



Victim or Criminal?

*A study of identified human trafficking victims in Denmark convicted
for criminal acts committed whilst trafficked*

Author: Evelina Eidem

Division of Human Rights Studies

Department of History

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Supervisor: Miia Halme-Tuomisaari

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Abstract

Human trafficking is one of the fastest growing crimes in the world, the International Labour Organisation estimate that there are 50 million people in modern slavery. In Denmark 294 trafficking victims were identified between 2019-2022, but only two traffickers were convicted of the crime. Trafficking victims are identified as such by Danish courts but also criminalized for crimes committed whilst trafficked. The questions this study seek to answer are “how can a trafficking victim be a criminal?” and “what does the conviction and criminalization of trafficking victims tell us of how international human rights law is implemented in Denmark?” This is analyzed through six court cases and three appeals of identified trafficking victims convicted for criminal acts whilst trafficked in Denmark between 2009-2021, along with six interviews of experts with experience of working with trafficking victims in Denmark. A content and discourse analysis with theory of the human rights-based approach, a law-enforcement approach and international law is implemented in national law is analyzed with the data. This study is anchored in a pre-theoretical commitment that the implementation of international human rights law in national law is important for a state to fulfil their human rights commitments in the field of human trafficking. Based on this study, it can be said that a victim can be a criminal due to the lack of non-punishment through the implementation of international human rights law in Danish national law of identified trafficking victims in Denmark.

Keywords: Trafficking in Human Beings, THB, Human Trafficking, International Human Rights Law, International Law, Non-Punishment, Denmark, criminal, victim.

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List of Abbreviations

CEDAW Convention on the Elimination of All Forms of Discrimination against Women

CMM The Danish Center Against Human Trafficking

CRC Convention on the Rights of the Child

EC European Convention

EU European Union

GRETA Group of Experts on Action against Trafficking in Human Beings

ILO International Labour Organisation

IMM The Danish Immigration Services

NGO Non-Governmental Organisation

THB Trafficking in Human Beings

TIP Trafficking in Persons

UN United Nations

1 Introduction

Human trafficking is one of the most fast-growing crimes in the world. The International Labour Organisation (ILO) estimate in a report from 2022 that there are 50 million people in modern slavery, which is another term used to describe human trafficking.¹ Widely spread around the world it impacts people in close proximity to all of us, having both a local and a global impact. In the year of 2000 the Palermo Protocol was adopted by the General Assembly of the United Nations (UN) as the first legally binding instrument against human trafficking. Human trafficking was defined as the recruitment, transportation or harbouring of persons by the means of threat and the abuse of vulnerability for the purpose of exploitation through forced labour or practices similar to slavery.²

According to the Palermo Protocol, ratifying states are obliged to prosecute traffickers, prevent human trafficking and protect trafficking victims.³ Denmark has ratified the Palermo Protocol, along with several other human rights covenants and treaties against human trafficking.⁴ But even though Denmark has adopted national legislation stating the illegality of trafficking, few convictions of the crime has followed. Between the years of 2019-2022, 294 trafficking victims were identified, but only two (2) traffickers were convicted for the

¹ Walk Free International Labour Organization (ILO), And the International Organization for Migration (IOM) 'Global Estimates of Modern Slavery, Forced Labour and Forced Marriage', (2022). p.1

² General Assembly Resolution 55/25, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime', *Vienna: United Nations Office on Drugs and Crime, United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2000).

³ General Assembly Resolution 55/25, 2000

⁴ For example, International Labour Organisation, 'Forced Labour Convention ', 29 (1930), The Council of the European Union, 'Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings', *Official Journal of the European Communities* (2002). The Council of Europe Council of Europe Treaty Series, 'Convention on Action against Trafficking in Human Beings', in 16.V.2005 Warsaw (ed.), *No. 197* (14, 2005).

crime of trafficking in Denmark.⁵ Instead, trafficking victims in Denmark are systematically identified by the courts both as victims of the crime of trafficking and at the same time convicted for crimes committed whilst trafficked.

This study's first and current chapter contains the motivation, purpose and research questions researched within the scope of this study along with an argumentation of its relevance within the scholarly field. Chapter 2 introduce the international and Danish context of human trafficking along with terminology, chapter 3 present theory and previous research within the three themes of human rights-based approach to human trafficking, law-enforcement approach to human trafficking and international human rights law implemented in national law. Chapter 4 contain research positionality and ethics, chapter 5 the methodology chosen for this study, chapter 6 is the analysis and chapter 7 and 8 a discussion and a conclusion of the findings including suggestions for future research.

1.1 Statement of purpose and research questions

This is a study about trafficking victims in Denmark who are convicted for criminal acts committed whilst trafficked. This study analyzes six Danish court cases and three appeals between the years of 2009-2021, of identified trafficking victims convicted for criminal acts committed whilst trafficked, through a content and discourse analysis. Six expert interviews have also been conducted and analyzed, with interviewees with expertise on trafficking victims in Denmark. The purpose of this study is anchored in a pre-theoretical commitment that international law implementation and ratification locally within a state is important to fulfil their human rights commitments in the area of trafficking. I have chosen the primary data of this study as a reflection on how criminalized victims can be understood in the context of international law applied to national law in the court cases, appeals and interviews. The data will be analyzed through a theoretical framework of the identification of trafficking

⁵ Center Mod Menneskehandel, 'Menneskehandel I Danmark Årsrapport', (Socialstyrelsen, 2019), Center Mod Menneskehandel, 'Menneskehandel I Danmark 2020 Årsrapport', (Socialstyrelsen, 2020), Center Mod Menneskehandel, 'Menneskehandel I Danmark Årsrapport ', (Social- og Boligstyrelsen 2022), Center Mod Menneskehandel, 'Menneskehandel I Danmark 2021 Årsrapport', (Socialstyrelsen, 2021).

victims, a human rights-based approach versus a law-enforcement approach of non-punishment and the implementation of international law in national law.

In a Danish context previous scholars have focused on trafficking victims' identification and protection in the court, as well as the lack of convictions of traffickers.⁶ A focus group in these studies has mainly been women in sex trafficking. This study adds to the scholarly conversation by focusing on trafficking victims regardless of gender or type of trafficking that has in common that they have been convicted of criminal acts committed whilst trafficked.

The motivation and purpose of the research are found within this study's research questions:

- a) How can a trafficking victim be a criminal?
- b) What does the conviction and criminalization of trafficking victims tell us of how international human rights law is implemented in Denmark?

2 Context

This section consists of terminology, context and international law of human trafficking and the local context and national law of human trafficking in Denmark in four sections. The first contains terminology and context of human trafficking, the second what human trafficking looks like in the Danish context, the third an outline of international law and human trafficking and lastly Denmark's ratification of these laws in national law.

2.1 Human Trafficking terminology and context

This section begins with a passage of terminology and definition of terms used in relation to this study and human trafficking. Then follows a passage on how human trafficking is outworked.

⁶ For example, Annick Prieur, Mette Rømer, and Michelle Mildwater, 'Criminalized Victims:: When Victims of Trafficking for Sexual Exploitation Meet Danish Authorities', *Retfærd: Nordisk Juridisk Tidsskrift*, 1/168 (2021), 65-79. Annick Prieur, 'Strafferetlig Forfølgelse Af Menneskehandel Til Prostitution I Danmark: Hvilken Retsbeskyttelse Får Ofrene', *Nordisk Tidsskrift for Kriminalvidenskab*, 106/2 (2019), 156-75.

Human trafficking is a crime where traffickers abuse victims of trafficking to make a profit by forcing the victims to labor of various forms. Human trafficking refers to the recruitment, harboring or transportation of people, who through threats are abused in their vulnerability for the purpose of exploitation.⁷ Other terms used to describe human trafficking are modern slavery, forced labor and forced marriage.⁸ Within this study the term human trafficking has been used. Trafficker(s) refer to the ones who partake in the criminal act of enforcing this labor upon others, another term can be trafficker agent, but in this study, trafficker is the term used. Victim(s) refer to the ones who are exploited by the trafficker, other terms are survivor(s), trafficking in human beings (THB) or trafficking in persons (TIP). Within this study, the term victim has been used as this is a legal term of identification within the local context of Denmark.

