking the principle of human dignity, the core principle of international human rights law, states that prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community<sup>58</sup>. But nevertheless, there was no human trafficking definition, reasons or factors which can lead to this phenomenon.

Hence, the convention failed to adopt a rights-based approach and instead followed the tradition of its early 20<sup>th</sup> century predecessors, focusing almost exclusively on criminalization. While this convention does provide some protections to victims, they are minimal. Further, the drafters of the convention continued to employ a definition that made the consent of the

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<sup>56</sup> C. Morcom, A. Schloenhardt, *supra* note 25, p. 14.

<sup>57</sup> *Ibid.*

<sup>58</sup> J. Cerone, *supra* note 36.

victim<sup>59</sup> completely irrelevant to the definition of trafficking<sup>60</sup>. Perhaps the most striking aspect of the convention is that it states in Article 1.

The Parties to the present convention agree to punish any person who, to gratify the passions of another:

- procures, entices or leads away, for the purposes of prostitution, another person, even with the consent of that person;
- exploits the prostitution of another person, even with the consent of that person.

The convention has played a positive role in shaping the understanding of the need to combat human trafficking, but over time its interpretation of the crime and the strategy to combat it ceased to meet the realities of life and ideology of human rights instruments.

Further, despite the important efforts of the Convention, it failed to challenge other forms of trafficking in persons not linked to prostitution. As stated by the Special Rapporteur<sup>61</sup> on violence against women:

“The United Nations addresses trafficking in women through the Convention by 1949. Due to its ill-defined and broad terminology, a weak enforcement mechanism and its uniquely abolitionist perspective, the Convention by 1949 has failed to attract widespread support and only 70 States are parties.

Most Governments and non-governmental organizations agree that there is an urgent need to reformulate international standards so as to meet the exigencies of modern reality. Such a reformulation requires a definition of trafficking and would have to set out principles to guide national and international action with regard to trafficking in women”.

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<sup>59</sup> During the development of convention no attention was paid to the victims of trafficking. In the text of this document, the rights of victims of sexual exploitation were prescribed imperfecting.

<sup>60</sup> J. Cerone, *supra* note 36.

<sup>61</sup> R. Coomaraswamy. *Integration of the Human Rights of Women and the Gender Perspective Violence against Women*, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Commission On Human Rights Resolution 1997/44.

### **2.3.6 Convention on Elimination of All Forms of Discrimination against Women**

Recognition that the *Convention by 1949* was considered obsolete and ineffective provided impetus to the adoption of the *Convention on Elimination of All Forms of Discrimination against Women*, adopted on 8 December, 1979 (further to be referred to as “CEDAW”) which became, in essence, “an international bill of women’s rights”<sup>62</sup>.

The comprehensiveness of CEDAW becomes an appropriate instrument to address the wide ranging issues that need to be discussed when dealing with trafficking<sup>63</sup>. And if we try to elaborate on our earlier idea concerning coloration of different approaches to human trafficking we would definitely state that this is for the first time when a human rights approach was successfully combined with a forced labour approach and prostitution in the sense of sexual exploitation. However, a discussion of CEDAW is relevant to this section of my thesis, as it maintains the link between the traffic in women and the sex industry.

The only lack of this legal arrangement was its only focus on women, as more vulnerable group<sup>64</sup>.

The General Recommendation № 19 to CEDAW pays attention to the fact that in addition to already established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages. These practices are incompatible with the equal

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<sup>62</sup> Although it is not the main subject of our research, here I would like to touch another topic, which may be usable for further research, which is the following: prominent focus on the trafficking of women over men arguably has links to assumptions about gender and, in particular, a generalized notion of female vulnerability. As *Rebecca Surtees*, in her book “*Trafficking of Men*”, noticed: “this perspective not only focuses on women but also leads to an omission of men from the trafficking discussion, and by implication, prevention and assistance paradigms. The issue of “human trafficking” must, therefore, be understood in its broadest sense and complexity so that the forces and factors that contribute to trafficking can be considered and redressed for all forms of exploitation and all profiles of victims”, pp. 2-5.

<sup>63</sup> Combating human trafficking in Asia: a resource guide to international and Regional Instruments, Political Commitments and Recommended Practices, United Nations. Economic and Social Commission for Asia and the Pacific (2003), p. 219.

<sup>64</sup> On the other hand, this approach is quite comprehensible since the convention deals with women and their rights. And in this sense our critic must be understood as one more conceptual.

enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse<sup>65</sup>.

Although the CEDAW does not provide a clear definition of trafficking in women and exploitation of prostitution of women, but developed mechanism to implement the provisions of the Convention obliges States to pay attention to the urgency of the problem and take all appropriate measures at the domestic level<sup>66</sup>.

Analyzing international prostitution conventions one can see a continued criminalization approach to the traffic in women. Trafficking in women mainly focused on prostitution and sexual exploitation. Further, these conventions established a distinctly gendered vision of trafficking in persons, whereby women and children were positioned as eternal victims<sup>67</sup>.

Anyway, these international instruments have fundamentally influenced the contemporary international framework in relation to trafficking in persons, the conceptualizations and responses contained therein<sup>68</sup>.

## 2.4 International Labour Law

International community also paid attention to another element of trafficking, which is forced labour. Thus, the General Conference of the International Labour Organization<sup>69</sup> on 28 June, 1930 adopted the *Convention on Forced Labour*<sup>70</sup> (further to be referred to as “*The Convention 29*”), in which forced or compulsory labour “shall mean all

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<sup>65</sup> General recommendations made by the Committee on the Elimination of Discrimination against Women, <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>>, visited on 11 of April, 2011.

<sup>66</sup> Similarly, the Convention on the Rights of the Child adopted on 20 November, 1989 (further to be referred to as “*CRC*”) obligates State Parties to protect children from economic exploitation and all forms of sexual exploitation and abuse. <<http://www2.ohchr.org/english/law/crc.htm>>, visited on 11 of April, 2011.

<sup>67</sup> C. Morcom, A. Schloenhardt, *supra* note 25, pp. 17-20.

<sup>68</sup> *Ibid.*

<sup>69</sup> The ILO is the international organization responsible for drawing up and overseeing international labour standards. The ILO was founded in 1919. The ILO became the first specialized agency of the UN in 1946.

<sup>70</sup> *Convention on Forced Labour*, entered into force 1 May 1932.

<<http://www2.ohchr.org/english/law/forcedlabour.htm>>, visited on 5 May 2011.

work or service<sup>71</sup> which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”<sup>72</sup> and *Abolition of Forced Labour Convention* (further to be referred to as “*Convention 105*”) Adopted 25 June, 1957, which institute measures to prevent compulsory labour from degenerating into conditions analogous to slavery<sup>73</sup>.

Further development of International Labour Organization conventions in relation to trafficking in persons has, to some extent shifted attention away from the sole focus on trafficking for purposes of prostitution<sup>74</sup>.

Nowadays understanding and international response to combat human trafficking has been advanced by international labour law, by prohibiting forced and compulsory labour, the worst forms of child labour and the exploitation of migrant workers, and by extending a measure of protection to trafficked persons.

## **2.5 International human trafficking law in the modern human rights law era, 1945-present**

Further development of phenomenon of human trafficking gradually leads us to the inevitable manifestation to another approach to human trafficking, which is the human rights approach<sup>75</sup>.

International human rights law is substantially influential upon the contemporary framework governing trafficking in persons.

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<sup>71</sup> A forced labour situation is determined by the nature of the relationship between a person and an “employer”, and not by the type of activity performed, the legality or illegality of the activity under national law, or its recognition as an “economic activity” (ILO, Global Report 2005, p. 6). Forced labour thus includes forced factory work as well as forced prostitution or other forced sexual services (also when prostitution is illegal under national law) or forced begging.

<sup>72</sup> Article 2.

<sup>73</sup> *Abolition of Forced Labour Convention*, Entry into force: 17 January 1959, <<http://www2.ohchr.org/english/law/abolition.htm>>, visited on 5 of May.

<sup>74</sup> C. Morcom, A. Schloenhardt, *supra* note 25, pp. 17-20.

<sup>75</sup> Up to now it was mentioned human trafficking as a forced labour approach and prostitution.

This process was reflected in the most significant legal documents of the 20th century in the field of human rights, such as *Universal Declaration*, further *The International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights* adopted on 16 December in 1966 (further to be referred to as “ICESCR”)<sup>76</sup>, which may be implicated in a trafficking context.

So, Article 8 of ICCPR sets forth the right to be free from slavery, servitude, and forced labour, and Article 7 of ICESCR, which provides for the right to “just and favorable conditions of work”. Other relevant rights include, inter alia, the freedom from torture or cruel, inhuman, or degrading treatment or punishment; the right to an adequate standard of living; the protection against arbitrary or unlawful interference with privacy; the right to the enjoyment of the highest attainable standard of physical and mental health; freedom from discrimination on the basis of race, gender, or other status; the right to liberty and security of the person; and, in some cases, the right to life.

Although it was initially unclear to what extent the two principal covenants could apply to trafficking, given the crime's transnational dimension and the private capacity of the principal perpetrators, the applicability of the ICCPR and the ICESCR is now broadly accepted. This acceptance has flowed in part from the respective treaty bodies evolving recognition of the scope of positive obligations under the two covenants as well as their extraterritorial application<sup>77</sup>.

## **2.6 Upsurge in concern over human trafficking**

Human trafficking and solutions to combat trafficking critically appeared on the agenda in the beginning of the 90<sup>th</sup>. The end of the Cold War and the opening of the markets in Eastern Europe coincided with the upsurge in

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<sup>76</sup> *International Covenant on Economic, Social and Cultural Rights*, entered into force 3 January 1976, <<http://www2.ohchr.org/english/law/cescr.htm>>, visited on 1 of May 2011.

<sup>77</sup> J. Cerone, *supra* note 36

concern over human trafficking<sup>78</sup>. Western European States may have been concerned that the fall of the Berlin Wall would lead to an increase in the number of trafficked persons from Eastern Europe<sup>79</sup>.

Transitional transformations following the disintegration of the Soviet Union have been raised as a significant factor increasing the vulnerability of people to trafficking<sup>80</sup>.

### **2.6.1 The Vienna Declaration**

During early 1990s we can see the formation of various working groups and proposed courses of action to handle the problem of human trafficking, such as the *Vienna Declaration* adopted on 12 July, 1993 by the World Conference on Human Rights<sup>81</sup>. Article 18 of the declaration, which deals with trafficking in women, states:

The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated.

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<sup>78</sup> Catherine Dauvergne. *Making People Illegal: What Globalization Means for Migration and Law*. New York: Cambridge Press: 2008, p. 74.

<sup>79</sup> Rebecca Surtees. 'Traffickers and Trafficking in Southern and Eastern Europe'. *European Journal of Criminology* (2008). Vol. 5, p. 40.

<sup>80</sup> As it was mentioned, human trafficking is not a new phenomenon for ex-soviet countries. The Soviet system by definition employed a repressive policy of control, doing whatever was considered "necessary and sufficient". This created a permanent environment for exploitation of the population, with numerous instances of exploitations satisfying the definition of trafficking under the Palermo Protocol (For more information, see: *Trafficking in persons in the South Caucasus – Armenia, Azerbaijan and Georgia: New challenges for transitional democracies* by Gulnara Shahinian).

<sup>81</sup> Vienna Declaration And Programme of Action, United Nation A/Conf.157/23, <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)>, visited on 5 May 2011.

The attitude to the human rights of women and of the girl child as an inalienable, integral and indivisible part of universal human rights continue to develop in the international legislation and one can see its reflection during the World Conference on Women, which adopted on 15 September 1995 *The Beijing Declaration and Platform for Action*<sup>82</sup>.

## **2.6.2 The Beijing Declaration and Platform for Action**

Thus, the Beijing Declaration called for the abolition of violence against women which both “violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms”<sup>83</sup>. As an agenda for action, the Platform “seeks to promote and protect the full enjoyment of all human rights and the fundamental freedoms of all women throughout their life cycle”<sup>84</sup> and international trafficking in women and children was at the top of the list of illegal practices to be eliminated.

After the Beijing Conference, the fight against human trafficking was included in the program of action in many countries, known as the “3P” paradigm – prevention, protection, and prosecution. Prevention<sup>85</sup> was focused on public awareness campaigns that inform and educate communities in source and destination countries about human trafficking so that they can identify victims or specifically warn migrants and other

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<sup>82</sup> *The Beijing Declaration and Platform for Action*,  
<<http://www1.umn.edu/humanrts/instree/e5dplw.htm>>, visited on 5 of May 2011.

<sup>83</sup> *Ibid.*

<sup>84</sup> United Nations. *The United Nations Fourth World Conference on Women (2009)*/ division for the Advancement of Women.  
<<http://www.un.org/womenwatch/daw/beijing/platform/human.htm>>, visited on 10 May 2009.

<sup>85</sup> “Today, prevention encapsulates cross-cutting endeavors that include: rectifying laws that omit classes of workers from labour law protection; providing robust labour enforcement, particularly in key sectors where trafficking is most typically found; implementing measures that address significant vulnerabilities such as birth registrations and identification; carefully constructing labour recruitment programs that ensure protection of workers from exploitation; strengthening partnerships between law enforcement, government, and nongovernmental organizations to collaborate, coordinate, and communicate more effectively; emphasizing effective policy implementation with stronger enforcement, better reporting, and government-endorsed business standards; and tackling this global crime at its root causes by monitoring product supply chains and reducing demand for commercial sex”. *The U.S. Department of State's Office to Monitor and Combat Trafficking in Persons*.



vulnerable populations. Protection included rescue, rehabilitation, and reintegration and the third “P”- prosecution. Nevertheless, eleven years after the conference many of the recommendations made in its Platform for Action remain unfulfilled until now<sup>86</sup>.

### **2.6.3 The Hague Ministerial Declaration On European Guidelines For Effective Measures To Prevent And Combat Trafficking In Women For The Purpose Of Sexual Exploitation**

The main ideas of the *Beijing Conference* for developing measures to prevent trafficking at the regional level, found its practical implementation in *The Hague Ministerial Declaration On European Guidelines For Effective Measures To Prevent And Combat Trafficking In Women For The Purpose Of Sexual Exploitation* adopted on 26 April, 1997 (further to be referred to as “*The Hague Ministerial Declaration*”). The EU Member States reaffirmed their commitment to maximize co-operation in the fight against trafficking in human beings, and against trafficking in women in particular, and agreed to this declaration with a view to responding to the concerns of the people of Europe. According to *the Hague Ministerial Declaration* trafficking in women constitutes a flagrant violation of women human rights that can only be tackled through a multi-disciplinary and co-ordinated approach involving all concerned players, NGOs, social, judicial, law enforcement and migration authorities. It requires both national, European and international actions and co-operation<sup>87</sup>.