Here follows an example of how human trafficking can be outworked in practice. Many trafficking victims cooperate with the trafficker at the beginning stages of trafficking as they might be offered a job or a marriage in another country unaware of the full implications of the “offer” until reaching the destination country. The one making the offer, the recruiter, is sometimes a relative or someone the victim knows.⁹ The recruiter introduces them to the so-called trafficking agent who makes an offer and arranges travel documents. Upon arrival in the destination country the victim is escorted and placed with the so-called employer, who is in fact a trafficker, and can be forced to work for months or years with limited or no salary and a job that can look drastically different to what they were told. On top of this victims often face the pressure to pay back a significant debt that their trafficker threatens can only be paid through their labor. The victims face the risk of being sold again by the trafficker, with an ever-increasing debt.¹⁰ A potentially planned escape is challenged by isolation both in culture, language, from family and friends, lack of resources and lack of trust in the authorities. Traffickers can also take a hold of the victim’s passport and documentation, threaten their family at their country of origin and instill fear of what might take place should

⁷ General Assembly Resolution 55/25, 2000

⁸ Global Estimates of Modern Slavery, 2022, p. 19

⁹ Kinsey Alden Dinan, 'Trafficking in Humans: Social, Cultural and Political Dimensions', in Sally Cameron and Edward Newman (eds.), (United Nations University Press, 2008). Pp. 71, 72

¹⁰ Dinan in Cameron and Newman, 2008, p. 72

the victim reach out to authorities.¹¹ Traffickers often threaten the victim that if they make a report to the Police, they will themselves be detained. A victim can find themselves in such a position of vulnerability that they find no other alternative than to agree with what the trafficker demands.¹² As human trafficking often means that victims are trafficked across borders, states attempt to combat trafficking through border controls where travel documents and passports are examined.¹³

2.2 Human Trafficking in Denmark

In this section human trafficking is firstly understood in the local context of Denmark in migration as borders are often crossed by trafficking victims. Secondly statistics from Denmark is presented of how many trafficking victims that have been identified, how they are identified and how many traffickers have been convicted of the crime.

Denmark is known internationally for its harsh stance on immigration.¹⁴ Denmark is one of the countries with the most restrictive policies in the EU when it comes to receiving asylum seekers (until the refugee crisis in Ukraine 2022 when a short-term law was implemented to receive refugees, however it is only implemented for those from Ukraine escaping after the invasion of Russia the 24th of February 2022).¹⁵ When many people migrated and fled across borders due to war and poverty in 2015, many refugees passed through Denmark to Sweden where they were welcomed more favorably in comparison.¹⁶ In relation to the increased flow of refugees in 2015, Denmark made a new law in 2016 that made the access of family reunification and

¹¹ Dinan in Cameron and Newman, 2008, p. 72

¹² Ryszard Piotrowicz and Liliana Sorrentino, 'The Non-Punishment Provision with Regard to Victims of Trafficking: A Human Rights Approach 1', *Routledge Handbook of Human Trafficking* (Routledge, 2017), 171-84. P. 175

¹³ Dinan in Cameron and Newman, 2008, p. 67

¹⁴ Anniken Hagelund, 'After the Refugee Crisis: Public Discourse and Policy Change in Denmark, Norway and Sweden', *Comparative Migration Studies*, 8/1 (2020), 1-17. P. 10

¹⁵ Ministry of Foreign Affairs Of Denmark, 'Information to Persons from Ukraine ', <<https://www.nyidanmark.dk/en-GB/Words%20and%20Concepts%20Front%20Page/Shared/Information%20Ukraine>>, accessed 23/5 2023.

¹⁶ Hagelund, 2020, p. 10

asylum seekers more challenging.¹⁷ “While we wait for an international solution,” said Prime Minister Lars Løkke Rasmussen in relation to the new rules, “it is our job to protect Denmark”¹⁸ Denmark has “the toughest family-migration rule package in force among Western democracies today.”¹⁹ In 2016 the European Court ruled the Danish laws in family reunification as discriminatory.²⁰ The same year the Government argued to make “Denmark less attractive to asylum seekers”²¹ in order to “protect the state of Danish social cohesion and the welfare regime.”²² According to Hagelund, Denmark is a frontrunner in actively not wanting to be an attractive destination for migrations or refugees in a “race to the bottom”.²³ Pedersen and Smith argue that the Danish tax pressure in combination with the social benefit schemes can lead “to attract less qualified immigrants from the poor Countries”²⁴ and that “these problems can hardly be handled by migration policy initiatives.”²⁵

Between 2007-2022, 1121 trafficking victims has been identified in Denmark.²⁶ In 2022, there were 73.²⁷ Most trafficking victims in Denmark are women, but in labour exploitation there are mostly men.²⁸ Between 2018-2022, there was 36 charges but three convictions of traffickers.²⁹ The judgements of identified trafficking victims in the court cases and appeals chosen for this study alone consist of five identified trafficking victims convicted for criminal acts whilst trafficked during that same time period.

¹⁷ Emily Cochran Bech, Karin Borevi, and Per Mouritsen, 'A 'Civic Turn' in Scandinavian Family Migration Policies? Comparing Denmark, Norway and Sweden', *Comparative Migration Studies*, 5 (2017), 1-24. P. 9

¹⁸ Steen A Jørgensen, 'Regeringen Vil Lade Flygtninge Vente Tre År På Familiesammenføring', *Jyllands-Posten*, 13/11 2015.

¹⁹ Bech, Borevi, Mouritsen, 2017, p. 6

²⁰ Bech, Borevi, Mouritsen, 2017, p 9

²¹ Bech, Borevi, Mouritsen, 2017, p 10

²² Bech, Borevi, Mouritsen, 2017, p 10

²³ Hagelund, 2020, p. 15

²⁴ Peder J Pedersen and Nina Smith, 'International Migration and Migration Policy in Denmark', (2001). P. 22

²⁵ Pedersen, Smith, 2001, p. 22

²⁶ Center Mod Menneskehandel, 'Statistik', [Internet], <<https://cmm.dk/statistik>>, accessed 17/05/23

²⁷ Center Mod Menneskehandel, 'Statistik', accessed 17/05/23

²⁸ Group of Experts on Action Against Trafficking and In Human Beings, 'Greta Evaluation Report Denmark', (2021). P. 4

²⁹ Center Mod Menneskehandel, 'Sigtelser Og Domme', <<https://cmm.dk/statistik/sigtelser-og-domme>>, accessed 17/5/23

Center mod Menneskehandel (the Danish Center against Human Trafficking, CMM) is a public institution that is a part of Socialstyrelsen in Denmark. Their assessment is to identify potential trafficking victims in Denmark through interviews, plan identified victim repatriation, combat human trafficking through partnerships and raise awareness about human trafficking. The Police need to let CMM know about all of the potential victims they are in contact with.³⁰ Udlændingestyrelsen (the Danish Immigration Service, IMM) identify potential trafficking victims who have no legal right to be in Denmark. When a trafficking victim is identified a reflection period of up to 120 days is assigned to the victim and repatriation is planned. Before the end of these days the victim must leave Denmark.³¹ Trafficking victims should not be deprived of their freedom and accommodated in crisis centers.³² Identification of trafficking victims is important in Denmark to convict traffickers of their crime, that criminal acts committed by the victim are handled correct and they are offered social support.³³ The identification is made by CMM and IMM. But the prosecution, the Police and the courts are not bound to their assessment and make their own judgement in charges against traffickers and when potential trafficking victims have committed crimes.³⁴ If a trafficking victim has committed criminal acts in Denmark, the conviction must be considered in relation to the seriousness of the crime and if the action took place due to threat. An identified trafficking victim should not be deported.³⁵ The Group of Experts on Action against Trafficking in Human Beings (the Council of Europe, GRETA) say in their report that, “Denmark is primarily a country of destination for victims of trafficking.”³⁶ GRETA criticizes Denmark for not having specific laws protecting trafficking victims against convictions of criminal acts committed whilst trafficked and that trafficking victims should be granted residence permits in Denmark.³⁷ The Trafficking in Person (TIP) report on Denmark from 2022 make a similar recommendation

³⁰ Rigsadvokatmeddelelsen, 'Menneskehandel Og Menneskeudnyttelse', (2022). P. 6

³¹ Rigsadvokatmeddelelsen, 2022, p. 6

³² Rigsadvokatmeddelelsen, 2022, p. 6

³³ Rigsadvokatmeddelelsen, 2022, p. 6

³⁴ Rigsadvokatmeddelelsen, 2022, pp. 9, 10

³⁵ Rigsadvokatmeddelelsen, 2022, pp. 9, 10

³⁶ GRETA, 2021, p. 4

³⁷ GRETA, 2021, p. 5

of “non-punishment provision ensuring trafficking victims...not incarcerated, fined or otherwise penalized solely for unlawful acts traffickers compelled them to commit.”³⁸

2.3 Denmark’s ratifications of international law against human trafficking

This section contains an overview of Denmark’s ratifications of international law against human trafficking.