The objective of The Hague Ministerial Declaration is to encourage further action in the field of prevention, investigation and prosecution, and appropriate assistance and support in line with the existing legal and budgetary frameworks and competencies at national and European level<sup>88</sup>.

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<sup>86</sup> Fact Sheet, *The “3P” Paradigm: Prevention, Protection, and Prosecution*, Office To Monitor and Combat trafficking in Persons (2010)

<<http://www.state.gov/g/tip/rls/fs/2010/143248.htm>>, visited on 10 May 2011

<sup>87</sup> *The Hague Ministerial Declaration*. General Considerations.

<sup>88</sup> *Ibid.*

One of the actions to be taken established by Hague Declaration as a new reporting mechanism: the office of National Rapporteur<sup>89</sup>.

Gradually, through the legal arrangements on different levels and in different forms, the international community came to the clear understanding that for combating human trafficking mere improvement of legal condition of women and children was no longer sufficient and in this sense “legal fight” against international organized crime was brought to the forefront.

These processes had their reflection in further legal arrangements. Thus, since January 1999, representatives of 102 countries met regularly in Vienna (Austria) to develop a new Convention against Transnational Organized Crime.

#### **2.6.4 The United Nations Convention against Transnational Organized Crime**

So, *The United Nations Convention against Transnational Organized Crime* (further to be referred to as “*The UN Convention by 2000*”) was adopted with the GA resolution 55/25 on 15 November, 2000. The Convention is further supplemented by 3 Protocols, which target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (further to be referred to as “*The Palermo Protocol*”), the Protocol against the Smuggling of Migrants by Land, Sea and Air (further to be referred to as “*The Smuggling Protocol*”) and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components

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<sup>89</sup> Ministerial Conference Under the Presidency of the European Union, Apr. 24–26, 1997, The Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation III.1.4. The following recommendations for action served as the basis for such a rapporteurship: reporting to governments on the scale of the prevention and combating of trafficking in women; developing criteria for reporting on the scale, nature, and mechanisms of reporting trafficking in women and the effectiveness of policies and measures concerning this phenomena; and encouraging the cooperation of national rapporteurs on a regular basis.

and Ammunition(further to be referred to as “*The Trafficking in Firearms Protocol*”)<sup>90</sup>.

While the UN Convention by 2000 was a mechanism to deal with organized crime generally, each of the three protocols addresses specific concerns of States with regards to their sovereignty, security and a particular organized crime<sup>91</sup>.

The reasons which necessitated the adoption of the new UN Convention against Transnational Organized Crime and its Additional Protocol on combating human trafficking are disclosed in the text of the document itself. Thus, in the preamble to the Palermo Protocol requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent trafficking, to punish the traffickers and to protect the victims of trafficking, including by protecting their internationally recognized human rights, since there is no universal instrument that addresses all aspects of trafficking in persons, and that the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime.

## **2.7 The definition of human trafficking in the Palermo Protocol**

So, in international instruments, the word “trafficking” means trade in slaves and drugs, and illicit trade on the whole. However, until recently, international law has not taken a unified approach to the definition of this term, which impeded, in a great measure, the establishment of an effective legislative framework that would enable effective measures to be taken in combating the traffic in persons. Again, neither lawyers, nor experts of public organizations, who are trying to prevent and suppress trafficking in

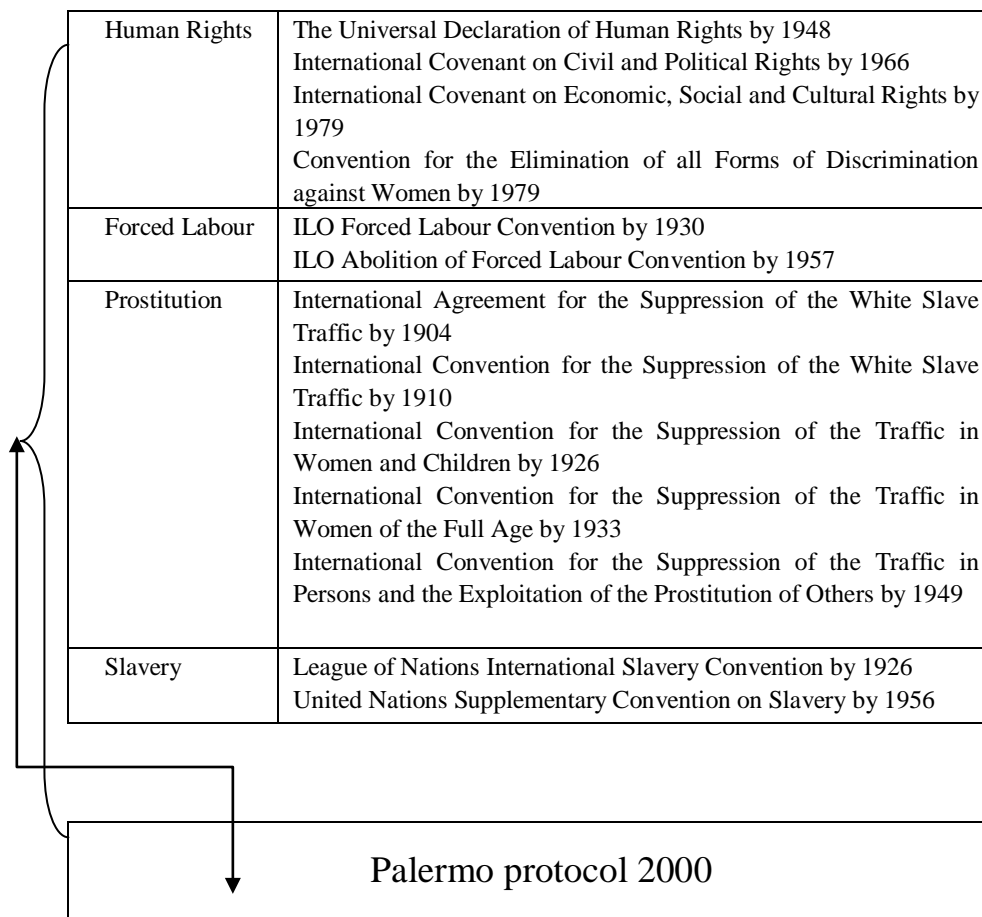
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<sup>90</sup> *United Nations Convention against Transnational Organized Crime and its Protocols*, UNDOC (2011), <<http://www.unodc.org/unodc/en/treaties/CTOC/index.html>>, visited on 1 of May 2011.

<sup>91</sup> Karen E. Bravo. ‘Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade’. *Boston University International Law Journal*. Vol. 25, (2007) pp. 224-225.

persons, have a common opinion on the issue. The majority of experts agree, however, that trafficking in human beings shall be defined as an act accompanied by fraud and various types of coercion<sup>92</sup>.

The definition of human trafficking in a protocol of the 2000 *UN Convention* was influenced by a long line of historical developments in international law. The following areas of international law can be identified, which have greatly contributed to the contemporary framework which governs, and constrains, responses to the traffic in persons both internationally and domestically. These areas are: slavery, prostitution, labour, rights of the child and human rights under international law<sup>93</sup>.



<sup>92</sup> D. Popa, K. Marczuk. 'Trafficking in Human Beings in the Post-Communist States of the Balkan Area', *Human Security Journal* (2008).Vol. 6, p.81; 'Trafficking in human beings-International knowledge and local practices'. A compendium of international practices. < <http://www.fesu.org>>, visited on 10 of May 2011.

<sup>93</sup> C. Morcom, A. Schloenhardt, *supra* note 25, pp. 20-22.

The process of drafting and adopting both the 2000 UN Convention and the 2000 Palermo Protocol occurred in a relatively short period of time. The 2000 Palermo Protocol was drafted by an ad hoc committee comprised of State delegates involved in the UN crime control programme, which is not an area in which human rights groups or migration or refugee bodies have typically participated<sup>94</sup>. However, for this particular protocol, there was substantial involvement of human rights NGOs, including the United Nations High Commissioner for Refugees (further to be referred to as “*UNHCR*”) and the Office of the United Nations High Commissioner for Human Rights (further to be referred to as “*OHCHR*”), which were able to mobilize and influence the drafting of the 2000 Palermo Protocol towards the inclusion of human rights provisions<sup>95</sup>. The involvement of the OHCHR and the anti-trafficking NGOs in the drafting process of the 2000 Palermo Protocol created a new identity for trafficked persons as victims of severe human rights abuses, rather than as criminals or illegal immigrants<sup>96</sup>. While criminalizing the traffickers, the Protocol highlights that prosecution and punishment should not endanger the safety of the victim. This shift in identity may have been largely symbolic because it is up to individual States to implement and enforce national laws – including both criminal and human rights provisions<sup>97</sup>.

The most controversial aspect of the drafting of the Palermo Protocol was the issue of consent, and whether non-forced adult prostitution should be included in the definition<sup>98</sup>. One side argued that a requirement of coercion would legitimize prostitution, taking the view that any prostitution is a human rights violation<sup>99</sup>. The opposing side believed that the inclusion of non-forced prostitution would blur the line between human trafficking

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<sup>94</sup> Joan Fitzpatrick. ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking’. *Michigan Journal of International Law*. Vol. 24, p. 1150.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, p. 1151

<sup>97</sup> *Ibid.*

<sup>98</sup> Elizabeth Bruch. ‘Models Wanted: The Search for an Effective Response to Human Trafficking’. *Stanford Journal of International Law* (2004). Vol. 40, p. 13.

<sup>99</sup> B. McSherry. ‘Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights’. *The International Journal of Human Rights* (2008). Vol.12, p. 71.

and smuggling.<sup>100</sup> Eventually a compromise was reached in the form of the final definition appearing in the Palermo Protocol.

Thus, the Palermo Protocol represents the first clear, internationally agreed definition of trafficking in persons. The definition has been adopted by 117 countries<sup>101</sup> and has been credited with promoting consistency in international anti-trafficking efforts.

What is the positive aspect of a universal definition of human trafficking? I would like to mention here the explanation by Dr. Andreas Schloenhardt, which states that, “human trafficking definition has assisted law enforcement agencies in numerous ways. Firstly, it has made trafficking a crime in countries which previously had limited or non-existent offences. Secondly, it simplifies the process of extraditing suspected participants. Thirdly, it is hoped that a common definition will standardize research and allow for better comparisons of data on trafficking”<sup>102</sup>.

So, the definition states, in Article 3(a) that “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.

This definition comprises 3 main elements that identify the crime of trafficking in persons as such, and which differentiate it from similar crimes, especially smuggling of migrants<sup>103</sup>.

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<sup>100</sup> *Ibid.*

<sup>101</sup> A. Schloenhardt. ‘Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children’ — Commentary. The University Of Queensland Tc Beirne School Of Law, <[www.law.uq.edu.au/humantrafficking](http://www.law.uq.edu.au/humantrafficking)>, visited on 11 Of May 2011.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

- 1) An act (what is done): recruitment, transportation, transfer, harbouring or receipt of persons.
- 2) The means (how it is done): 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<sup>104</sup> or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.
- 3) And an exploitative purpose (why it is done): this includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour<sup>105</sup> or services, slavery or practices similar to slavery, servitude or the removal of organs.

The definition of the crime of trafficking in persons requires the presence of a combination of these 3 elements. Here, several important points could be noted. This definition of trafficking is broad in its

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<sup>104</sup> The wide scope of this definition of illegal means can likewise be gleaned from the *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, as elaborated under the Interpretative Notes on Article 3 of the UN Trafficking Protocol: “The reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved” (*Travaux Préparatoires* of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, U.N. Doc A/55/383/Add.1 (Nov. 3, 2000), Part Two, Article 3, Section C: Interpretative Notes, Subparagraph (a)(a), at p. 347).

<sup>105</sup> “Forced labour” is not defined in the Protocol. There are, however, several international instruments in this regard, some of them were mentioned above, for example: the 1930 Convention concerning Forced or Compulsory Labour (Convention No. 105) of the International Labour Organization; and the 1957 Convention concerning the Abolition of Forced Labour (Convention No. 105) of the International Labour Organization. “Slavery” is not defined in the Protocol, but numerous international instruments, as well as the domestic laws of many countries, define or deal with slavery and similar practices (see, for example, article 4 of the 1948 Universal Declaration of Human Rights; the 1926 Slavery Convention, as amended by the 1953 Protocol (United Nations, Treaty Series, vol. 212, No. 2861); the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (United Nations, Treaty Series, vol. 266, No. 3822); the 1999 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention No. 182) of the International Labour Organization; article 11, paragraph 1, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (General Assembly resolution 45/158, annex); and article 4 (Prohibition of slavery and forced labour) of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms).

designation of illegal means, embracing abuse of a position of vulnerability, abuse of power, and various forms of coercion as possible illegal means<sup>106</sup>.

As it was mentioned before, some participants, including non-governmental organizations and States, wanted to classify all prostitution as trafficking in persons (referring to the definition above - abuse of power or position of vulnerability) while others wanted to include only forced labour, slavery or servitude in the definition. Consensus was reached with defining trafficking as involving slavery, forced labour and servitude, and leaving exploitation of the prostitution of others and sexual exploitation undefined.

The Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The interpretative notes highlight that States may interpret the article according to their domestic legislation<sup>107</sup>. Exploitation also includes, in the Protocol, servitude and the removal of organs.

The actual content of the definition has received mixed reviews. Positive points include its consideration of more subtle forms of coercion as a means of facilitating trafficking. However, the definition has also been criticized on a practical level as unwieldy and ill-suited for use in domestic criminal codes. A major criticism is that it contains too many elements, which complicates prosecution efforts<sup>108</sup>.

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<sup>106</sup> The wide scope of this definition of illegal means can likewise be gleaned from the *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, as elaborated under the Interpretative Notes on Article 3 of the UN Trafficking Protocol: "The reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved" (*Travaux Préparatoires* of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, U.N. Doc A/55/383/Add.1 (Nov. 3, 2000), Part Two, Article 3, Section C: Interpretative Notes, Subparagraph (a)(a), at p. 347).

<sup>107</sup> This accommodates the seemingly irreconcilable views of countries with different regulatory schemes for prostitution. Those with liberal regimes, such as the Netherlands, are able to exclude voluntary prostitution from their national trafficking framework while countries with stricter prostitution laws are able to expand the scope of their offences workers.