Denmark has ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons (Palermo Protocol, 2000).³⁹ Ratifying states of the Palermo Protocol are obliged to criminalize intentional breaches of trafficking victims by national law.⁴⁰ Other directives that Denmark has ratified include the decision of the Council of the European Union (EU) (2002),⁴¹ the Council of Europe Convention (EC) (2005),⁴² the EU directive on preventing and combating trafficking in human beings and protecting its victims (2011).⁴³ Denmark has also ratified the conventions by the International Labour Organization (ILO): The Forced Labour Convention (1930),⁴⁴ the Abolition of Forced Labor Convention (1957),⁴⁵ the Worst Forms of Child Labor Convention (1999),⁴⁶ the Protocol to the Convention on Forced Labour

³⁸ United States Department of State Publication Office to Monitor and Combat Trafficking In Persons, 'Trafficking in Persons Report 2022', (2022).

³⁹ General Assembly Resolution 55/25, 2000

⁴⁰ General Assembly Resolution 55/25, art.5, 2000

⁴¹ Council Framework Decision, 2002

⁴² The Council of Europe Convention, 2005

⁴³ European Parliament, 'Directive 2011/36/Eu of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and Replacing Council Framework Decision 2002/629/Jha', *Official Journal of the European Union*, (2011).

⁴⁴ Forced Labour Convention, 1930

⁴⁵ International Labour Office, 'Abolition of Forced Labour Convention', in International Labour Office (ed.), *105* (1957).

⁴⁶ International Labour Office, 'Worst Forms of Child Labour Convention', in International Labour Office (ed.), *Convention 182* (1999).

(2014).⁴⁷ And the convention of the United Nations (UN) on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979)⁴⁸ along with the Convention on the Rights of the Child (CRC, 1989).⁴⁹

Human trafficking is illegal according to Danish law, §262 a, §262 b.⁵⁰ According to the Alien Act §26 “an alien must be deported...unless this is in violation of Denmark’s international obligations.”⁵¹

3 Theory and previous research

Three approaches have emerged from scholarship in previous research on how states outwork their international ratifications to combat human trafficking. Firstly, the human rights-based approach, secondly the law-enforcement approach and thirdly the implementation of international human rights law in national law. A human rights-based approach according to Kreig “stresses the individual harm in contrast to a collective one and therefore puts emphasis on the protection of the individual in contrast to upholding the public or state interest”.⁵² In opposition to the human rights-based approach is the law-enforcement approach, according to Krieg, Mildwater, Prieur and Rømer, who argue that the law-enforcement approach allows states to view human trafficking as a migration issue leading to border protections and

⁴⁷ International Labour Organisation, 'The Protocol, Strengthening the Global Fight against All Forms of Forced Labour, Forced Labour Convention ', in International Labour Organisation (ed.), (2014).

⁴⁸ United Nations Human Rights Office of the High Commissioner, 'Convention on the Elimination of All Forms of Discrimination against Women

Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 34/180 of 18 December 1979

Entry into Force 3 September 1981, in Accordance with Article 27(1)', in United Nations Human Rights Office of the High Commissioner (ed.), (1979).

⁴⁹ United Nations Convention on the Rights of The Child, ' Convention on the Rights of the Child ', in United Nations (ed.), 44/25 (1989).

⁵⁰ Danske Love, 'Straffeloven, §262 a, § 262 B', <<https://danskelove.dk/straffeloven>>, accessed 23/5 2023.

⁵¹ Danske Love, 'Udlændingeloven, §26, Stk. 2', <<https://danskelove.dk/udlaendingeloven>>, accessed 23/5 2023.

⁵² Sarah H Kreig, 'Trafficking in Human Beings: The Eu Approach between Border Control, Law Enforcement and Human Rights', *European Law Journal*, 15/6 (2009), 775-90. P.785

deportations of victims.⁵³ Krieg means that the tension between the two lies in protection of the individual in relation to ensure State interests.⁵⁴ According to Koskenniemi international law falls short “whatever other merit it may have”⁵⁵ if it is not practiced and outworked in national law. This section will explore each of these approaches to human trafficking within the scholarly discussion and ends with how scholars argue that international human rights law is applied in Denmark within the field of human trafficking.

3.1 Human rights-based approach to human trafficking

3.1.1 Scholarly overview human rights-based approach to human trafficking

Another term used by some scholars for the human rights-based approach, is the victim-centered approach.⁵⁶ The human-rights based approach along with the victim-centered approach argue that victims of trafficking need to be protected and their rights respected for international law to be properly implemented in national law.⁵⁷ The difference between a human rights-based approach and a law-enforcement approach is according to Mildwater, Prieur and Rømer, that the human rights-based approach is an aim to protect victims but the law-enforcement approach aims to use “methods such as surveillance, detention, and deportation”⁵⁸ in protection of the state. Krieg argues that States in the making of the Palermo Protocol had the intention of combating human trafficking with a law-enforcement approach whilst NGOs instead argued for it to be dealt with within a human rights-based approach.⁵⁹ Rijken argue that most violators and initiators of the crime of trafficking are not the state but individuals, but a

⁵³ Mildwater, Prieur, Rømer, 2021, p. 776

⁵⁴ Krieg, 2009, p. 785

⁵⁵ Martti Koskenniemi, 'Letter to the Editors of the Symposium', Symposium on Method in International Law', *American Journal of International Law*, 93 (1999), 1999, 360. P. 124

⁵⁶ Carolina Villacampa and Nuria Torres, 'Human Trafficking for Criminal Exploitation: Effects Suffered by Victims in Their Passage through the Criminal Justice System', *International review of victimology*, 25/1 (2019), 3-18. P. 16

⁵⁷ Villacampa, Torres, 2019, p. 16

⁵⁸ Mildwater, Prieur, Rømer, 2021, p. 3

⁵⁹ Krieg, 2009, p. 776

human rights-based approach does not focus on the negative obligation to refrain from violations, but rather on a positive obligation to protect trafficking victims.⁶⁰

According to Rijken the human rights-based approach was birthed out of an apparent need of victim protection revealed in relation to their testimony in prosecution of the trafficker, as the testimony is crucial with other evidence often lacking.⁶¹ This due to threats by traffickers to harm trafficking victims' families. As the trafficking victims are often from another culture and country and have been taken across borders to another state, the traffickers often use this to instill fear of the local Police.⁶² But even if Rijken argue that the human rights-based approach emerged as a result of the threats trafficking victims faced in prosecution of the trafficker, their protection should not solely rest upon their collaboration in the criminal procedure.⁶³ According to Rijken and Volder the European Union (EU) has primarily focused on a law-enforcement approach where the focus lies in prosecution of traffickers. But a human rights-based approach would include protection of trafficking victims and prevention measures against human trafficking. Examples of such areas are migration and labor law.⁶⁴ Core obligations by states to protect trafficking victims are according to Gallagher “noncriminalization of victims; provision of immediate protection and support; provision of legal assistance including temporary residency; and safe and voluntary return.”⁶⁵

3.1.2 Human rights-based approach to non-punishment of trafficking victims

Piotrowicz and Sorrentino argue that there are three obligations that a state should fulfil in a human rights-based approach to non-punishment. Firstly, the legislation should have practical and effective protection of the rights of trafficking victims, and of potential trafficking victims. Secondly, an early identification of trafficking victims that is not reliant on the potential trafficking victim proving this status. And thirdly that states should train their authorities in

⁶⁰ Conny Rijken, 'A Human Rights Based Approach to Trafficking in Human Beings', *Security and Human Rights*, 20/3 (2009), 212-22. P. 216

⁶¹ Rijken, 2009, p. 217

⁶² Rijken, 2009, p. 217

⁶³ Rijken, 2009, p. 218

⁶⁴ Conny Rijken and Eefje De Volder, 'The European Union's Struggle to Realize a Human Rights-Based Approach to Trafficking in Human Beings', *Conn. J. Int'l L.*, 25 (2009), 49. Pp. 49, 50

⁶⁵ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010). P. 276

identification, investigation, prosecution and prevention of trafficking.⁶⁶ Piotrowicz and Sorrentino argue that non-punishment should lead to protection from prosecution, detention or criminal records of trafficking victims.⁶⁷ The implementation of the legal definition of non-punishment in national law vary from state to state, and according to Villacampa and Torres its implementation is a reflection to “the states regard for the victims’ human rights.”⁶⁸ States that most respect trafficking victims’ human rights will ensure their exemption from criminal liability and refrain from prosecution of trafficking victims, according to Villacampa and Torres.⁶⁹ Gallagher says that “criminalization is the antithesis of a victim-centered approach, inevitably operating to deny trafficked persons the rights to which they are entitled under international law.”⁷⁰

A group in need of special protection of a victim-centered approach to non-punishment is, according to Villacampa and Torres trafficking victims exploited for criminal exploitation committing criminal acts. Otherwise the state fails to protect trafficking victims’ dignity and instead violate their human rights.⁷¹ However, according to Piotrowicz and Sorrentino, “trafficked persons are often criminalized for offences related to their trafficking situation.”⁷² Law enforcement fail to recognize the trafficking victim behind the criminal they encounter, and instead of protecting them treats them as law violators.⁷³ Traffickers have a criminal strategy in involving trafficking victims “in illicit activities, such as holding false documents, theft, pickpocketing, drug smuggling, drug dealing, cannabis cultivation and fraud”⁷⁴ according to Piotrowicz and Sorrentino. Placing trafficking victims in detention and prosecuting them of crime can lead to trauma, self-harm, suicide, psychological diagnosis and an increased risk of vulnerability leading to re-trafficking or disappearance after trafficking victims have been released. It can also lead to a lack of trust in the authorities and an unwillingness to proceed in a potential cooperation in prosecuting traffickers.⁷⁵ Another risk

⁶⁶ Piotrowicz, Sorrentino, 2017, p. 180

⁶⁷ Piotrowicz, Sorrentino, 2017, p. 176

⁶⁸ Villacampa, Torres, 2019, p. 5

⁶⁹ Villacampa, Torres, 2019, p. 5

⁷⁰ Gallagher, 2010, p. 283

⁷¹ Villacampa, Torres, 2019, p. 5

⁷² Piotrowicz, Sorrentino, 2017, p. 171

⁷³ Piotrowicz, Sorrentino, 2017, p. 171

⁷⁴ Piotrowicz, Sorrentino, 2017, p. 171

⁷⁵ Piotrowicz, Sorrentino, 2017, pp. 171, 172

mentioned by Dinan is that convicted as “illegal aliens”⁷⁶, or punished for crimes and placed in detention or deported, trafficking victims lack trust in the authorities.⁷⁷

Gallagher argue that a reason for why criminalization of trafficking victims takes place is due to a lack of identification as such by the state.⁷⁸ Piotrowicz and Sorrentino agrees that that a challenge in the implementation of non-punishment lies in the identification process of trafficking victims: “the later they are identified, the harder it is to halt the prosecution or prevent other administrative penalties, and the less likely it is that they will receive justice.”⁷⁹ They mean that the failure to identify trafficking victims lie with the frontline services and staff such as the Police, border personnel and the prosecutors as they fail to look past “the apparent offender when they encounter victims either at a crime scene or committing a crime”.⁸⁰ Piotrowicz and Sorrentino adds that trafficking victims are, “doubly victimized: first, by the process leading to their enslavement itself and, second, by the system’s failure to identify them as victims...held legally and criminally liable for acts committed in the exploitation stage of the trafficking process.”⁸¹ Piotrowicz and Sorrentino argue that trafficking victims who are forced to criminal acts face a greater risk of not being identified as trafficking victims.⁸² Gallagher argue that there is a complexity in identifying trafficking victims and that their protection rests on this identification. The identification should according to Piotrowicz and Sorrentino lead to support and investigation of the crime of trafficking committed against them and the non-punishment of the trafficking victim if potential criminal acts were committed as a result of trafficking. Gallagher argue that detention of trafficking victims is unlawful but common. Trafficking victims who are not able or willing to provide the information necessary to the court will be sent in detention for immigrants and then deported.⁸³ Kreig agrees that “criminalization of trafficked persons is commonplace, even in situations where it would appear obvious that the victim was an

⁷⁶ Dinan in Cameron and Newman, 2008, pp. 72, 73

⁷⁷ Dinan in Cameron and Newman, 2008, p. 73

⁷⁸ Gallagher, 2010, p. 296

⁷⁹ Piotrowicz, Sorrentino, 2017, p. 177

⁸⁰ Piotrowicz, Sorrentino, 2017, p. 177

⁸¹ Piotrowicz, Sorrentino, 2017, p. 177

⁸² Piotrowicz, Sorrentino, 2017, p. 177

⁸³ Gallagher, 2010, pp. 288, 296

unwilling participant in the relevant illegal act.”⁸⁴ According to Rijken the lack of non-punishment of trafficking victims is one of the “most expressive violations”⁸⁵ of human rights.

3.2 Law-enforcement approach to human trafficking

3.2.1 Scholarly overview of the law-enforcement approach to human trafficking

The law-enforcement approach to human trafficking allow states to approach it as a migration issue, according to Krieg, Mildwater, Prieur and Rømer, leading to states ensuring their interests by border protections and deportations of victims.⁸⁶ Krieg argue that the tension between the human rights-based and the law-enforcement approach lies in protection of the individual in relation to ensure state interests. Krieg asks if trafficking victims are “a punishable perpetrator of immigration regulations or an injured victim of a crime?”⁸⁷ But adds that the relation between the two approaches cannot be simplified to the good human rights-based approach versus the bad law-enforcement approach, but that they are interconnected.⁸⁸ Dauvergne argue that migration regulation is based on the security of a state’s sovereignty.⁸⁹ Krieg refers to Dauvergnes statement as a “securitization of migration“.⁹⁰ Krieg mention that the EU approach of trafficking victims focuses on protection of their human rights but “favors the limitation of irregular migration”.⁹¹ Mildwater, Prieur and Rømer applies the theoretical understanding “cimmigration“ to discuss the intersection of criminal acts in relation to border control.⁹² Cimmigration can according to Cuauhtémoc and Hernández be understood as

⁸⁴ Krieg, 2009, p. 776

⁸⁵ Rijken, 2009, p. 215

⁸⁶ Mildwater, Prieur, Rømer, 2021, p. 3 and Krieg, 2009, p. 776

⁸⁷ Krieg, 2009, p. 785

⁸⁸ Krieg, 2009, p. 785

⁸⁹ Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008). Pp. 94, 95, 113

⁹⁰ Krieg, 2009, p. 785

⁹¹ Krieg, 2009, p. 790

⁹² Mildwater, Prieur, Rømer, 2021, p. 4

“demonization of migrants and discussions of migration as a threatening unknown”.⁹³ However, according to the law enforcements ratified by the states, they “accept a general obligation to cooperate through information exchange aimed at identifying perpetrators or victims of trafficking, as well as methods and means employed by traffickers”.⁹⁴ The means of border control as well as ensuring travel documentation and passports are according to the legal framework seen as important measures in combating human trafficking, argue Gallagher.⁹⁵

3.2.2 The law-enforcement approach to human trafficking in border control and migration

Dinan argue that it is important to understand human trafficking and trafficking victims within the context of “movement across international borders”.⁹⁶ Movement, according to Dinan, often takes place due to a search for a greater economic opportunity leading a majority to migrate to wealthier states, even though origin and destination of migration often intermingle within states.⁹⁷ Dinan argue that poverty rates contribute to migration as families seek to reduce economic risks by making an income across different borders, and that governments need to deal with economic instability and reducing poverty and inequality in countries of origin.⁹⁸ In human trafficking and the transportation of trafficking victims there are often transit countries of borders crossed before reaching the destination country. Perrin suggests that it is important to control transit and travel documents and enhance cross-border detection in transit countries to prevent human trafficking.⁹⁹ But Perrin also argue that destination countries “bear the greatest burden in terms of victim protection obligations and enforcement

⁹³ César Cuauhtémoc García Hernández, 'Deconstructing Crimmigration', *UC Davis L. Rev.*, 52 (2018), 197. P. 214

⁹⁴ Gallagher, 2010, p. 88

⁹⁵ Gallagher, 2010, p. 88

⁹⁶ Dinan, 2008, p. 58

⁹⁷ Dinan, 2008, pp. 58, 60

⁹⁸ Dinan, 2008, pp. 63, 76

⁹⁹ Benjamin Perrin, 'Just Passing Through? International Legal Obligations and Policies of Transit Countries in Combating Trafficking in Persons', *European Journal of Criminology*, 7/1 (2010), 11-27. p. 23

against traffickers”¹⁰⁰ and should fund programs in transit countries to combat human trafficking. Dinan is of another opinion and argue that stricter border controls have led to “a growth of criminal activity as migrants increasingly turn to third parties.”¹⁰¹ According to Dinan this has led to a greater vulnerability of trafficking victims adding to the risks of trafficking.

“Until countries address the mismatch between global migratory pressures and national immigration policies that makes trafficking and smuggling operations attractive to migrants and highly profitable for crime groups, little progress will be made.”¹⁰²

Dauvergne argues that in the discussion of trafficking victims and migration, a debate is often included on the difference between smuggling and trafficking. According to Dauvergne, the difference between the two is that smuggled persons are considered to have had a choice in making the illegal choice to cross a border, making them a criminal. Whereas trafficking victims did not have the same choice and are therefore considered as a victim. Dauvergne criticizes a polarizing separation between the two, claiming that criminally assisted migration is the cause of immense suffering for many.¹⁰³ Trafficking victims can be mistaken for smuggled migrants and risk deportation as they transition through countries, this leads to a risk of re-trafficking, according to Dauvergne.¹⁰⁴ The discussion of trafficking victims and smuggled migrants however, lies beyond the scope of this study.