<sup>108</sup> A. Schloenhardt, *supra* note 92.



# 3. Legal framework of understanding Human trafficking at European level

## 3.1 Introduction to the two regional legal systems

There have been significant recent developments at European level against human trafficking, in particular *the Council of Europe Convention on Actions against Trafficking in Human Beings*, adopted on 15 May, 2005. Other European Union initiatives continue to have relevance, as does the jurisprudence of the Strasbourg Court of Human Rights<sup>109</sup>. Even though the Council of Europe and the European Union were products of the same idea, the same spirit and the same ambition, they mobilized the energy and commitment of the same founding fathers of Europe<sup>110</sup>, it's important to bear in mind that there are two separate system of regional law with different bases and different membership: the European Union<sup>111</sup> and the Council of Europe<sup>112</sup>.

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<sup>109</sup> Sandhya Drew. *Human trafficking-Human rights*, legal action group 2009.

<sup>110</sup> J. Juncker 'Council of Europe –European Union: "A sole ambition for the European continent"', report. <[http://www.coe.int/t/der/docs/RapJuncker\\_E.pdf](http://www.coe.int/t/der/docs/RapJuncker_E.pdf)>, visited on May 1 May, 2011.

<sup>111</sup> The European Union (EU) is not a federation like the United States. Nor is it simply an organization for co-operation between governments, like the United Nations. It is, in fact, unique. The countries that make up the EU (its 'member states') remain independent sovereign nations but they pool their sovereignty in order to gain a strength and world influence none of them could have on their own. Pooling sovereignty means, in practice, that the member states delegate some of their decision-making powers to shared institutions they have created, so that decisions on specific matters of joint interest can be made democratically at European level.

<sup>112</sup> In 1949, the Treaty of London established the Council of Europe based on principles of pluralist democracy, human rights, and the rule of law. For a state to join the COE, it must demonstrate both a respect for the rule of law and for human rights. Additionally, the COE is concerned with promoting European culture and diversity, consolidating and maintaining democratic stability, and promoting economic strength. States that join the Council of Europe retain their individual sovereignty and political identity. However, they must fulfill treaty obligations signed at the COE headquarters located at the *Palais de l'Europe* in Strasbourg (France).

### **3.1.1 The Council of Europe Convention on Action against Trafficking in Human Beings**

The Council of Europe considered that it was necessary to draft a legally binding instrument which goes beyond recommendations or specific actions<sup>113</sup>. Thus, the Council of Europe *Convention on Action Against Trafficking in Human Beings* (further to be referred to as “*The CoE Convention*”) was adopted.

The convention should be read together with the Explanatory Report attached to it, which sets out the background to the convention and explains the purpose of some of the provisions.

The definition of trafficking in Article 4 of the CoE Convention is taken from Article 3 of the Palermo Protocol. Article 4 provides:

- "Trafficking in human beings" 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;
- The consent of a victim of “trafficking in human beings” to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article.

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<sup>113</sup> The Council of Europe *Convention on Action Against Trafficking in Human Beings*, <<http://conventions.coe.int/treaty/en/reports/html/197.htm>>, visited on 10 of May 2011.

The convention frees the definition from its “moorings” in transnational organized crime, since it applies to all forms of trafficking in human beings<sup>114</sup>. The Explanatory report guide us that the drafters wanted the Convention to make clear that it applied to both national and transnational trafficking, whether or not related to organized crime. That is, the Convention is *wider in scope* than the Palermo Protocol and, as stated in Article 39, is intended to enhance the protection which the Palermo Protocol affords<sup>115</sup>.

Article 1(2) of the Palermo Protocol states that the provisions of the *United Nations Convention against Transnational Organized Crime* apply *mutatis mutandis* to the protocol unless the protocol otherwise provides, and Article 3(1) of the United Nations convention states that it applies to certain offences of a transnational nature and involves an organized criminal group. Under Article 2 of the CoE Convention, therefore, Chapters II to VI apply even if trafficking is at the purely national level and *does not involve any organized criminal group*<sup>116</sup>.

The convention also contains important guidance on the concept of vulnerability. Thus, under abuse of a ‘*position of vulnerability*’ we should understand abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. It means that the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce (Article 83)<sup>117</sup>.

According to Article 87 of the convention it is not necessary that someone have been exploited for there to be trafficking in human beings. It is enough that they have been subjected to one of the actions referred to in the definition and by one of the means specified “for the purpose of”

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<sup>114</sup> Sandhya Drew, *supra* note 101, p. 52

<sup>115</sup> *Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report*, Council of Europe Treaty Series - No. 197, <[http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197\\_en.asp#P743\\_73227](http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197_en.asp#P743_73227)> , visited 1 of May 2011.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

exploitation. Trafficking in human beings is consequently present before the victim's actual exploitation<sup>118</sup>.

While taking on board the definition of "human trafficking" contained in the Palermo Protocol, the Coe Convention contains also a definition of victim. '*Victim*' shall mean any natural person who is subject to trafficking in human beings as defined in this article<sup>119</sup>.

The Council of Europe Convention has a fundamentally *Human Rights-based* approach, which entails a positive obligation on States to prevent trafficking and protect victims, which goes beyond the individual criminal liability, and unlike Palermo Protocol it provides the possibility not to impose penalties on victims for their involvement in unlawful activities, if they were compelled to do so by their situation

According to the Council of Europe understanding if there is trafficking, it is because there is demand for it, that is why the convention criminalizes the "clients" that is those who knowingly make use of the services of victims of trafficking.

One of the main values added by convention in comparison with the Palermo Protocol is the monitoring mechanism. The UN Convention against Transnational Organized Crime entrusts a Conference of the Parties to promote and review the implementation of the Convention and its Protocols. The Council of Europe Convention puts in place a monitoring mechanism consisting of two complementary pillars<sup>120</sup>; the Group of Experts against Trafficking in Human Beings or GRETA, a technical body, composed of independent and highly qualified experts, and a purely governmental body, the Committee of the Parties. The quasi-judicial GRETA is tasked with adopting a report and conclusions on each Party's implementation of the Convention<sup>121</sup>.

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<sup>118</sup> The Explanatory Report refers to jurisprudence of Strasbourg Court, and to other Council of Europe legislative instruments, when considering the definition.

<sup>119</sup> UNODC Panel Session: "*The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation*", Speech by Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe.

< [http://www.coe.int/t/dc/press/News/20080215\\_disc\\_sga\\_unodc\\_en.asp](http://www.coe.int/t/dc/press/News/20080215_disc_sga_unodc_en.asp) >, visited on 10 May 2011.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

Moreover, the Convention is not restricted to Council of Europe member states; non-member states and the European Community also have the possibility of becoming parties to the Convention.

### **3.1.2 The European community and the European Union**

The Treaty on European Union (further to be referred to as “*TEU*”) represents a new stage in European integration since it opens the way to political integration. It creates a European Union consisting of three pillars: the European Communities, Common Foreign and Security Policy (further to be referred to as “*CFSP*”), and police and judicial cooperation in criminal matters (further to be referred as “*JHA*”). The Treaty introduces the concept of European citizenship, reinforces the powers of the European Parliament and launches a economic and monetary union (further to be referred to as “*EMU*”). Besides, the EEC becomes the European Community (further to be referred to as “*EC*”)<sup>122</sup>.

Measures to combat trafficking have so far been taken under Pillar III as measures of cooperation.

The first significant call to action was in 1995, in the European Parliament’s Resolution on trafficking in Human Beings (A4-0326/95 OJ C 32/88). This was followed by the Joint Action 97/154/JHA on 24 February, 1997 concerning action to combat trafficking in human beings and sexual exploitation of children (OJ L63 of 04.03.1997). The Joint action required member states to review its existing law and practice and to criminalize human trafficking at national level. It also requires taking the measures necessary to ensure that in addition to ordinary constraining measures such as search and seizure, adequate investigation powers and techniques are available to ensure that offences are investigated and prosecuted effectively, in compliance with the rights of defense and privacy of the persons subject to those measures<sup>123</sup>.

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<sup>122</sup> *Treaty of Maastricht on European Union*, <  
[http://europa.eu/legislation\\_summaries/economic\\_and\\_monetary\\_affairs/institutional\\_and\\_economic\\_framework/treaties\\_maastricht\\_en.htm](http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/treaties_maastricht_en.htm)>, visited on 10 of May 2011.

<sup>123</sup> Joint action to combat trafficking in human beings and sexual exploitation of children.

It was amended and updated by the Framework Decision 2002/629/JHA, which followed the signing by the European Community, in December 2000, of the UN Convention against Transnational Organized Crime and the Protocols.

The Council Framework Decision on Combating Trafficking in Human Beings affirms in its Preamble that Trafficking in Human beings comprises serious violations of fundamental human rights and human dignity of victims. It also acknowledges the importance of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the UN Convention against Transnational Organized Crime<sup>124</sup>.

The Council Framework Decision on Combating Trafficking in Human Beings contains 3 important elements, such as, a definition of trafficking, provision for minimum penalties in certain circumstances and provision on victim protection and assistance.

The definition of trafficking is provided in article 1 of the framework decision<sup>125</sup>. It's derived from the Palermo protocol and defines trafficking as:

The recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:

- (a) use is made of coercion, force or threat, including abduction, or
- (b) use is made of deceit or fraud, or
- (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or
- (d) payments or benefits are given or received to achieve the consent of a person having control over another person

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<[http://europa.eu/legislation\\_summaries/other/133072\\_en.htm](http://europa.eu/legislation_summaries/other/133072_en.htm)>, visited on 15 May 2011.

<sup>124</sup> Opinion of the Group of Experts on Trafficking in Human Beings set up by the European Commission On the Commission Proposal for a Council Framework Decision on preventing trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, COM (2009) 136 final, 'International J. Refugee Law' (2009) <<http://ijrl.oxfordjournals.org/content/21/3/515.full#xref-fn-1-1>> 21 (3): 515-518. doi: 10.1093/ijrl/eep014 >, visited on 15 May 2011.

<sup>125</sup> <[http://eurex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichet](http://eurex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichet)>, visited on 15 May 2011.

for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or

for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.

In March 2009, the European Commission proposed a new Framework Decision on preventing and combating trafficking in human beings, and protecting victims, which will repeal Framework Decision 2002/629/JHA<sup>126</sup>.

The proposal builds upon the 2000 United Nations Protocol on trafficking in persons especially women and children, and the 2005 Council of Europe Convention on action against trafficking in human beings, and brings added value<sup>127</sup>. Until then, the 2002 Framework Decision continues in force.

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<sup>126</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/131&type=HTML>

<sup>127</sup> The new Framework Decision would provide for:

-Substantive criminal law provisions, including definition of the crime, aggravating circumstances and higher penalties, non-punishment of the victims for unlawful activities such the use of false documents in which they have been involved for being subjected to by traffickers.

-Prosecution of Offenders, including extraterritorial jurisdiction (the possibility to prosecute EU nationals for crimes committed in other countries), use of investigative tools typical for organised crime cases such as phone tapping and tracing proceeds of crime.

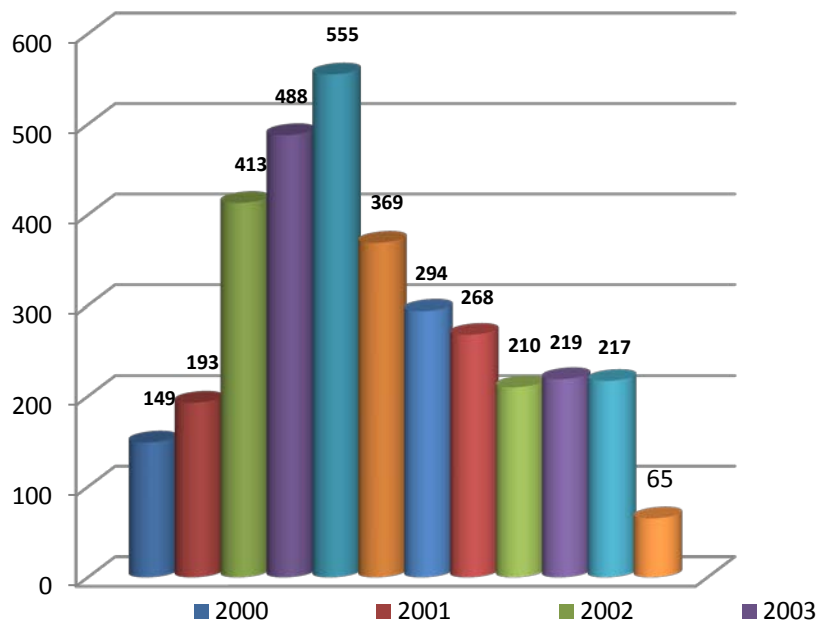
-Victims' rights in criminal proceedings, including specific treatments for particularly vulnerable victims aimed at preventing secondary victimisation (no visual contact with the defendant, no questioning on private life, no unnecessary repetition of the testimony etc.), police protection of victims, legal counselling also aimed to enable victims to claim compensation; special protective measures are envisaged for children such as the taking of interviews in a friendly environment.

-Victims' support, including national mechanisms for early identification and assistance to victims, based on cooperation between law enforcement and civil society organizations, providing victims with shelters, medical and psychological assistance, information, interpretation services. A victim shall be treated as such as soon as there is an indication that she/he has been trafficked, and will be provided with assistance before, during and after criminal proceedings.

- Prevention, including measures aimed at discouraging the demand that fosters trafficking, i.e. employers hiring trafficked persons and clients buying sexual services from victims of trafficking, and training for officials likely to come in contact with potential victims.

- Monitoring, providing for the establishment of National Rapporteurs or equivalent mechanisms, which should be independent bodies, in charge of monitoring the implementation of the measures foreseen by the Framework Decision. Such bodies should have further tasks including giving advice and addressing recommendations to governments.

## 4. The Phenomenon of Trafficking in Human Beings: The Case of Belarus



*The Number of Crimes Linked with Human Trafficking (years 2002 – 2011), according to data statistic from Ministry of Internal Affairs.*

### 4.1 The general remarks on human trafficking issue in Republic of Belarus through the historical, geopolitical and legal perspectives

The strategy and practical measures for preventing and combating any phenomenon can only be properly developed where the concept is clearly defined. This allows one to respond with appropriate methods and means to ensure effective accomplishment of the declared aims and purposes.

In this chapter my primary interest is through detailed analysis of the Belarusian legislation on human trafficking to show first of all to what extent international law on combating human trafficking has been reflected in it, especially from the perspective of Article 3, Palermo Protocol. Later, I



will focus on law implementation process, as it's a well known fact that without thorough implementation of law it becomes lifeless and loses its main function and essence.

Why Belarus, the country of my origin? Because for this country human trafficking is a relatively new phenomenon, which determinates by historical circumstances, that's why we need to make a short historical and geographical journey.

Belarus (officially The Republic of Belarus) is located in the eastern part of Europe. It borders Poland in the west, Lithuania in the north-west, Latvia in the north, Russia in the east and north-east, and Ukraine in the south<sup>128</sup>.

Republic of Belarus remains a popular transit route for irregular migrants moving westward in search of a better life. The general increase in irregular migration worldwide along with migratory flows towards the European Union (further to be referred as "EU") borders have had a pronounced impact on Belarus – creating new migration challenges for an already-strained system in the area of interception, reception or detention, care and services, registration and return. As in other Eastern European countries, trafficking in persons, especially women, to the Russian Federation, Middle East, and EU countries is another major challenge for Belarus<sup>129</sup>.

Thus, Belarus is a transit country, which is in the exact cross-roads of Western and Eastern Europe, fraught with consequences. Besides the fact that Belarus is a transit country at the same time it is also country of origin: people are being trafficked to the EU (particularly Germany, Poland, the Czech Republic, Lithuania, and Cyprus), the Middle East (particularly Israel), Turkey, Russia, Ukraine, and Japan. The country's open border with Russia was a particular problem as it allowed easy trafficking of women<sup>130</sup>.

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<sup>128</sup> Joy Ngozi Ezeilo, "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development", Report of the Special Rapporteur on trafficking in persons, especially women and children.

<sup>129</sup> L.N. Kalinkovich, I.L. Petrik, *supra* note 45.

<sup>130</sup> *Ibid.*

So, according to NGO sources<sup>131</sup>, the victims of human trafficking in Belarus are estimated 10 thousand citizens annually, primarily for sexual exploitation in other countries. Women under the age of 30 and girls were at particular risk of being trafficked due to their ignorance of the danger and their lack of economic opportunities<sup>132</sup>.

In this context I would like analyze political and legal correlation of Belarus with EU. On the one hand, Belarus has no contractual relations with the EU, for many years official Minsk persuade a self isolation policy and build the Union State with Russia. Since 2008, Belarus has been trying to improve its relations with the EU. The crackdown after the presidential elections in December 2010 has interrupted this process<sup>133</sup>. But, finally Belarus welcomed the European Neighborhood Policy (further to be referred to as “*ENP*”) concept and suggested specific areas for cooperation without, however, responding to the basic democratic requirements.

Antidemocratic developments and serious human rights violations have made it impossible for EU-Belarus relations to develop further within the ENP framework, but even though within the framework of the European Neighborhood Partnership Instrument (further to be referred to as “*ENPI*”) Belarus is involved in regional and cross-border cooperation projects in areas such as transport, border management and customs, migration and asylum, measures against human and drug trafficking, management of man-made and natural disasters, and other areas of regional and cross-border importance<sup>134</sup>.

Why is this important to mention here? Belarus geographically and actually is a part of Europe. And if we follow the organic theory of state and law<sup>135</sup>, so here we can surely state that if a cell of a body, doesn't function

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<sup>131</sup> Although this numbers is different from official one, and one of the reasons is that human trafficking is mainly a latent crime.

<sup>132</sup> Although women over 30 increasingly became trafficking victims during the last several years.

<sup>133</sup> Paving the Road towards Visa-free Travel between the Eastern Partnership countries and the EU, <<http://novisa.eu/wp-content/uploads/2011/01/BELARUSFINAL.pdf>>, visited on 15 of May 2011.

<sup>134</sup> *Ibid.*

<sup>135</sup> Theory of the state as analogous to a natural organism. The state is better understood as a ‘natural’ rather than a ‘mechanical’ phenomenon, with different institutions performing

properly, so the whole body itself is failed to function as well. And this statement refers not only to Belarus, as through the example of Belarus we would try to rise up the whole image of countries in transaction in Europe.

## **4.2 Application of International law on Human Trafficking in the legal system of the Republic of Belarus**

### **4.2.1 *Status of International Agreements in Belarusian National Law***

According to the Belarusian Constitution, international agreements, take precedence over domestic law in Belarus<sup>136</sup>. This means that it is possible to implement directly international agreements on human rights issues, including human trafficking. Lack or insufficiency of the national legislation vis-a-vis the protection of trafficking victims thus can be circumvented by direct implementation of the international agreements. It would however be more efficient if international obligations were incorporated into national law as this would help to ensure that they are known and consistently applied<sup>137</sup>.

### **4.2.2 *International Agreements Signed and Ratified by Belarus***

Belarus is party to a number of international instruments, requiring the prohibition of slavery and forced labour, including the UN slavery conventions, the ILO Conventions № 29, 105 prohibiting forced labour and

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different functions, and the good health of the whole being attributable as much to the good working of the whole as to the contribution of any particular part.

<sup>136</sup> Article 8 of Constitution of Belarus states: (1) The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles.

<sup>137</sup> This statement although must be understood with some reservation, which is the following: although international agreements have supreme legal force and the norms thereof shall apply directly, which means that on the one hand, courts in law implementation process are entitled to make decisions, based on the provision on these agreements, but, on the other hand, within the European-continental legal system, one can be punished only if the committed act is envisaged in the Criminal Code of the state. So, in this sense, Criminal Code, and not only it, plays an exceptional role in combating Human Trafficking, which is going to be shown further.

ILO Convention № 182, outlawing the worst forms of child labour<sup>138</sup>. In regard to international agreements specific to trafficking in human beings, Belarus ratified the United Nations Convention against Transnational Organized Crime and its smuggling and trafficking protocols<sup>139</sup>.

Belarus, however, has not ratified nor signed the Council of Europe Convention on Action against Trafficking in Human Beings. In regard to specific international standards on victim rights and victim protection, Belarus has not signed the European Convention on the Compensation of Victims of Violent Crimes.

### **4.2.3 Regional and Bilateral Agreements**

At the regional level, Belarus is a Commonwealth of Independent States (further to be referred to as “CIS”) founding member. It is a party to the Convention on Human Rights and Fundamental Freedoms of CIS<sup>140</sup> and the Agreement on the Cooperation of the CIS member States in Combating Trafficking in Persons, Human Organs and Tissues<sup>141</sup>.

The objective of this later agreement is to develop a coherent strategy and adopt integrated joint legal, socio-economic, informational and other measures to combat human trafficking, eliminate the causes and conditions conducive to its emergence and protect and rehabilitate victims. The parties also agree to cooperate to prevent, detect, deter and solve the crimes related to trafficking in persons and protect victims of trafficking in persons, especially women and children, and their rehabilitation.

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<sup>138</sup> It is not a party to the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families nor ILO Conventions N 97 and N 143 on Migrant Workers which include provisions to protect both regular and irregular migrants workers, and relevant to the protection of trafficked persons too.

<sup>139</sup> Ratified by Belarus on 25 June 2003.

<sup>140</sup> Richter A. *Commonwealth of Independent States Convention on Human Rights*, <<http://merlin.obs.coe.int/iris/1995/6/article100.en.html>>, visited on 11 May 2011.

<sup>141</sup> The Agreement on the Cooperation of the CIS member States in Combating Trafficking in Persons, Human Organs and Tissues, <<http://www.cis.minsk.by/page.php?id=6712>>, visited on 10 May 2011.

In the frame of CIS, Belarus also ratified the Convention on Legal Assistance and Legal Cooperation on Civil, Family and Criminal matters of 22 January, 1993. All CIS countries<sup>142</sup> are parties to this Convention.

#### **4.2.4 The Palermo Protocol in the scope of Belarusian legislation**

As has been noted above, the definition of trafficking in persons, currently used by the United Nations, is given in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime which was adopted by UN General Assembly Resolution 55/25 of 15 November 2000<sup>143</sup>. These legal documents have been signed by the duly authorized representatives of the Republic of Belarus<sup>144</sup>.

### **4.3 National Legislation of the Republic of Belarus on Human Trafficking**

Since Belarus ratified the Palermo Protocol, national legislation has been gradually brought into the conformity with the international law<sup>145</sup>. And this legal arrangement process on combating human trafficking is taking place in different levels of national legislation of Belarus, starting from Constitution, which grants equal rights and freedoms to everybody, concluding with different legislative acts and decrees of executive bodies.

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<sup>142</sup> Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Russia, Uzbekistan and Ukraine.

<sup>143</sup> *Commentary*

Article 3 (a) of the Protocol:

“Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of a person by means of the threat or use of force or other means of coercion, or by abduction, fraud, deception, abuse of power or of a position of vulnerability, or by 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”.

The inclusion of fraud, deception and the abuse of power or of a position of vulnerability recognizes that trafficking can occur without the use of any overt (physical) force.

<sup>144</sup> As well as the Protocol against illicit transportation of migrants by road, sea and air.

<sup>145</sup> This process, of course, dynamic and changes all the time, but for the sake of our research, we have to limit it into some chronological borders.

Skipping through Constitution<sup>146</sup>, here I would like to focus only on some of these legal acts. In the core of them central position belongs to Criminal Code of Belarus by 9 July, 1999, № 275-3<sup>147</sup>. The significant role of the later is not only in defining Trafficking in Human Beings, but more its penitentiary and preventive functions.

### **4.3.1 The Qualification of Human Trafficking in Belarusian Case Law**

Before starting the analyze of the respective article in Criminal Code, I would like for the purpose of further comparison to show the definition of the offence in Palermo Protocol, which separates the offence into three elements<sup>148</sup>:

- i) The act of trafficking: recruitment or transportation or transfer or harbouring or receipt of persons.
- ii) The means used to involve the individual in the act: threat or use of force or forms of coercion or abduction or fraud or deception or abuse of power or abuse of a position of vulnerability or the giving and receiving of payments or benefits to achieve the consent of a person who has control over another person.
- iii) The exploitative purpose of the trafficking, at minimum: the exploitation of the prostitution of others or other similar forms of sexual exploitation or forced labour or services or slavery or practices or servitude or the removal of organs.

Article 181 of Criminal Code, under the title “Trafficking in Human Beings”, states: Actions intended to sell or purchase or undertake other

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<sup>146</sup> Constitution of Belarus, adopted on 15 March, 1994 (with changes and additions adopted at the republican referenda of November 24, 1996\* and of October 17, 2004), <<http://www.law.by/work/englportal.nsf/acb13549f7a9bf5fc225703e004d85da/d93bc51590cf7f49c2256dc0004601db?OpenDocument>>, visited on 11 May 2011.

<sup>147</sup> Criminal Code of Belarus, <<http://www.pravo.by/webnpa/text.asp?RN=hk9900275>>, visited on 11 May 2011.

<sup>148</sup> So in this respect, it's important also to mention that in Soviet legal scholarship used to analyze articles (crimes) through 4 elements, which literally translated are the following: Object, Objective side, subject and subjective side. The internationally accepted analyze of offence is quite different. But for the sake of comprehensive understanding in this thesis we will go according to the later.

types of activities regarding turning over or obtaining a dependant person (trafficking of people).

So, from this definition of trafficking of people, we can clearly state that any action in which the intent is to sell, purchase or undertake other types of activities regarding turning over or obtaining a dependent person, are prohibited by Criminal Code<sup>149</sup>.

## The actus reus

So, according to Criminal Code, the *actus reus*<sup>150</sup> of human trafficking can be expressed in alternative acts:

- the “purchasing” and “selling” people or any other kind of transactions in regard to the persons;
- the recruitment, transportation, transfer, harboring or receipt of persons for the purpose of exploitation.

The problem is how to understand or to interpret the terms “purchasing and selling” and “transactions”: according to civil law<sup>151</sup>, or

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<sup>149</sup> *Excerpts from the Criminal Code of the Republic of Belarus (official translation)*, 9 July 1999. N 275-3 that characterize the legal framework of the combat against trafficking and crimes and the attendant or resultant circumstances, adopted by the Chamber of Representatives on 2 June, 1999, approved by the Council of the Republic on 24 June, 1999:

### Article 181. Trafficking in persons

1. Acts aimed at effecting the purchase and sale or other transactions in respect to a dependent person in the form of his/her transfer or capture (trafficking in persons), shall be punished by arrest for a term of up to six months, or ;limitation of liberty for a term of up to three years, or deprivation of liberty for a term of up to six years , with or without sequestration of property.

2. The same acts committed:

- 1) in respect to a person known to be a minor;
- 2) in respect to two or more persons;
- 3) for the purpose f sexual or other exploitation;
- 4) for the purpose of removal of the victim’s organs or tissues for transplantation;
- 5) by a group of individuals through preliminary conspiracy, or by an organized group;
- 6) by an office holder taking advantage of his/her powers of office, shall be punished by deprivation of liberty for a term of five to ten years, with or without sequestration of property.

3. The acts, provided for in part 1 or 2 of this Article, that have caused death of the victim by negligence, or inflicted severe bodily injuries, shall be punished by deprivation of liberty for a term of eight to fifteen years, with or without sequestration of property.

<sup>150</sup> *Actus reus* is a term of art in criminal law. Literally the Latin phrase means *bad act*. The technical, legal use of the phrase denotes one of the elements that must be proven by the prosecution before anyone can be liable to criminal punishment.

<<http://law.jrank.org/pages/467/Actus-Reus.html#ixzz1KWQmOwgz>>, visited on 5 of May 2011.

just based upon the nature of these concepts? Of course, in a civilized society personal freedom can't be the object of any transaction and the definitions of "purchasing and selling" and "transaction" regarding to human trafficking can't be used in the sense of civil legislation, but they must be interpreted only in the light of the nature of the acts, committed by culpable persons. So, the same statement is valid also in regard to the understanding "other transaction".

*Recruiting* means attraction, recruitment, and hiring people to do any work or services. It may be as well defined as encouragement (e.g., persuasion, promises, proposals) of a person to take certain actions (e.g., to agree to something, to sign a contract, to go abroad) in order to later abuse that person via control measures restricting his/her freedom. A review of judicial practice indicates that in most cases criminals use non-violent methods of recruitment and do not hide from the targeted people the nature of intended work<sup>152</sup>. In fact, recruitment can be veiled or done openly, without hiding the fact of exploitation. To determine the fact of the crime, the victim's recruitment need not be finalized; it is sufficient to prove the process of recruitment itself.

*Transportation* of persons includes the physical displacement<sup>153</sup> or organizing of the physical displacement of persons from one place to another, by any means of transport.

*The transfer* is a direct transition from the disposal of one person to the disposal of another person.