¹⁰⁰ Perrin, 2010, p. 23

¹⁰¹ Dinan, 2008, p. 69

¹⁰² Dinan, 2008, p. 76

¹⁰³ Dauvergne, 2008, p. 91

¹⁰⁴ Dauvergne, 2008, p. 91

3.3 International human rights law implemented in national law

3.3.1 Scholarly overview of international human rights law implemented in national law

To successfully make an overview of international human rights law in national law I believe the question first must be asked of what is local and global in international law and national law? Moore discuss “global” and “local” and their differentiation by using data and context to make comparisons between the two.¹⁰⁵ They interconnect through a flow of economy, people, cultures and goods.¹⁰⁶ The local and the global co-exist in human trafficking. It connects people locally with economic gain across state borders by transporting people from local environments into a “no-mans-land” between the local and the global where someone can gain interest upon someone else over and over again. Globalization according to Moore is about how people “engage with the global and make themselves both global and local.”¹⁰⁷ Victims of trafficking are removed from their local context, perhaps in the hopes of being global, according to Moores understanding of the term relating to culture and lifestyle. But the trafficking victims instead end up in threatful situations through the criminal acts and economic gain of another.

To understand the implementation of international law, Koskenniemi says this of the example of torture: “it can only be speculated what it may mean, socially and for ourselves, to integrate "torture" as part of the routines of bureaucratic culture instead of holding it as an exceptional evil, defying technical articulation, and grasping us, as it were, through our souls.”¹⁰⁸ In other words, we cannot understand the implementation of international law through a pre-theoretical understanding that some things are evil. According to Koskenniemi we must instead understand international law through the bureaucratic implementation of signed treaties and the possible outworking of using these treaties to hold others accountable, outworked by practitioners.¹⁰⁹ Milano agrees that international human rights law suggests

¹⁰⁵ Henrietta L Moore, 'Global Anxieties: Concept-Metaphors and Pre-Theoretical Commitments in Anthropology', *Anthropological theory*, 4/1 (2004), 71-88. Pp. 75, 76

¹⁰⁶ Moore, 2004, p. 78

¹⁰⁷ Moore, 2004, p. 81

¹⁰⁸ Koskenniemi, 1999, p. 122

¹⁰⁹ Koskenniemi, 1999, p. 124

state responsibility through monitoring bodies on a national, regional and international level.¹¹⁰ Human trafficking is according to the view of Koskenniemi and Milano only as “unjust” as is bureaucratically implemented in national law through treaties. Language is used in international law and law in general to fulfill the wants of one's client and can follow different methods according to Koskenniemi.¹¹¹ International law becomes what “international lawyers make of it”.¹¹² International law is not a fixed set of rules, just as local law generally is not. In summary, international law is not fixed but must be outworked and interpreted locally. Milano argue that international human rights law and transnational law correlate and argue that trafficking victims are situated between them.¹¹³ According to Milano international law has led to a change of transnational and national criminal law. Trafficking victims are not only protected as witnesses in prosecution of traffickers, but the states consider their positive obligations in the protection of trafficking victims.¹¹⁴

3.3.2 Scholarly overview of international human rights law implemented in national law in Denmark

In the study of Mildwater, Prieur and Rømer, 14 identified trafficking victims in Denmark were interviewed, women from Nigeria, Kenya and Brazil. Mildwater, Prieur and Rømer found that all the interviewees in their research had to navigate the landscape of immigration and criminal law, and that most of them had not been protected by Denmark's ratifications of trafficking legislation.¹¹⁵ Mildwater, Prieur and Rømer argue that the status of being an immigrant trumps the status of being a trafficking victim in Denmark. They mention an example of a trafficking victim that was failed to be identified as a current trafficking victim

¹¹⁰ Valentina Milano, 'The International Law of Human Trafficking: At the Forefront of the Convergence between Transnational Criminal Law and International Human Rights Law?', *V. Milano (2018), "The International Law of Human Trafficking: At the Forefront of the Convergence Between Transnational Criminal Law and International Human Rights Law, (2018). P. 124*

¹¹¹ Koskenniemi, 1999, p. 116

¹¹² Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006). P. 615

¹¹³ Milano, 2018, p. 102

¹¹⁴ Milano, 2018, pp. 126, 127

¹¹⁵ Mildwater, Prieur, Rømer, 2021, pp. 10, 11

by IMM as a result was deported.¹¹⁶ Legal protection “is in practice reserved to national citizens.”¹¹⁷ Prieur agrees, in an individual scholarly work on the protection of trafficking victims in prostitution in Denmark, that trafficking victims who fail to be identified through CMM are usually deported after transitioning through a closed departure center.¹¹⁸ But Prieur argue that also those who have been identified as trafficking victims in Denmark can disappear and work in prostitution in other countries. The granted reflection period to transitioning trafficking victims given to sort out their return to their country of origin can, according to Prieur, lead to an extended interest in getting identified. Prieur argue that there is however a chance that some of the affected trafficking victims do not see themselves as victims, if they for example know the purpose of the trip in advance or if they have strong personal connections to the trafficker. For these reasons Prieur conclude that it more likely that identification of trafficking victims is underreported in Denmark.¹¹⁹

Trafficking victims collaboration is key when it comes to the investigation and prosecution process against traffickers in Denmark, but this is a challenge, according to Prieur, as long as they are not compensated financially or protected with permanent Danish residency.¹²⁰ Prieur comments that CMM and the Danish Police work in partnership with each other but are two separate entities where the identification of a trafficking victim does not automatically lead to a Police report, even though a criminal act has been committed.¹²¹ Most cases of trafficking victims in prostitution who bring a charge against a trafficker does not lead to prosecution in Denmark.¹²² Prieur questions why trafficking victims should want to collaborate with the Danish Police when there is little chance for their case to be investigated and the trafficker prosecuted, along with an almost non-existent compensation and a limited chance of permitted residency.¹²³ Danish legislation is formulated to combat human trafficking through conviction of traffickers, but in reality this stands next to migration law that reduces trafficking victims’ freedom of movement. Prieur question Denmark’s quest to combat human

¹¹⁶ Mildwater, Prieur, Rømer, 2021, p. 11

¹¹⁷ Mildwater, Prieur, Rømer, 2021, pp. 12

¹¹⁸ Prieur, 2019, pp. 160, 161

¹¹⁹ Prieur, 2019, pp. 160, 161

¹²⁰ Prieur, 2019, pp. 156, 157

¹²¹ Prieur, 2019, p. 161

¹²² Prieur, 2019, p. 173

¹²³ Prieur, 2019, p. 173

trafficking through judicial solutions and argue that more should be invested in social and medical assistance of the trafficking victims. This would lead to a greater impact on behalf of the victims than prosecution of the traffickers does.¹²⁴

4 Research positionality and ethics

In this section I will define ontology according to Halme-Tuomisaari along with definitions of theory by Moore, Maxwell and Mittapalli to locate this study theoretically. Pre-theoretical definitions are then explored and integrated into this study through Moores understanding of the local and the global and Koskenniemis definition of international law.

Ontology can according to Halme-Tuomisaari be referred to as one's "truth", either as a part of a truth, or the truth depending on one's own ontology. Human rights can be understood as a universal and absolute truth, or one truth as a part of understanding humanity.¹²⁵ Halme-Tuomisaari suggests three different ontological pathways of human rights. Firstly, an absolute truth of human rights that can be discovered, secondly that there is no universal truth to human rights but that human rights are made up and constructed out of the policies that are made, and finally that there may be a universal truth of human rights that may be partially discovered, "but its assessment is beyond established scientific methods."¹²⁶

This study rests on the ontological foundation and understanding of a universal truth or a potential universal truth when it comes to human rights. The universal truths would not be placed within the framework of my human rights research as the way I understand and relate to human rights in many ways relate to law. This then looks very different depending on what state is implementing the laws, and therefore the universality of the ontology as a researcher would differ depending on national or international law. This study is based on the use of

¹²⁴ Prieur, 2019, p. 173

¹²⁵ Miia Halme-Tuomisaari, *Human Rights in Action: Learning Expert Knowledge* (Brill, 2010). P. 18

¹²⁶ Halme-Tuomisaari, 2010, p. 18

theory as described by Moore, Maxwell and Mittapalli that theory is used as foundational ideas and values that could shape the outcome of the result of a study. “Pre-theoretical commitments are underlying assumptions and principles. Principles are, of course, linked to methods.”¹²⁷ According to Maxwell and Mittapalli, theory in qualitative studies differs from theory in other studies, such as in the physical sciences. In qualitative studies theory is used inductively, by exploring a theory in relation to chosen methods, whilst theories in other studies could be used more deductively by testing a theory to see if it is outworked in practice. “It should also involve investigating the processes stated or implied by the theory, to see if these are actually operative for the phenomena in question.”¹²⁸