*Exploitation* is defined in the Belarusian law, but in a more limited way in comparison to that, provided under the Palermo Protocol definition. It does not make reference to servitude or other forms of slavery or slavery like practices, which are referred to under the Protocol and defined in

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<sup>151</sup> According to civil legislation of Belarus, the actions of citizens and legal persons directed towards the establishment, change, or termination of civil rights and duties shall be deemed to be transactions, Article 154, Civil Code of Republic of Belarus.

<sup>152</sup> Gutauskas A. *'Human Trafficking and Its Treatment In Criminal Law'*, Mykolas Romeris University Faculty Of Law. Department of Criminal Law. Ateities 20, Lt -08303 Vilnius, Lithuania.

<sup>153</sup> A person can be transported not only to the place where he/she will be exploited but also to another location—e.g., to show him/her to a potential buyer, for temporary lodging before being transported abroad.



international law and which would also encompass debt bondage. It does not refer to forced labour, but to ‘slave labour’ which is considered an extreme form of forced labour and further will be discussed below.

### **Human trafficking, using labour exploitation**

Thus, human trafficking, using labour exploitation is often ignored and not regarded as a crime in Belarus. Forms of exploitation under Belarusian’s last proposed human trafficking definition also need to become more “open”, for the sake of better responding to the constantly changing nature of acts in human trafficking<sup>154</sup>.

Forms of exploitation include a wide spectrum of methods, such as forced provision of sexual services, labour, begging, surrogate mothering or marriage. Currently, Article 181 of Criminal Code has a shortened and closed list regarding applicable types of exploitation. In addition to the need for a clearer definition of forms of criminal exploitation, it is necessary to have reflected in the legislation means used to control people in exploitation, such as depriving a person’s freedom of movement; manipulation of employee relationships; document confiscation or retention; debt dependency; use or threat of physical force or psychological abuse; blackmail; limitation of one’s freedom to travel or communicate with relatives or fraud<sup>155</sup>.

Article 181-1 “exploitation of slave labour’ reads<sup>156</sup>:

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<sup>154</sup> Articles 13 and 181 of Criminal Code.

<sup>155</sup> Each of the listed forms of exploitation and use of control over them may be implemented in a variety of ways and change depending on the circumstances. For example, a debt obligation may arise in the form of a loan made available by an employer or agent (e.g. for the purchase of accommodation for migrants); a “fixed” debt, a penalty for some offence; or a fabricated expense. Unpaid work may also come in a variety of forms: holding wages “pending work completion”; illegal wage deductions; or reporting people to police (e.g. in the case of illegal migrants) instead of paying them for their work. Forms of exploitation linked with human trafficking greatly vary. Many forms of exploitation are still not addressed in legal definitions, not only within Belarusian law, but also among international provisions. Adequate legal formulations are needed to reflect the separate forms of human exploitation, to clarify the nature of these crimes, and to identify them.

<sup>156</sup> Law of the Republic of Belarus No. 15-Z on 4 May 2005.

1. Exploitation of slave labour or any other form of human exploitation, in the absence of signs of the crime described in Article 181 of this Code, - shall be punishable by deprivation of freedom for a term of two to five years.

2. The same acts committed:

- 1) Against a known minor;
- 2) Against two and more persons;
- 3) By a group of persons in previous collusion;
- 4) By an officer of the state who used his official authority;
- 5) Against a woman who is pregnant to the knowledge of the guilty person;
- 6) By a person who has previously committed crimes described in this Article, and in articles 171, 171-1, 181, and 187 of this Code, - shall be punishable by deprivation of freedom for a term of three to ten years, either with the confiscation of property or without.

3. The acts described in sections 1 and 2 of this Article that due to negligence have led to the death of the victim, or to grave bodily injuries, or to other grave consequences, or that were committed by an organized group, - shall be punishable by deprivation of freedom for a term of eight to twelve years with the confiscation of property.”

So, Article 181.1 criminalizes the actual usage of slave labour. It is distinct from article 181 which requires the recruitment of a victim for the purposes of exploitation but not the actual subjection of that person to exploitation. Therefore those who commit a crime under Article 181 should know that the person would be exploited but they may not use his/her slave labour. Those who commit a crime under 181.1 have actually used that person’s slave labour. At the same time someone who recruits a person for the purposes of exploitation and actually uses that person’s slave labour would be liable for crimes under both Articles 181 and 181.1.

The definition of slave labour under the Criminal Code does not correspond to the definition of forced labour under Article 13 of the Labour Code<sup>157</sup>, which appears in compliance with the international definition of forced labour under the ILO Convention on Forced Labour<sup>158</sup>.

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<sup>157</sup> Labour Code (available only in Russian language)

<<http://pravo.kulichki.com/vip/trud/00000002.htm>>, visited on 1 May 2011.

<sup>158</sup> See chapter 2.4 of this thesis.

Thus, Article 181.1 narrows the sphere of criminal responsibility for forced and compulsory labour, reducing it mainly to extreme forms of labour and slavery. The labour law enumerates the forms of forced labour, the use of which is prohibited whilst the criminal law provides for the responsibility only for some of these forms.

We can see that forms of exploitation linked with human trafficking greatly vary, thus Article 187 of the Criminal Code, i.e. provides that if, as a result of illegal acts directed towards foreign employment of Belarusian citizens, persons who have been secured employment abroad were subjected to sexual or other exploitation against the will of a person in the absence of signs of the offence, stipulated by article 181 of Criminal Code are punishable by imprisonment for a term of between three and five years with the revocation of the right to hold certain offices or pursue certain activities.

If committed by an organized group, such offences are punishable by imprisonment for a term of between six and eight years with the confiscation of property and with the revocation of the right to hold certain offices or pursue certain activities.

So, many forms of exploitation are still not addressed in legal definitions, not only within Belarusian law, but also among international provisions. Adequate legal formulations are needed to reflect the separate forms of human exploitation, to clarify the nature of these crimes, and to identify them.

### **The category of “dependant person”**

The Criminal Code itself does not define who “dependent person” is; it doesn’t give any other forms of dependence of the victim on the guilty person as well. There is no clear notion of the criminal-legal category of “dependence” in the scholarship of criminal law either. In the Russian language, the words “to depend” and “depended” mean “to be under control, under complete influence”. Thus, the semantic interpretation of the word “dependent” means the subjugated conduct of one person with respect to the will of another person, limited expression of one’s will.

The relations of dependence may also be caused by any preceding act of violence committed by one person in respect of another person, this act being aimed at suppressing and subjugating the will of a definite person<sup>159</sup>.

The position of dependence may also be the result of abduction. The abduction of a person is a variant of the restriction of personal freedom, which is established as a crime under Article 182 of Criminal Code. However, when the abduction of a person is followed by the actions aimed at committing a purchase or sale or any other transaction in respect of the victim in the form of his transfer or subsequent capture, then the offence shall be qualified under Article 181 of the Criminal Code. When a person has been abducted obviously for the purpose of committing actions in the future that involve a transaction in respect of the victim, this shall form an ideal aggregate of offences: abduction of a person<sup>160</sup> and preparation for trafficking in persons<sup>161</sup>.

## **Human trafficking using Sexual exploitation**

Sexual exploitation as the purpose of human trafficking may take the following forms:

- Coercion into prostitution<sup>162</sup>, or exploitation of voluntary prostitution with the application of the means listed in the human trafficking definition. While the Palermo Protocol includes these provisions in its definition, Belarusian legislation fails to list these means which may result in difficulties for prosecution of these cases.

- Coercion into participation or exploitation of voluntary participation in the production of pornography with the assistance of the means referred to above.

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<sup>159</sup> L.N. Kalinkovich, I.L. Petrik, *supra* note 45.

<sup>160</sup> Article 182 of Criminal Code.

<sup>161</sup> Articles 13 and 181 of Criminal Code.

<sup>162</sup> In accordance with the current legislation of the Republic of Belarus, engaging in prostitution is only an administrative infraction. It is regulated by the norms of the Code of administrative offences of the Republic of Belarus. Under Article 162-1, engaging in prostitution entails a warning or a fine of up to ten minimal wages; similar acts committed repeatedly within a year of the imposition of an administrative penalty entail a fine of up to twenty minimal wages.

- Sexual slavery, for example, sexual exploitation of a victim in “domestic circumstances” or at military installations.

- Child prostitution and pedophilia.

Each of these types of sexual exploitation may be broken down further into sub-categories, but types of sexual services are irrelevant to qualification of the offence<sup>163</sup>.

## **The mens rea**

The mens rea<sup>164</sup> of the accomplice is an essential element of the crime. The subjective aspect or subjective side of a crime (offence) is characterized by culpable state of mind in the form of express malice, where the offender is aware that he is negotiating a deal in respect to the dependent person in the form of his transfer or capture and wishes to initiate such actions. The motives and aims, except those specified in part 2 of Article 181, do not affect the qualifications of the offender’s actions and are taken into consideration.

On the contrary, from the brief comparison of Criminal Code to Palermo Protocol, we can see that in the later such motives or aims, as coercion, deceit, fraud or an abuse of vulnerability are not only important, but necessary and sufficient elements for defining trafficking.

To prove the fact of trafficking in human beings in Belarus, it is necessary to prove a violation of personal freedom as defined under Article 181. The main problem and challenge is to define the threshold between illegal transactions that violate the individual freedom and free-will agreements between two persons, where one of them gives the consent to be exploited.

Often victims give their consent to be enslaved; in some cases they themselves seek out a person to help them find placement in to work abroad, that’s why it is quite difficult to determine when a free-will agreement between adults may evolve into repressive exploitation. This aggravating factor is included under the Part 1, Article 181 of Criminal Code, leading to

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<sup>163</sup> Since it’s not the main topic of the thesis, we are not going to elaborate further.

<sup>164</sup> The mental elements—are required for an accused to be found liable for a criminal offence in criminal systems around the world.

harsher penalties. It means, for example, that a person's awareness of being employed in the sex industry or in prostitution does not exclude such person from becoming a victim of trafficking.

Many practicing lawyers do not comprehend the context of trafficking in human beings. In the Belarus in legal practice, there is always a risk that the legal notion of trafficking in humans may be perverted by defense arguments substantiating free will between adult persons.

### **4.3.2 Presidential Decree<sup>165</sup>**

Article 5, paragraph 1, of the Palermo Protocol provides that, each State party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of the Protocol, when committed intentionally.

Here, I would like to analyze the decrees which reflect the provisions of the Palermo Protocol.

*Presidential Decree No. 3 "On certain measures aimed at combating trafficking in human beings"*<sup>166</sup> regulates all acts aimed at employing citizens of Belarus abroad. More specifically, any such acts may only be performed when a special permit has been issued by the Ministry of the Interior and under certain enumerated conditions. Furthermore, it provides that citizens who study at educational institutions in Belarus shall be sent to study abroad only upon written permission of the Ministry of Education. The Decree sets tougher administrative and criminal responsibility for both private individuals and legal entities violating anti-trafficking laws. It also

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<sup>165</sup> The powers of the President of the Republic of Belarus are among the widest-reaching in the world. The President declares referendums, extraordinary elections, dismisses chambers of Parliament in cases stipulated by the Constitution, and nominates, with the consent of the Council of Republic, the Chairman of the Central Electoral Commission, the General Prosecutor, and the Chairman of the National Bank. The President independently nominates and releases from the office the Chairman of the State Control Committee, etc.

The greatest powers of the President are in the field of legislation. The 1996 Constitution of the Republic of Belarus expanded the competence of the head of state in law-making activities. The President issues Decrees (valid as law), Edicts, and Orders, which take obligatory force in all territories of Belarus. The vast reach of the law-making powers of the President casts a shadow over the representative body - the Parliament - and consequently, removes the citizens from the process of the proposal and enactment of new laws.

<sup>166</sup> Adopted on 9 of March, 2005.

requires various government structures to introduce additional legal requirements for marriage agencies, educational, tourist and other institutions participating in travel abroad programs.

As a follow up to the President's Decree No. 3, Presidential Decree No. 15-3 “*On Introduction of Amendments to Some Codes of the Republic of Belarus on Increasing the Level of Responsibility for Trafficking in Human Being and Other Related Criminal Offences*” adopted on May 4, 2005 by the National Assembly (Parliament) of the Republic of Belarus introduces major amendments to Criminal, Criminal Procedure and Administrative Codes. It offers revised versions of human trafficking definition, sentencing guidelines, and administrative offences relevant to human trafficking.

Although the revised version of the human trafficking definition raises many reservations, specifically regarding a comprehensive nature of casuistry in terms of attributes of the crime consisting in human “purchase and sale” and the manner of committing such crime. One should, nevertheless, restrain from assessing this definition, because the coming years will prove whether the introduction of the definition has lead to more effective work of prosecution bodies and whether the phenomenon consisting forced labour, including slave trade, is effectively prevented in Belarus.

The Decree No. 352 adopted on August 8, 2005 “*On Prevention of the Consequences of Trafficking*” establishes a legal and institutional framework for providing adequate protection for the persons who have suffered from criminal activities related to human trafficking, including sexual exploitation.

# 5. Rights and Legal Position of Victims, Witnesses and other Participants in Criminal Procedure

## 5.1 Characteristics of victims

From the reports of NGO's and official statistics<sup>167</sup> provided by Belarusian government, it is possible to learn about the characteristics of the trafficked and their traffickers, as well as the *modus operandi* of human trafficking through Belarus.

In relation to victims, International Organization for Migration (further to be referred to as "IOM") has identified social and demographic profile of victims of human trafficking on the bases of their casework.

Thus, the victims are mainly 16-30 years old, unmarried and childless men and women. By analyzing the reports I came to the conclusion the stereotype that the victims are uneducated<sup>168</sup> and naive is not corresponding to reality. Most males trafficked from Belarus had received some type of technical or vocational training, following completion of either middle or high school. This category accounted for 57.1 per cent in 2004, 59.2 per cent in 2005 and 66 per cent in 2006. This is slightly higher than the educational levels of Belarusian female victims; 45.5 per cent of those assisted in 2004 who had technical or vocational training, 41.1 per cent in 2005 and 45.9 per cent in 2006<sup>169</sup>. Moreover, rather than being naive,

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<sup>167</sup> Surtees R. 'Trafficking of men –a trend less considered. The case of Belarus and Ukraine'. NEXUS Institute, Vienna Report for the International Organization for Migration.