Laura Nader reflects on how anthropology and research could be done by “studying up” instead of “down”.¹²⁹ This study is an example of “studying up”, a conscious and ethical choice according to Naders theory. The reason is that Denmark has a legal structure with people who are being trafficked yet criminalised and punished. And a financial and “rich versus poor” understanding of the global, as Denmark is a rich state receiving people from other poorer states not as wealthy who get exploited into human trafficking.¹³⁰

Sally Engle Merry discusses the quantification of trafficked people and the challenges to study a group as a homogenous group when it consists of individuals from many different backgrounds. According to Engle Merry a challenge with human trafficking reports, such as the TIP report made by the US, is that they focus solely on the criminal act of trafficking and that they fail to bring in the perspective of structural violence leading to trafficking.¹³¹ There are power structures and relations between political, financial and social backgrounds that are not identified in the TIP reports according to Engle Merry.¹³² Even though the TIP report will

¹²⁷ Moore, 2004, p. 74

¹²⁸ Joseph A. & Mittapalli Maxwell, Kavita, ed. Lisa M Given (The Sage Encyclopedia of Qualitative Research Methods: Sage publications, 2008). P. 1

¹²⁹ Laura Nader, 'Up the Anthropologist: Perspectives Gained from Studying up in Reinventing Anthropology', (New York: Pantheon Books, 1969). P. 306

¹³⁰ Nader, 1969, p. 306

¹³¹ Sally Engle Merry, 'The Seductions of Quantification', *The Seductions of Quantification* (University of Chicago Press, 2016). P. 159

¹³² Engle Merry, 2016, p. 160

not be analysed in the scope of this study, Engle Merry's considerations to study a group as homogenous that consists of individuals, and the lack of perspective of structural violence leading to trafficking are insightful to potential limitations of this study.

A pre-theoretical commitment can be expected as a foundation for this study that human trafficking should be abolished, through the means of local and international law. Denmark is used as an example where the international and the local meet in local court cases appealing to international law, as well as through the experience of interviewees.

5 Methodology

5.1 Data collection and presentation

5.1.1 Six court cases, three appeals in the Danish court

Six anonymized court cases and three appeals of identified trafficking victims convicted for criminal acts committed whilst trafficked in Denmark has been selected for this study. The trafficking victims have been identified through CMM or the Danish Immigration Service (IMM). The cases have been made accessible through CMM via the publisher Karnov, some of them are anonymized and published. The six court cases along with the three appeals are all relevant to this study as the appeals add to the complexity of the issue of trafficking victims being criminalized. They are situated between the time span 2009-2021, a demarcation that is relevant as foundational international law ratifications mentioned in chapter 2.3 had then been passed in Denmark. The original language of the court cases and appeals is Danish. The quotes and references made have all been translated using Google Translate. Changes have occasionally been made to that translation where I found a synonym of a word more suitable, but the original meaning of the cases and appeals have not been changed.

The cases and appeals that are a part of this study have been numbered in the analysis according to the table below, to make it easier to follow. An appeal belonging to a previous case has gotten the same number as the previous case along with the letter “B”.

(1A) Københavns Byrets dom, 13th of October 2010
(1B) Østre Landsrets dom, 26th of November 2010
(2) Retten i Svendborg, 3rd of April 2017
(3A) Hellerød Rets dom, 23rd of April 2018
(3B) Østre Landsrets dom, 3rd of August 2018
(4) Retten i Glostrup, 10th of February 2020
(5A) Københavns Byrets Dom, 24th of June 2021
(5B) Østre Landsrets Dom, 19th of August 2021
(6) Københavns Byret, 11th of June 2021

For each case and appeal several considerations have been made leading up to the analysis. Such considerations have been when the conviction took place, what actors identify the defendant as a trafficking victim, how long the defendant has been in detention. Along with what crime and punishment is convicted, the testimony from the defendant and/or CMM, the reasoning of the court about the punishment and if the defendant is previously convicted of crime. Find tables in appendices, chapter 10.1 and 10.2, for an overview of each case and appeal with some of this information.

Here follows a short presentation and summary of each case. In Københavns Byrets dom (case 1A) the defendant is convicted to prison and deportation for the use of false documents. The defendant is from Nigeria and came to Denmark via Switzerland and Italy with a passport received through a partial payment.¹³³ In the appeal Østre Landsrets dom (appeal 1B) the defendant is acquitted of the deportation claim as the court agree with IMM that the defendant is a victim of trafficking.¹³⁴ This was the only change made in the appeal compared to the previous judgement. In Retten i Svendborg (case 2) the defendant is convicted to prison for cannabis production, but freed of deportation as the court identifies them as a trafficking victim and that the criminal acts were committed as a result of this. The defendant is from Vietnam and left to make money on behalf of the family as the income in Vietnam was not

¹³³ Københavns Byret 13/10, 'Tfk2011.214oe-Oe2010.S.2451.10', (Københavns Byret Dom, 2009).

¹³⁴ Østre Landsrets Dom, 'Anke 10. Afd. S-2451-10', *Østre Landsrets dom* (Østre Landsrets dom, 2010).

enough.¹³⁵ In Hillerød Rets dom (case 3A) the defendant is convicted to prison and deportation for theft. The defendant is from Morocco and was hired in an orphanage in Spain by a criminal gang called LTF. The gang then asked the defendant to go to Denmark with a false passport. The court does not consider the crime trick theft to have any relation to the claim made by the defendant of being a trafficking victim.¹³⁶ In the appeal Østre Landsrets dom (appeal 3B) the previous judgement stands with the difference of the court identifying the defendant as a trafficking victim, but they argue like the previous court that the crime does not relate to this.¹³⁷

In Retten i Glostrup (case 4) the defendant is convicted to prison for the use of false documents, but freed from deportation as the court identifies the defendant as a trafficking victim. The defendant is from India and came to Denmark through Italy and was drugged on the way and threatened not to reach out to anyone.¹³⁸ In Københavns Byrets dom (case 5A) the defendant is convicted with prison for theft and fraud but freed from deportation as the court identifies them as a trafficking victim. The defendant is from Romania and came to Denmark through Germany to pay off a debt under threat through criminal acts in Denmark.¹³⁹ In the appeal Østre Landsrets dom (appeal 5B) a deportation claim is added as the court does not identify the defendant as a trafficking victim.¹⁴⁰ In Københavns Byret (case 6) the defendants are convicted with prison for drug usage and theft, but freed from deportation as the court identifies them as trafficking victims. It is not stated in the case where the defendants are from, but they came to Denmark through France and Sweden. They claim to not recall what happened as they were under the influence of drugs and had committed the theft due to threat.¹⁴¹

¹³⁵ Retten i Svendborg, 'Anke 10. Afd. S-2451-10', *Retten i Svendborg* (2017).

¹³⁶ Hillerød Rets Dom, '9-1704/2018', (Hillerød Rets dom, 2018a).

¹³⁷ Østre Landsrets Dom, 'S-1558-18', (Østre Landsrets dom, 2018b).

¹³⁸ Retten i Glostrup, 'D11-1478/2020', (Retten i Glostrup, 2020).

¹³⁹ Københavns Byrets Dom 24/6, 'Ss 1-10786/2021 - Db 0100-84141-0020-21', (Københavns Byrets dom, 2021).

¹⁴⁰ Østre Landsrets Dom, 'S-1945-21', (Østre Landsrets 16. Afdelings Dom, 2021).

¹⁴¹ Københavns Byret 11/6, 'Ss 2-7536/2021 ', (Københavns Byret, 2021).

5.1.2 Content analysis

Prior says that content analysis is a text-based analysis and argues that it is mainly used to understand the message of a text and its core rather than to analyze the response of the recipient. It is mainly used for speeches, interviews and text, through the content of for example words, terms, sentences and themes.¹⁴² A content analysis can also be the first step leading into a discourse analysis, to first analyze the content, then what the language and the content means in relation to other statements in the data gathered. As Prior argues, a content analysis is a form of “hybrid” tool of both quantitative and qualitative data, which makes it a suitable method for the data I have collected.¹⁴³ To study how trafficking victims can also be criminals in Denmark a content analysis has been made by looking into certain themes found within the court cases and interviews that would define the victim as a criminal. For example, by examining the courts judgement in terms of convicting an identified victim of trafficking to prison, and to specify what criminal acts the victims in these cases have been convicted of. The definition of trafficking victim will be analyzed based on what and how the actors identify the trafficking victim(s) as such. Three themes have been found through the content analysis. The themes are explained in chapter 6.

5.1.3 Discourse analysis

A discourse analysis is made in this study on the basis of the content analysis. A discourse analysis is a qualitative study seeking to find connections between terms and their use, connecting them to the actor making the statement. A way to analyze content according to Prior, can be to look at what is mentioned alongside a term chosen.¹⁴⁴ The actors have been placed into different categories in this study as “characters” in the narrative, an analytic tool used by Prior in an example of policy documents, while at the same time arguing that they can be used for other texts too.¹⁴⁵ Examples of characters in this study can be found in the cases and appeals such as the court, CMM and IMM. The first step is to notice clusters of terms, or

¹⁴² Lindsay Prior, in Patricia Leavy (ed.), *The Oxford Handbook of Qualitative Research* (Oxford University Press, USA, 2014). P. 544

¹⁴³ Prior in Leavy, 2014, p. 534

¹⁴⁴ Prior in Leavy, 2014, p. 545

¹⁴⁵ Prior in Leavy, 2014, p. 543

themes as in this study. Prior then recommends using the content data in combination with a discourse analysis.¹⁴⁶

5.1.4 Semi structured interviewing

For the six expert interviews of this study, semi structured interviews have been conducted. According to Brinkmann this is an effective way to make use of “the knowledge-producing potentials of dialogues”.¹⁴⁷ It also gives the researcher a freedom to direct the interview “focusing the conversation on issues that he or she deems important in relation to the research project.”¹⁴⁸ Interviews are according to Brinkmann conducted to produce knowledge and have a specific purpose.¹⁴⁹ Open ended and descriptive questions along with an intention to follow “contradictory meanings”¹⁵⁰, have been applied in this study to seek the experience of the interviewee. The semi structured questions were sent in advance if asked for. The interviewees have been given a chance to accept and revise quotes mentioned. The interviewees were chosen based on their expertise in trafficking victims in relation to Denmark. Their opinions are their own, even though they work in the field professionally and bring experiences to the interviews, the interviews are conducted with persons and not organizations. The interviews are presented in chapter 6.1.3, 6.2.3 and 6.3.3, and a list is presented chapter 10.3: Appendix 3.

6 Analysis

Three themes have been chosen for the following analysis, based on the content found in the six cases and the three appeals, expert interviews along with theory and previous research in chapter 3. The theme headings are “Identification of trafficking victims”, “A human rights-based approach versus a law-enforcement approach to non-punishment” and “The

¹⁴⁶ Prior in Leavy, 2014, p. 554

¹⁴⁷ Svend Brinkmann, 'Unstructured and Semi-Structured Interviewing', *The Oxford handbook of qualitative research*, 2 (2014), 277-99. P. 438

¹⁴⁸ Brinkmann, 2014, p. 438

¹⁴⁹ Brinkmann, 2014, p. 438

¹⁵⁰ Brinkmann, 2014, p. 438

implementation of international law in national law”. Each heading is divided into four sections, starting with an introduction of what will be analyzed and what theoretical framework has been used, followed by an analysis of the court cases and appeals, followed by interviews and ending with a conclusion of an analysis of court cases, appeals and interviews combined. This analysis ties in with the questions researched in this study on how trafficking victims can be criminal, and what the conviction and criminalization of trafficking victims tell us of how international human rights law is implemented in Denmark. Main actors in the cases and appeals that are analyzed are CMM, IMM and the court.

6.1 Identification of trafficking victims

6.1.1 Introduction: Identification of trafficking victims

This section contains an analysis of the identification of trafficking victims in Denmark through the court cases, appeals and semi structured interviews.

There are two ways an identified trafficking victim is presented as such to the court by CMM/IMM. Either through a written statement or through a witness testimony by one of their representatives in court. Both will be analyzed in relation to the court’s judgement and response in their own identification or lack of such of the defendant. CMM and the court make comments on their own identification process. CMM states that their identification process is not a legal assessment but a social worker assessment and that victims of trafficking at times are reluctant to report it due to mistrust and fear of consequences. The court comment their own reasoning in choosing not to identify a victim of trafficking: the claim was stated too late by the defendant, there was a lack of evidence, the crime did not relate to such an identification, the defendant was unclear about the trafficker’s whereabouts. The cases, appeals and interviews are analyzed through the theoretical understanding of Piotrowicz and Sorrentino who argue that for States to have a human rights-based approach of non-punishment of trafficking victims and that early identification is a key factor. Piotrowicz and Sorrentino also argue that the process of identification should not add a burden of proof to the potential trafficking victim in proving their status.¹⁵¹ Koskenniemi’s argument that international law is only as valid as it is applied to

¹⁵¹ Piotrowicz, Sorrentino, 2017, p. 180

national law, no matter how good the intentions were with making the law¹⁵², will be analyzed along with the description mentioned in the Palermo Protocol of how trafficking victims are identified and used by CMM and IMM in their identification process.¹⁵³

6.1.2 Analysis: Identification of trafficking victims in court cases and appeals

In all the court cases and appeals, apart from in case 1A, the defendant(s) are identified as trafficking victim(s) by CMM and/or the IMM. The court makes their own judgement in each case and appeal if they agree with the identification of the defendant as a trafficking victim made by CMM and/or IMM or not.

In cases 4 and 6 and in appeal 3B, a written statement is presented by CMM to the court noting several indicators of trafficking along with an assessment that the defendant is a trafficking victim. On all three occasions, the court agrees with CMMs identification.¹⁵⁴ An example of this can be seen in case 6, “the court finds that, based on the prosecution's documentation and the witness from the Center against Human Trafficking, it has been proven that there is a high probability that both defendants have been exposed to human trafficking.”¹⁵⁵ In case 4 and appeal 3B the court argue that the written statement from CMM was the basis of their own conclusion that the defendant is to be identified as a trafficking victim. As seen in appeal 3B, “following the statement from the Center for Human Trafficking of 13 July 2018, the statement from the Danish Immigration Service of 31 July 2018 and the defendant’s explanation in the high court, the high court finds that the defendant has been exposed for human trafficking.”

In cases 1A, 2, 3A, 5A and appeals 1B and 5B, where an identification of the defendant was made by CMM and/or IMM through a CMM witness bringing their testimony to court. In cases 2, 5A and 6, the court make a statement in their judgement concluding that they agree with the assessment that the defendant is an identified trafficking victim. There is however no comment on how or why they came to that conclusion within these cases.¹⁵⁶ See for example

¹⁵² Koskenniemi, 1999, p. 124

¹⁵³ General Assembly Resolution 55/25, 2000

¹⁵⁴ Glostrup 10/2 2020, København 24/6 2021, Østre 3/8 2018, Hillerød 23/4 2018

¹⁵⁵ København, 11/6, 2021

¹⁵⁶ Østre, 3/8 2018

case 2, “the defendant is a victim of human trafficking.”¹⁵⁷ The difference between a written statement and a witness statement of identification in these cases is that when a written statement was made, the court agreed with CMM/IMM, but when a witness statement was made the court did not always agree.

CMM and the court comment on their own identification process in case 5A and appeal 5B, which is insightful when it comes to understanding how they reason about their identification process. CMMs witness comments on their identification process in case 5A, “you can tick off the various possible indicators, and at the top there is also a chart, where it is checked by a social worker assessment whether human trafficking is suspected... that it cannot be assessed...or... does not exist. This is not a legal assessment. ”.¹⁵⁸ CMM makes a comment to the court about how they should view CMMs identification in appeal 5B, “...more is needed, before the Courts consider a person to have been trafficked, than if it is a case of a pure social worker assessment.”¹⁵⁹ In both case 5A and appeal 5B, CMM identifies the defendant as a trafficking victim based on the definition in the Palermo Protocol.¹⁶⁰ As seen through CMMs comments in case 5A and appeal 5B, they view their own identification process as insufficient within the judicial system even though their process is based on the Palermo Protocol and they are one of the designated actors in Denmark to identify victims. CMM comments further about their identification process in appeal 5B, “victims of human trafficking are typically reluctant to report it to the authorities. This is due to mistrust of the system and fear of the consequences. Sometimes several conversations with a person have had to be conducted before it can be determined whether the person in question has been trafficked.”¹⁶¹

The court comments on their reasoning in choosing not to identify the defendant as a trafficking victim in appeal 5B, the information that the defendant has been a victim of human trafficking derives solely from his own explanation of this”.¹⁶² The court changes their judgement from case 5A claiming that the defendant cannot be identified as a trafficking victim due to a lack of

¹⁵⁷ Svendborg, 3/4 2017

¹⁵⁸ København, 24/6 2021

¹⁵⁹ Østre, 19/8 2021

¹⁶⁰ General Assembly Resolution 55/25, 2000

¹⁶¹ Østre, 19/8 2021

¹⁶² Østre, 19/8 2021

evidence. The court adds, “the explanation for this only came out a short time before the main hearing in the district court, as the defendant refused at the arrest in February 2021 or in the constitutional hearing to talk about human trafficking.”¹⁶³ The court argue that “the defendant's explanation appears unclear on a number of points, including with regard to the traffickers identity and whereabouts in Denmark”¹⁶⁴ This led to the court changing their judgment in appeal 5B concluding that the defendant is not a trafficking victim, regardless of CMMs assessment claiming otherwise.