<sup>168</sup> It is not clear how educational levels, whether high or low, may have played a role in decisions to migrate. Where unemployment is high and wages low and where less educated individuals are competing against persons with higher education for employment, migration may be one of a very limited range of options. Equally relevant may be that persons of higher education are dissatisfied with economic and professional opportunities at home and, thus, seek work abroad. It is also unclear how (and what type of) education may (or may not) equip migrants with the skills and capacity to avoid trafficking and/or negotiate and escape from their exploitation.

<sup>169</sup> Surtees. *Supra* note 162

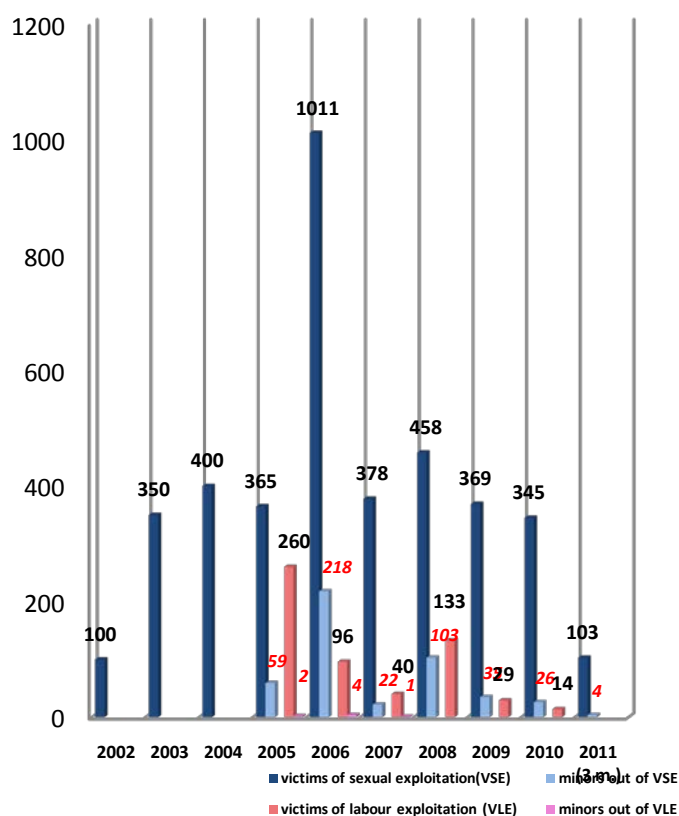


deciding to move abroad or even working in the sex business were seen as ways of becoming independent or improving material and living situation.

*The following table illustrates certain elements of the profile of victims of trafficking assisted by IOM Minsk between 2006 and March 2009:*

	2006	2007	2008	2009
<b>Gender:</b>				
Female	263	153	162	33
Male	159	31	56	27
<b>Type of exploitation:</b>				
Sexual	187	134	153	31
Labour	229	47	63	28

*The following diagram illustrates the number of victims subjected to sexual and labour exploitation (years 2002 – 2011), according to statistic data provided by Ministry of Internal Affairs<sup>170</sup>.*



<sup>170</sup> Note: in 2010 there were 3 victims of criminal organs withdrawal (besides victims of sexual and labour exploitation).

It also should be noticed an important gender distinguish between aims of exploitation, while women are generally forced into prostitution, men works in the forced labour condition.

Stana Buchowska mentions four main factors conducive to trafficking. The first is poverty and unemployment. Human Trafficking is an economic problem and the main reason why victims go abroad is a desire to improve their living and financial conditions. The second is the feminization of poverty<sup>171</sup>. Women have limited opportunities to choose a job. That is why some women decide to pursue risky employment or to marry a foreigner. Women take over the traditional male role and migrate to other countries. Formerly, women migrated with their husbands or with the whole family. Now women migrate alone or with children. The last factor is the demand for cheap, unprotected labour and services provided by migrants in countries of destination<sup>172</sup>.

But it should be emphasized that these factors are generally not isolated but rather mutually reinforcing and co-terminous. It is often a combination of factors and contributors which lead to decisions about migration, which may, in many cases, result in trafficking<sup>173</sup>.

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<sup>171</sup> According to the 2001 independent nation-wide survey “Spread of Poverty among Belarusian Women”, 74 per cent of Belarusian women are considered poor based on their income. Major hardships that determined the poverty level of women included an inability to afford: balanced nutrition; basic medicine and health care; basic means of hygiene; new clothing and footwear; recreation and visits to relatives; recreation and health improvement of the child; basic furniture and home equipment. As a dramatic example of poverty, many women of reproductive age also reported the financial inability to give birth to a first child. Negative natality in Belarus makes this situation even more disturbing.

Women’s unemployment is still considered to be one of the most alarming problems – 68 per cent of all unemployed are women. Finding and continuing employment is especially difficult for women with minor children, women who have just graduated and have no professional experience, underprivileged women, and women nearing retirement age.

Official statistical analysis confirms that unpromising economy sectors with low salaries are feminized, while women have managed to maintain or even improve their positions in only 5 more or less stable and prospective sectors. Women have been losing their jobs in what is traditionally considered women’s professions (i.e. financing, credit, insurance, trade and catering) that are rapidly growing and where salaries have gone up. According to official statistics, women’s salaries in Belarus on average are at 81 percent of Belarusian men’s average salary. The average women’s income, according to UN experts, is at 64 per cent of men’s average income.

<sup>172</sup> Gillian Wylie, Penelope McRedmond. *Human Trafficking in Europe. Character, Causes and Consequences*. Published by Palgrave Macmillan, pp.70-72.

<sup>173</sup> Surtees, *supra* note 165, p.37.

## 5.2 Characteristics of perpetrators

Information about the perpetrators of human trafficking is more limited than information about the victims. The number of accused shows that the main national group of perpetrators is Belarusian<sup>174</sup>, according to information provided by Ministry of Internal Affairs of Belarus, the country of origin for foreigner perpetrators mainly Israel and Turkey<sup>175</sup>.

It can be noticed that among prosecuted were women, worked as a recruiters<sup>176</sup>.

## 5.3 Criminal Procedure

The Code of Criminal Procedure (further to be referred to as “CPC”) stipulates that no one may be considered to have committed an offence unless his or her guilt has been proven in a procedure established by law and a valid verdict of a court has entered into effect<sup>177</sup>. Accused persons are not obliged to prove their innocence. No persons may be compelled to give evidence or testimony against themselves, members of their families or close relatives. Evidence gathered in violation of the law has no legal force. The Criminal Procedure Code differentiates between victims, civil claimants and witnesses. It describes inter alia the procedure for the recognition of a person as a victim and the granting of a legal status as well as the rights and obligations of victims.

The CPC does not specifically refer to victims of trafficking but generally defines a victim as “a person, upon whom physical, moral or property damage was inflicted by the crime<sup>178</sup>”. According to Article 49 of

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<sup>174</sup> Ministry of Internal Affairs of Republic Belarus, <<http://mvd.gov.by/ru/main.aspx?guid=5531>>, visited on 11 May 2011; Koktysh Marina. ‘Millionaires on the model business “put behind bars”, the Minsk City Court took decision on the sensational case of human trafficking’. Newspaper *Narodnaya Volya*, 27.04.2007 № 67-68, <<http://old.nv-online.info/index.php?c=ar&i=3676>>, visited on 11 May 2011.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> Article 11.

<sup>178</sup> According to Decree of the President of the Republic of Belarus «On Prevention of Consequences of Trafficking in Persons» of August 8, 2005, No. 352 «the victims of trafficking in persons are understood as the individuals, in relation to whom the acts were committed, entailing responsibility under Article 181 of the Criminal Code of the Republic

the CPC the decision to recognize or not to recognize a person as a victim should be formalized (made) by the body running the criminal process. According to Article 142.6 of the CPC, a victim may appeal against a decision: to refuse initiation of a criminal case or proceedings on newly discovered evidence; to terminate preliminary investigation or prosecution.

An investigator who has recognized a person as victim has the obligation to inform the victim on his/her rights. In case the crime caused material damage to the person, s/he or her/his representative must also be informed about the right to file a civil claim<sup>179</sup>. Article 50.21 of the CPC permits a victim to be represented by any other person of his/her choice; hence they shall enjoy the same procedural rights as the person they represent.

Various basic rights are linked to the legal recognition of a person as victim. According to Article 20 of the CPC, the victim (and also the civil claimant as well as their representatives) participates in court hearings as party shall enjoy equal rights to bring forward evidence, participate in the examination of evidence and prove their cogency before court. Article 49.3 lists the rights of a victim, which also apply to his or her close relatives, if the victim died. These rights include inter alia the right to furnish evidence; to submit requests; to review all case material from the moment the pretrial investigation was completed, or where no pre-trial investigation took place from the moment the case was brought to court; to participate in the court trial; to file motions for dismissals; to lodge complaints against actions of the inquirer, investigator, prosecutor and the court as well as to appeal against the sentence or resolutions of the court or of the people' judge; and on certain grounds to be granted security.

Article 65 of the CPC explicitly stipulates the right to protection of victims involved in criminal proceedings in case of a real threat of a murder,

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of Belarus, or other actions directed towards using them with the aim of sexual or other exploitation, responsibility for which is assumed by Articles 171, 171-1, 182 and 187 of the Criminal Code of the Republic of Belarus, and if in connection with committing them in the territory of the Republic of Belarus or abroad the criminal prosecution was (is) undertaken". Thus, the legislator does not relate the notion of a "victim of trafficking in persons" with the criminal-procedural status of this person.

<sup>179</sup> Article 192.

violence, property destruction or damage, or any other illegal act, for a participant of a criminal case who is defending his own or his client's rights and interests.

In general, court proceedings are public. Under certain circumstances, however, the judge may order to have a closed court hearing. According to Article 23 of the CPC this may be the case if the crime is committed by a minor, or in matters related to sexual crimes and other cases to prevent publicity of information on intimate aspects concerning the personal life of participating persons and when it is necessary for the safety of the victim, witness or other participants in criminal proceedings, as well as their family members or close relatives. This provision is not automatically applicable in human trafficking cases, as they are not explicitly mentioned by law.

## **5.4 Legal bases for compensation of damage caused by a crime**

Part 6, Article 6, of the Palermo Protocol establishing that "Each State Party shall ensure that its domestic legal system contains norms that offer victims of human trafficking the possibility of obtaining compensation for damage suffered". The current national legislation in this sphere meets the international requirements. The right to compensation for victims of crime is protected in the Constitution of the Republic Belarus in Articles 21 and 60<sup>180</sup>. Moreover, these provisions are implemented into the criminal-procedural legislation. Thus, Article 27, of the CCP states, that the body of criminal prosecution "shall ensure the victim's access to justice and take measures to ensure compensation of the caused damage".

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<sup>180</sup> *Article 26.* No one may be found guilty of crime unless his guilt is proven under the procedure specified by law and established by a court sentence that has come into legal force. Accused persons shall not be required to prove their innocence.

*Article 60.* Everyone shall be guaranteed protection of his rights and freedoms by a competent, independent and impartial court within the time limits specified by law. In order to protect their rights, freedoms, honour and dignity in accordance with law, citizens shall be entitled to claim, through courts, both property damage and financial compensation for moral injury.

The CCP has no direct definition of the term “damage<sup>181</sup>”. In the civil law it is understood as diminishing of the property belonging to a legal entity, or of the personal or property wealth of citizen a citizen<sup>182</sup>.

Article 149.1 of CCP, assumes that “the individual or legal entity, who or *which has suffered damage from a crime* or a public dangerous act committed by a mentally incompetent person, may *lodge* by themselves or via their legal representatives a civil claim against the defendant or the persons who bear material responsibility for his/her actions, from the moment of initiation of the criminal case and till the end of the court investigation”. *The police and prosecutors* have to gather sufficient evidence to demonstrate that the suspect committed the crime, but they are *not obliged* to gather evidence to prove the nature and scale of damage suffered by the victim. This is the responsibility of the claimant. And in a case court finds the damages to be unproven, they can reject the civil claim.

A civil claim may be brought either in writing or orally. Oral statements are duly noted in the record of proceedings. A civil claim brought as part of a criminal procedure is considered by the court in conjunction with the criminal case. If the civil claim has remained non-claimed, then, according to part 8, Article 149, of the CCP, the court may decide, on its own initiative, the issue of compensation of the damage, caused by a criminally punishable act.

Why the claim mechanism in criminal court proceedings currently does not work in trafficking cases? First, I believe, due to the high level of corruption<sup>183</sup> in Belarus, hence traffickers or exploiters can seek protection from officials and therefore be “immune” from court based claims. Second, the lack of legal awareness amongst victims, who often do not know about the possibility of filing a civil claim within criminal proceedings, this means that relevant authorities do not adequately inform victims about their rights.

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<sup>181</sup> The legislator defines three types of damage: physical, property and moral.

<sup>182</sup> Comments to the Civil Code of the Republic of Belarus: in two vol. V. 2 (ed. by V.F. Chigir) Minsk (1999) p. 449.

<sup>183</sup> According to the report of the international organization Transparency International by 2010, Belarus ranks the 127-th place on the level of corruption among 178 countries. <[http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results)>, visited on 11 May 2011.

Third, the complexity of the proceedings, in particular, victim must prove a causal link to the facts of the acts which s/he leads to the damage. Also generally victims (not only of trafficking cases) do not actively seek to protect their rights since generally they believe in that they will not receive anything at the end of the proceedings<sup>184</sup>. To prove this statement, I would like to analyze Statistic Data<sup>185</sup> on the numbers of suits claimed for compensation of moral damage, based on Articles 171, 171-1, 173, 181, 182, 187, 343 of the Criminal Code, provided by Ministry of Justice of Belarus for the period from 2002-2008.

Region	Number of claims	Total sum Claimed (in thousand/ Belarusian rubles)	Total sum collected by Court decisions (in thousand/ Belarusian rubles)	Total sum actually received by claimants (in thousand/ Belarusian rubles)
Brest	27	55,200	32,500	10,100
Vitebsk	13	24,000	22,000	5560
Gomel	13	35,800	29,300	8300
Grodno	6	22,900	10,100	4620
City of Minsk	28	41,600	29,100	9520
Minsk	23	38,600	29,200	4184
Mogilyov	12	26,000	17,100	4670
Total for the Republic of Belarus	122	244,100	169,300	46,954

According to the statistic data provided by Ministry of Justice, during 2002 - 2008, in total the Republic of Belarus considered 122 suits for compensation of moral damage, caused by trafficking in persons and related crimes. All the claims were satisfied. Out of the claimed 244.1 million rubles, the courts ruled to collect 169.3 million rubles, or 69.5% of the claimed compensations.

<sup>184</sup> A.D. Boykov. 'The third power in Russia. The second book. The continuation of reforms' ( 2002), <[http://www.kalinovsky-k.narod.ru/b/boikov2/05.htm#ch5\\_2](http://www.kalinovsky-k.narod.ru/b/boikov2/05.htm#ch5_2)>, visited on 11 May 2011.

<sup>185</sup> Ministry of Justice of the Republic of Belarus doesn't provide special differentiated statistics on all types of damage, claimed to compensation by victims of human trafficking; therefore, it is hardly possible to present the whole picture of the considered issue.

According to the statistic data provided by the Ministry of Internal Affairs during 2002-2008, in total 3591 victims were subjects of trafficking. Thus, the comparison of the statistic data leads to the conclusion, that out of the 3591 victims only 3.4% lodged their claims for compensation of moral damage caused by a crime. This data verifies my previous statement that victims do not actively seek to protect their rights, since generally they believe in that they will not receive anything at the end of the proceedings.

## 5.5 Assistance

While the Belarusian government has made progress on legislative and law-enforcement anti-trafficking developments, the state has yet to implement extensive human trafficking victim protection schemes and systems, covering the whole process from victim identification through to reintegration and support once they have left their refuge. Overall, victim protection and assistance is the weakest component of the Belarusian anti-trafficking strategy<sup>186</sup>.

The OSCE<sup>187</sup> Action Plan makes a number of recommendations with regard to victims and criminal proceedings. It provides that States should take measures to provide effective protection from retaliation or intimidation for witnesses in criminal proceedings and for their relatives and other persons close to them; that States ensure data protection and the victim's right to privacy including by avoiding public disclosure of the identity of victims of human trafficking; that States provide legal counseling for victims, when they are in the process of deciding whether or not to testify in court; that States permit NGO's to support victims in court hearings and that States consider the provision of work permits to victims during their stay in the receiving country<sup>188</sup>.

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<sup>186</sup> *Human Trafficking in the Russian Federation. Inventory and Analysis of the Current Situation and Responses*, Report Conducted By E.V. Tiurukanova And The Institute For Urban Economics For The Un/IOM Working Group On Trafficking In Human Beings. Moscow (2006), p. 93.

<sup>187</sup> Belarus is a full member of the OSCE since 30 January 1992.

<sup>188</sup> OSCE Action Plan chapter III, ss.4.1, 4.3, 4.5 and 4.6 respectively and chapter V ss. 7.4 and 8.3.



In this context I would like to analyze Edict of the President of the Republic of Belarus No. 352 on 8 August, 2005 *On Prevention of the Consequences of Trafficking in Human Beings* (further to be referred to as “*Edict No 352*”) which brought Belarus closer to best practice in protecting crime victims, witnesses and their families<sup>189</sup>.

Edict No 352 provides that all the main parties to criminal proceedings are entitled to ensuring their security; providing for their social protection and rehabilitation; rendering assistance to them through diplomatic missions and consulate offices of the Republic of Belarus<sup>190</sup>.

The persons protected include the victim and his/her legal representative, witnesses, the accused, their civil claimant/respondent and others<sup>191</sup>. Social protection and rehabilitation of the victims of trafficking shall be provided free of charge and include: the granting of temporary shelters, including sleeping accommodation and meals, to the victims of trafficking: legal assistance, as well as a free representation provided by the Bar<sup>192</sup>.

Medical assistance; psychological assistance, as well as the socio-pedagogical assistance; search for the families of minor victims of trafficking in human beings, or placing them into other families for fostering, or in the event that this is not possible, putting them into boarding institutions for children; assistance in securing permanent employment; other assistance provided according to the decisions made by the Local Councils of Deputies, executive and administrative bodies<sup>193</sup>.

Identifying victims and, more specifically, separating them from the perpetrators of the crime of trafficking is a complex process. Combating human trafficking, there is a risk that the Government treats certain individuals recovered in a trafficking operation as criminals rather than properly identifying them as victims<sup>194</sup>. Article 6 of the Palermo Protocol

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<sup>189</sup> See news bulletin, <[www.legislationline.org/Russian](http://www.legislationline.org/Russian)>, visited on 11 May 2011.

<sup>190</sup> Article 2.

<sup>191</sup> Article 3.

<sup>192</sup> There is a formal procedure, where a victim signs a protocol stating that they are officially an “injured party” and that they will participate in the criminal procedure as a party to the proceedings (Article 49).

<sup>193</sup> Article 3.

<sup>194</sup> Ezeilo, *supra* note 126.

provides that States parties shall provide assistance to and protection of victims of trafficking in persons. Furthermore, guideline 4, paragraph 4, of the Recommended Principles and Guidelines on Human Rights and Human Trafficking provides that States should ensure that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons<sup>195</sup>. This guideline is reflected in Decree No. 352 (Article 7), but there have been a number of difficulties with the application of this law, which certain commentators have attributed to its lack of funding. Although, police identified and referred most victims to NGOs for assistance, the Belarusian government did not demonstrate any tangible victim protection improvements. It did not provide funding to implement protections mandated under Edict No 352 and it continued to rely almost exclusively on NGOs and international organizations to provide victim assistance. Furthermore, the government overtly pressured victims to assist law enforcement with investigations and prosecutions. Belarus must take steps to improve its efforts to protect and assist victims by providing funding for victim assistance programs promised and codified into law in 2005<sup>196</sup>.

Other identified difficulties with the law include the fact that it is widely perceived as being applicable only in cases where victims of crime cooperate as witnesses in proceedings. If victims do not wish to give testimony to police, they may risk prosecution, as no further attention is paid to them and no protection afforded under this law, although it should be noted that Article 10.3 and Article 50.1 of the CPC provide for protection measures for victims in case of threats or danger to life.

But in many cases the reluctance to provide testimony is construed as indicating that the victim is not a victim of crime at all but is trying to conceal his or her own offences for which they may be punishable<sup>197</sup>. Thus,

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<sup>195</sup> United Nations High Commissioner For Human Rights. *Principles and Guidelines on Human Rights and Trafficking*, E/2002/68/Add.1 (2002).

<sup>196</sup> Office to Monitor and Combat Trafficking in Persons. *Trafficking in Persons Report* (2007).

<<http://www.state.gov/g/tip/rls/tiprpt/2007/82805.htm>>, visited on 11 May 2011.

<sup>197</sup> Tiurukanova. *Supra* note 178.

Article 11 of Decree No. 352 provides that “measures on protecting the victims of trafficking in human beings, envisaged by this Decree, *shall not be applied*, and those being applied shall be revoked, if the victim of trafficking in human beings is impeding the initial investigation or the legal proceedings of the criminal case”. While s/he did not receive any allegations that this had occurred, I support the opinion of the Special Rapporteur<sup>198</sup>, who insists that *the lack of capacity or willingness* on the part of the victim of trafficking to participate in legal proceedings *should never be interpreted* as “*impeding an initial investigation or the legal proceedings*”<sup>199</sup>.

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<sup>198</sup> J. Ezeilo, *supra* note 128.

<sup>199</sup> *Ibid.*

# Conclusions

In the beginning of this I made a brave statement, that Human Trafficking is the same as slavery or other later forms of human exploitation, which changed its name, maybe perception and forms, but in its essence it is still could be considered as the same phenomenon. During writing I tried to find the answer whether it becomes more severe or more “human”, what successes does the humanity have in combating Human Trafficking, or, even more, did it succeed or not?

To answer to these questions I showed gradual development of Human Trafficking Law, since its beginning up to nowadays, focusing on the main shifts in Human Trafficking Law, on different approaches, conceptions and definitions. Since, I believe that historical critique of the international legal framework influenced contemporary conceptualizations of trafficking in persons and it helps to understand the scope and limitations of current definitional issues and responses to this phenomenon, during my research I put attention on the main elements of modern definition, such as slavery, sexual exploitation, and forced labor.

As we can see early, slavery conventions leads to the development of the contemporary human trafficking framework under international law, with recognition of slavery and practices similar to slavery as the possible exploitative purpose of trafficking in persons.

Anti-prostitution conventions were the initial recognition of the traffic in persons for the purpose of commercial sexual exploitation. Influence of further development of trafficking with focus on gender is obvious in modern treaties.

The prohibition of forced labor and the exploitation of child labor and migrant labor, have also contributed to the contemporary trafficking in persons framework, particularly by extending the scope of trafficking to encompass the exploitation of labor outside of the sex industry.

And of course, Human rights development, which brought the tension and recognition of parallel systems operating under international law,

*videlicet* international human rights law and criminal law approach in combating human trafficking.

Furthermore in the thesis I showed the whole legal background of combating Human Trafficking in Belarus. Thus, my second research question was how current legal and legislative means to combat human trafficking in the Republic of Belarus, correlate with the legal framework of International Law. I found out that Belarus was among the first CIS countries to initiate a large scale campaign on fighting trafficking and has demonstrated its strong commitment to combating trafficking in human beings and is a participant in the main international legal documents related to the protection of trafficking victims.

Amendments to Criminal, Criminal Procedure and Administrative Codes offers revised versions of human trafficking definition, sentencing guidelines, and administrative offences relevant to human trafficking.

Although the revised version of human trafficking definition raises many reservations, specifically regarding a comprehensive nature of casuistry in terms of attributes of the crime consisting in human “purchase and sale” and the manner of committing such crime.

*Exploitation* is defined in a more limited way in comparison to that, provided under the Palermo Protocol definition. It does not make reference to servitude or other forms of slavery or slavery like practices, which are referred to under the Protocol and defined in international law and which would also encompass debt bondage. It does not refer to forced labor, but to ‘slave labor’ which is considered an extreme form of forced labor.

Furthermore, to prove the fact of trafficking in human beings in Belarus, it is necessary to prove a violation of personal freedom as defined under Article 181 Criminal Code, but many practicing lawyers do not comprehend the context of trafficking in human beings. In the Belarus in legal practice, there is always a risk that the legal notion of human trafficking may be perverted by defense arguments substantiating free will between adult persons.

Even though UNDP supports the Government of Belarus by enhancing strategic partnerships and national capacity building in fighting

human trafficking through preventive measures and better protection and rehabilitation of victims of trafficking<sup>200</sup>. However, I believe, that government campaign against trafficking appears not to focus enough on prevention or addressing the root causes of the phenomenon. The root causes of trafficking in human beings are multiple and interlinked, and include such issues as gender inequalities, poverty and/or low economic conditions and employment opportunities and demand for exploitative services. Therefore, a multispectral approach to tackling such root causes is crucial. I am concerned that the root causes human trafficking should be addressed more sufficiently, or in other case human trafficking will continue to thrive as potential victims become more desperate to escape their unfavourable situations.

Moreover, domestic violence is one of the largest problems, affecting Belarus. But, there are currently no specialized shelters for women suffering from domestic violence, no national hotline dedicated to the issue and, no law on domestic violence.

Although Belarus has a large set of legislative acts combating Human Trafficking, another issue is arising, which is not as much real implementation of these acts, as the real results of legal policy in this sphere, does it succeed, or not, if yes, to what extent? In this context I would like to make a statement, which is the following: the main aim of Human Trafficking law and legal policy of any state or international or domestic organization, finally, is to protect and to restore the human rights of the victims of human trafficking. And here unfortunately I have to state that in Belarusian reality statistics regarding this issue sometimes are artificial and do not show the real picture. In these regards, one should mention a violation of certain human rights in the name of counter-trafficking efforts, such as freedom of movement, right to privacy and right to work and earn a decent livelihood. I believe that anti-trafficking measures can not operate to violate people's human rights. A proper balance must be struck between measures to combat trafficking and the protection of human rights.

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<sup>200</sup> The funding for the project of nearly 1,335,000 Euro, has been provided by the European Commission, UNDP and UNICEF.

The lack of victim centered approach (which is based on the basic human rights of victim) led to the situation that claim mechanism in criminal court proceedings currently does not work in trafficking cases, which, in its turn, conjugates the lack of legal awareness amongst victims, who often do not know about the possibility of filing a civil claim within criminal proceedings, this means that relevant authorities do not adequately inform victims about their rights. The complexity of the proceedings, in particular, victim must prove a causal link to the facts of the acts which s/he leads to the damage. Also generally victims (not only of trafficking cases) do not actively seek to protect their rights since generally they believe in that they will not receive anything at the end of the proceedings. Thus, it is of tremendous importance for Belarus to provide non-conditional assistance to victims and build their trust so that they accept the State's offer of protection and assistance.

To conclude I want to emphasize that unless Belarusian government and law enforcement agencies take the necessary steps to address human trafficking from both a human rights as well as law enforcement perspective<sup>201</sup>, the majority of trafficking cases will continue to go uncounted, the victims uncared for, and the traffickers unpunished.

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<sup>201</sup> The necessity to adopt proper definition of human trafficking, not limited to forced slavery is urgent.

# Supplement A. Power Point Presentation for Defence

Lund University



## **Human Trafficking: Analysis of Belarusian Legislation on Human Trafficking in the Scope of International Human Rights Law**

### **Thesis supervisor:**

- Ida Elisabeth Koch

### **Opponent:**

- Arie Poluzzi

### **Speaker:**

Hanna Baranouskaya

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1. Introduction
2. History of development of Human trafficking Law: Human Trafficking as a legal phenomenon and definition
3. Legal framework of understanding human trafficking at European level
4. The Phenomenon of Trafficking in Human Beings: The Case of Belarus
5. Rights and Legal Position of Victims, Witnesses and other Participants in Criminal Procedure
6. Conclusions



## Research Questions:

**First question:** how international instruments in the areas of slavery, prostitution, labour and human rights have influenced the framework within which trafficking in persons is discussed and addressed on the international and regional level, and by consequence, domestically?

**Second question:** how current legal and legislative means to combat human trafficking in the Republic of Belarus, correlate with the legal framework of International Law?

→ **Delimitations:**

1. Study mainly focused on women.
2. No accurate figures on the number of Belarusians being trafficked were available.
3. The main focus is on trafficking within the borders of Europe.
4. Russian phrase 'torgovlya lyudmi', translates to 'trade of people'.

## History of development of Human trafficking Law:

Figure 1: Contributions to the *Trafficking in Persons Protocol* from diverse branches of international law

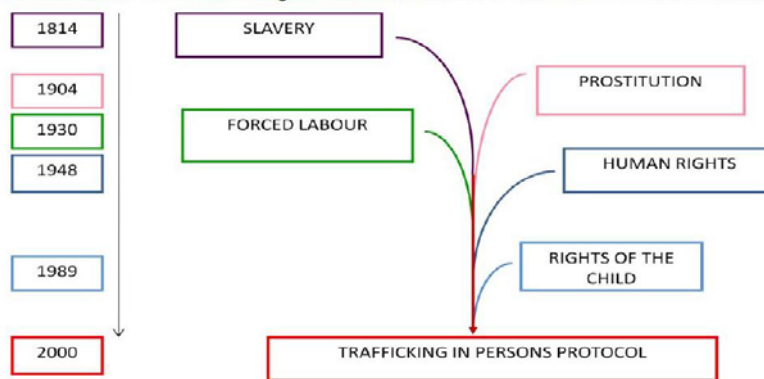
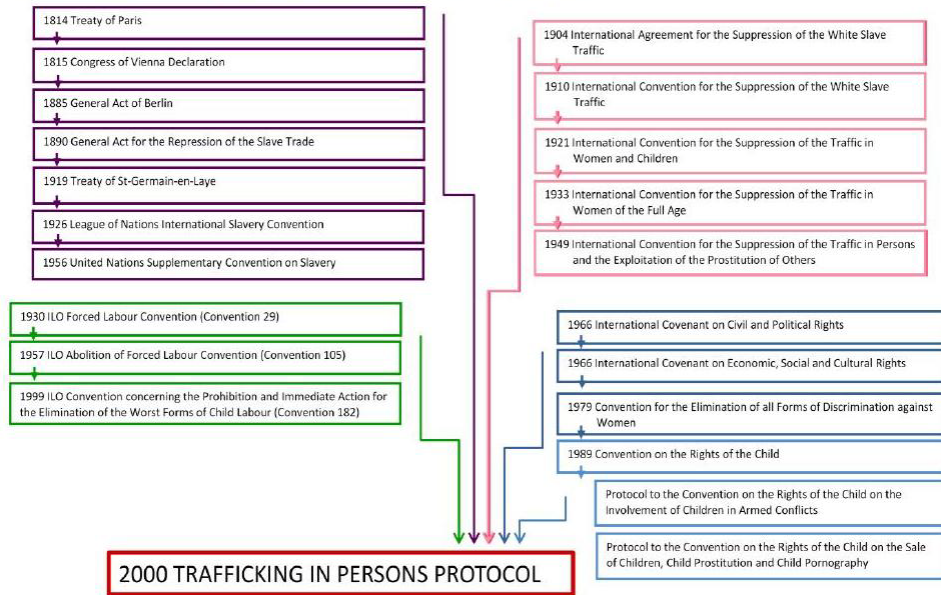
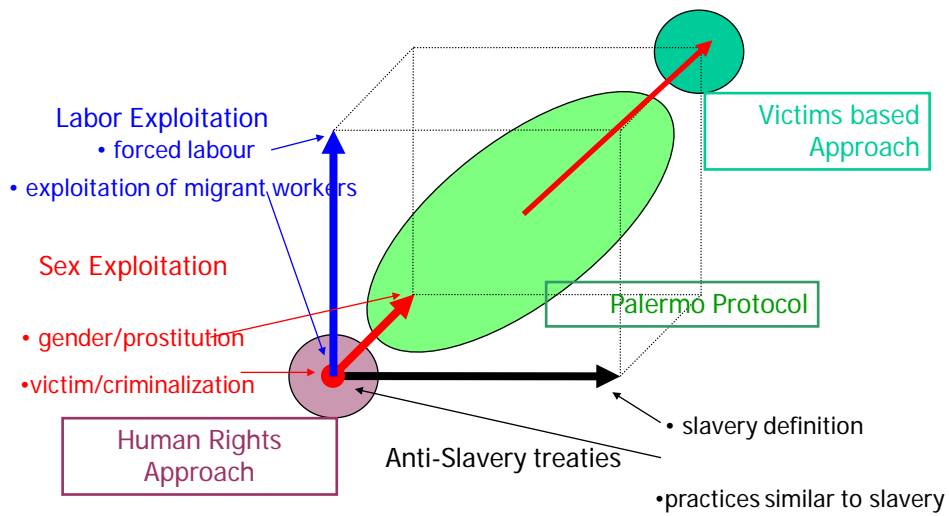


Figure 2: International legal instruments relating to trafficking in persons



## The definition of human trafficking



## **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)**

### **Article 3(a) "trafficking in persons" shall mean:**

1. An act (what is done): recruitment, transportation, transfer, harbouring or receipt of persons.
2. The means (how it is done): threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.
3. The exploitative purpose (why it is done): this includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

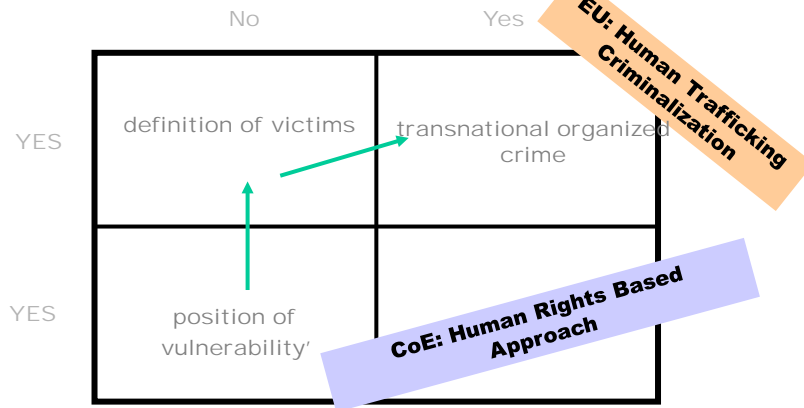
## **Human Trafficking Definition**

- **Prostitution = Human Trafficking** (referring to the definition above - abuse of power or position of vulnerability)
- **Only forced labor, slavery or servitude = Human Trafficking**

**Consensus** was reached with defining trafficking as involving **slavery, forced labor and servitude**,  
and  
leaving **exploitation of the prostitution** of others and **sexual exploitation undefined**.

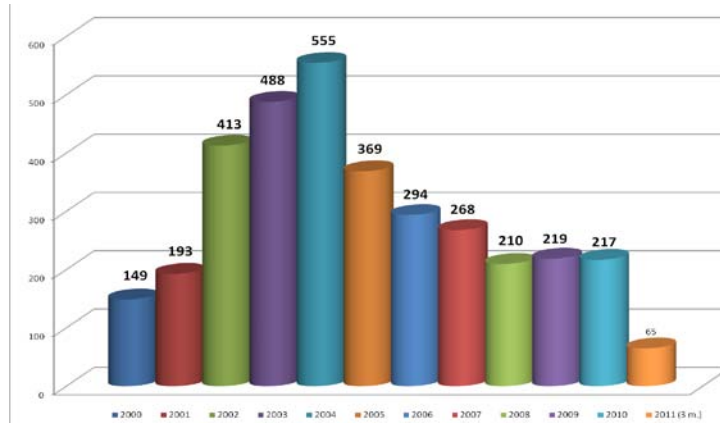
# European Union v. Council of Europe

EU: Palermo Protocol = Framework Decision 2002/629/JHA



## The Phenomenon of Trafficking in Human Beings: The Case of Belarus

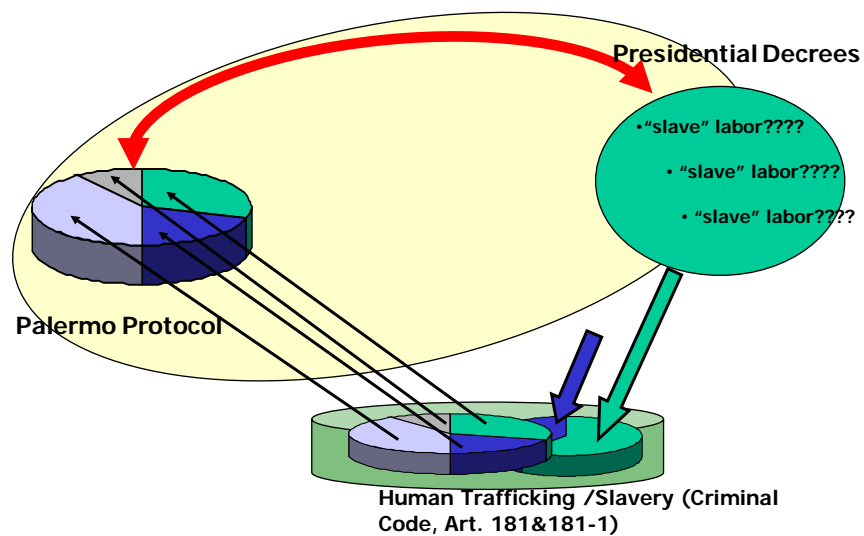
*The Number of Crimes Linked with Human Trafficking (years 2002 – 2011), according to data statistic from Ministry of Internal Affairs.*



## Actus reus of human trafficking can be expressed in alternative acts (Criminal Code, Article 181)

- The “purchasing” and “selling” people or any other kind of transactions in regard to the persons;
- The recruitment, transportation, transfer, harboring or receipt of persons for the purpose of exploitation.

## Human Trafficking v. Slave Labor



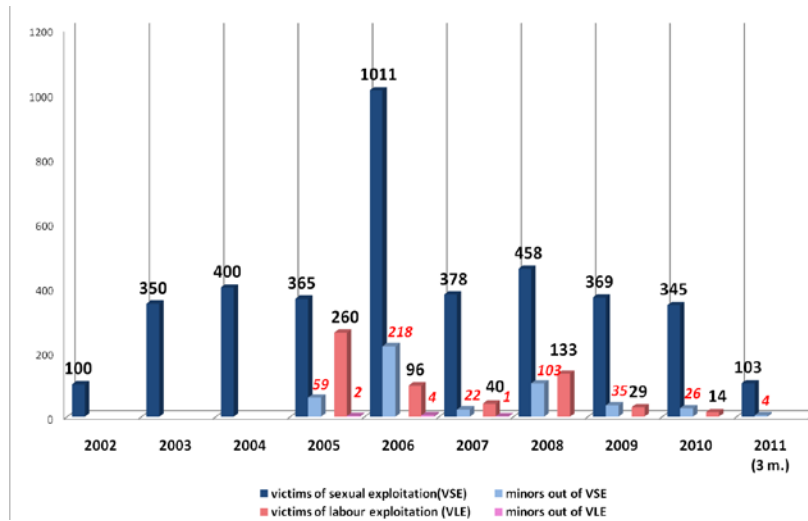
## Purpose of Exploitation? “Belarusian Invention” Article –Art 181-1

- Article 181.1 criminalizes the actual usage of slave labor. It is distinct from article 181 which requires the recruitment of a victim for the **purposes of exploitation** but not the **actual subjection** of that person to exploitation.
- Therefore those who commit a crime under *Article 181* should know that the person would be exploited but they may not use his/her slave labor. Those who commit a crime under *Article 181.1* have actually used that person's slave labor. At the same time someone who recruits a person for the **purposes of exploitation** and **actually** uses that **person's slave labor** would be liable for crimes under both Articles 181 and 181.1.

## Purpose of Exploitation? “Belarusian Invention” Article –Art 181-1

- Exploitation is defined in the Belarusian law, but in a more limited way in comparison to that, provided under the Palermo Protocol definition.
- It does not make reference to servitude or other forms of slavery or slavery like practices, which are referred to under the Protocol and defined in international law and which would also encompass debt bondage.
- It does not refer to forced labor, but to ‘slave labor’ which is considered an extreme form of forced labor

## Rights and Legal Position of Victims in Criminal Procedure



## Rights and Legal Position of Victims in Criminal Procedure

1. The Criminal Procedural Code (CPC) does not specifically refer to victims of trafficking but generally defines a victim as "a person, upon whom physical, moral or property damage was inflicted by the crime"
2. In general, court proceedings are public. Under certain circumstances, however, the judge may order to have a closed court hearing.
3. Article 27, of the CCP states, that the body of criminal prosecution "shall ensure the victim's access to justice and take measures to ensure compensation of the caused damage.

## Why the claim mechanism in criminal court proceedings currently does not work in trafficking cases in Belarus?

- Traffickers or exploiters can seek protection from officials and therefore be “immune” from court based claims.
- The lack of legal awareness amongst victims, who often do not know about the possibility of filing a civil claim within criminal proceedings, this means that relevant authorities do not adequately inform victims about their rights.
- The complexity of the proceedings, in particular, victim must prove a causal link to the facts of the acts which s/he leads to the damage.
- Generally victims (not only of trafficking cases) do not actively seek to protect their rights since they believe in that they will not receive anything at the end of the proceedings.

Corruption

Lack of Respect of legal system

## The numbers of suits claimed for compensation of moral damage

(1 euro=5 000 Rubles)

Region	Number of claims	Total sum Claimed (in thousand/ Belarusian rubles)	Total sum collected by Court decisions (in thousand/ Belarusian rubles)	Total sum actually received by claimants (in thousand/ Belarusian rubles)
Brest	27	55,200	32,500	10,100
Vitebsk	13	24,000	22,000	5560
Gomel	13	35,800	29,300	8300
Grodno	6	22,900	10,100	4620
City of Minsk	28	41,600	29,100	9520
Minsk	23	38,600	29,200	4184
Mogilyov	12	26,000	17,100	4670
Total for the Republic of Belarus	122	244,100	169,300	46,954



## Number of Claims v. Number of Victims

- According to the statistic data provided by Ministry of Justice, during 2002 - 2008, in total the Republic of Belarus considered 122 suits for compensation of moral damage, caused by trafficking in persons and related crimes. All the claims were satisfied. Out of the claimed 244.1 million rubles, the courts ruled to collect 169.3 million rubles, or 69.5% of the claimed compensations.
- According to the statistic data provided by Ministry of Internal Affairs during 2002-2008, in total 3591 victims were subjects of trafficking.
- Thus, the comparison of the statistic data leads to the conclusion, that out of the 3591 victims only 3.4% lodged their claims for compensation of moral damage caused by a crime.

## Recommendations

Anti-trafficking measures do not operate to violate human rights

A multisectoral approach to the identification and treatment of victims of trafficking

### Regarding legislation, the Government should ensure

- The adoption and implementation, as a matter of urgency, of a law on domestic violence, ensuring that the law is gender-specific and addresses the root causes of domestic violence, prevention, assistance to victims and prosecution of the offence.
- The ratification the Council of Europe Convention on Action against Trafficking in Human Beings & The International Convention on the Protection of the Rights of All Migrant workers and Members of Their Families

### General

- Although levels of awareness of trafficking are high, assistance and prevention programmes should be strengthened, in particular by targeting specific vulnerable groups. Broad-based, awareness-raising initiatives should also be strengthened and properly evaluated to avoid stigmatization or re-victimization of victims of trafficking.

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