Another argument used by the court in case 3A and appeal 3B for not choosing to identify the defendant as a trafficking victim is the claim that the crime trumps the identification. The court argue that “although both the Center for Human Trafficking and the Danish Immigration Service have assessed that the defendant has been a victim of human trafficking, the crime - trick theft - is not a consequence of such human trafficking”.¹⁶⁵ The court in this case argue that certain criminal acts cannot be a consequence of human trafficking.

The court in appeal 5B goes against what scholars like Piotrowicz and Sorrentino argue when it comes to how trafficking victims should be identified according to a human rights-based approach. For example, the burden of proof should not lie with the potential trafficking victim and an early identification is important for the protection of the trafficking victim.¹⁶⁶ CMM argue that their identification process is not a legal assessment in case 5A.¹⁶⁷ What instance should carry the burden of the proof? The courts arguments in the judgment of appeal 5B along with the comment from CMM that their assessment is not a legal one in case 5A, burdens the victim to bring enough proof of their claims, at the right time and to the right instance. CMM, IMM, the court and the Police are all Governmental institutions that share the responsibility according to international law to identify and protect trafficking victims. It seems that international human rights law has failed to be fully implemented in Danish national law to Koskenniemi's theory of international law implemented in national law.¹⁶⁸

¹⁶³ Østre, 19/8 2021

¹⁶⁴ Østre, 19/8 2021

¹⁶⁵ Hillerød, 23/04 2018, Østre, 3/8 2018

¹⁶⁶ Piotrowicz, Sorrentino, 2017, p. 180

¹⁶⁷ Københavns, 24/6 2021

¹⁶⁸ Koskenniemi, 1999, p. 124

6.1.3 Expert interviews: Identification of trafficking victims

The identification of trafficking victims in Denmark takes place through different actors, as further explained in chapter 2.2. The practical outworking of this identification process is discussed by the expert interviewees in this section.

Ingrid Thalia von Lüttichau, Social worker at Center mod Menneskehandel (CMM), explains their identification process with potential trafficking victims as, “an interview that we have with them for maybe 1-2 hours, and this is it.”¹⁶⁹ Michelle Mildwater, Director, Founder and Trauma therapist at HopeNow, comments on the identification process, “a person who does not know them who comes in and has a series of structured questions... our clients have told us they experience, as another interrogation”.¹⁷⁰ Mildwater argue, “to successfully create trust, time and patience is required, often with many meetings... why it is so important that NGO staff who also may have met the victim during outreach work, can also be invited to interview clients”¹⁷¹

In the current identification process of trafficking victims in Denmark, NGOs cannot make their own identifications, Lüttichau comment that NGOs, “refer them to us and then we identify them as a victim of human trafficking.”¹⁷² There are different ways potential trafficking victims get in contact with CMM for identification, Lüttichau comments, “in most of our cases is when the Police contacts us and say “we suspect that this person might be a victim of human trafficking.””¹⁷³ Another way is through asylum seekers via IMM, “they can themselves decide to give them the status as a victim of human trafficking but sometimes they also want us to have an extra conversation with them”.¹⁷⁴ IMM can make their own identifications but at times it seems that they refer potential trafficking victims to CMM. Lüttichau comment on the identification made by the court and the Police compared to CMM that they are, “two separate

¹⁶⁹ Thalia von Lüttichau, Ingrid, Social worker, Center mod Menneskehandel (CMM), 23rd of March 2023, Copenhagen

¹⁷⁰ Mildwater, Michelle, Director, Founder and Trauma therapist, HopeNow, 7th of March 2023, Frederiksberg

¹⁷¹ Mildwater, 2023

¹⁷² Lüttichau, 2023

¹⁷³ Lüttichau, 2023

¹⁷⁴ Lüttichau, 2023

tracks”¹⁷⁵ where the court and the Police “have the criminal case and provide evidence”¹⁷⁶ and that it, “doesn’t have anything to do with the way we do our assessments.”¹⁷⁷ It seems like the identification process of trafficking victims in Denmark mainly takes place through partnership and referrals between institutions and organizations rather than through potential trafficking victims themselves reaching out.

Mildwater comments on the fact that “the trauma they have suffered means that it takes time and a professional training in trauma to gradually without re traumatizing the client to elicit consistency in a victims testimony.”¹⁷⁸ Mildwater visits prisons and hundreds of the clients she meets share stories of,” rape, psychological torture and really horrific physical abuse”.¹⁷⁹ Mildwater comments, “ in order to try to ensure they are not criminalized by the state. Therefore, we endeavor to make sure their narrative is as consistent as possible.”¹⁸⁰ Julliette Lloren, Project leader at HopeNow argue,” that is why it requires several interviews, because as you build the trust, they relax and they remember more and more of their own narrative”¹⁸¹

Karin Kjærgaard, Founder and Director at EXIST comments the issue of unidentified trafficking victims,

“I do not think they know themselves if they are trafficked or not...some people paid some money for them to go to Denmark...now in deep debt to the guys who brought them here...the Danish state says that they should be identified... if they want the support that Denmark can give, but I don't understand this requirement because they will not know themselves if they are just prostitutes or if they are victims of trafficking.”¹⁸²

¹⁷⁵ Lüttichau, 2023

¹⁷⁶ Lüttichau, 2023

¹⁷⁷ Lüttichau, 2023

¹⁷⁸ Mildwater, 2023

¹⁷⁹ Mildwater, 2023

¹⁸⁰ Mildwater, 2023

¹⁸¹ Lloren, Julliette, Project leader, HopeNow, 7th of March 2023, Frederiksberg

¹⁸² Kjærgaard, Karin, Founder and Director, EXIST, 1st of March 2023, Copenhagen

6.1.4 Conclusion: Identification of trafficking victims

Within these cases and appeals CMM, IMM and the court at times make different judgements about whether the defendant(s) are to be identified as trafficking victim(s) or not. Mentioned in the expert interview with Lüttichau, who comment on CMMs identification process compared to the court, “the criminal case and provide evidence...doesn’t have anything to do with the way we do our assessments.”¹⁸³ The burden of evidence should not be the trafficking victims responsibility, according to Piotrowicz and Sorrentino.¹⁸⁴ But the evidence needed seem to be a “no-mans-land”, where one could question who it is that prove the identification of the trafficking victim in some of the cases.¹⁸⁵ Examples of this is that CMM argue that they perform a “social worker assessment”¹⁸⁶ and not a “legal assessment”¹⁸⁷ in identifying trafficking victims. The court argue in appeal 5B that “the information that the defendant has been a victim of human trafficking derives solely from his own explanation of this”.¹⁸⁸

Denmark has a complex system in their identification of potential trafficking victims. Gallagher argue that there is protection in identification.¹⁸⁹ But this is complex in Denmark due to the court’s own assessment in the identification of trafficking victims, regardless of previous identification made by CMM and/or IMM. Potential trafficking victims need to have a consistent story. And even though IMM can identify a victim, they sometimes reach out to CMM, “for an extra conversation with them”.¹⁹⁰ The instances who identify trafficking victims in Denmark make different conclusions, and at times refer to each other when they could have made their own decision. According to Prieur, there is a chance that some trafficking victims do not see themselves as victims, leading to underreported identification of trafficking victims in Denmark.¹⁹¹ An example of this is found in the interview with Kjærgaard commenting potential trafficking victims, ”will not know themself if they are just prostitutes or if they are

¹⁸³ Lüttichau, 2023

¹⁸⁴ Piotrowicz, Sorrentino, 2017, p. 180

¹⁸⁵ Piotrowicz, Sorrentino, 2017, p. 180

¹⁸⁶ Østre, 19/8 2021

¹⁸⁷ Københavns, 24/6 2021

¹⁸⁸ Østre, 19/8 2021

¹⁸⁹ Gallagher, 2010, p. 277

¹⁹⁰ Lüttichau, 2023

¹⁹¹ Prieur, 2019, pp. 160, 161

victims of trafficking.”¹⁹² There is a lack in the identification system considering a trafficking victims trauma, as commented by Mildwater, “ the trauma they have suffered means that it takes time and a professional training in trauma to gradually without re traumatizing the client to elicit consistency in a victims testimony.”¹⁹³ According to Koskenniemi’s argumentation of international law applied in national law, the Palermo Protocol and its identification of trafficking victims has not been adopted in national law in a consistent way by CMM, IMM and the court.¹⁹⁴

6.2 A human rights-based approach versus a law-enforcement approach to non-punishment

6.2.1 Introduction: A human rights-based approach versus a law-enforcement approach to non-punishment

This section contains an analysis of a human rights-based approach versus a law-enforcement approach to non-punishment within the court cases, appeals and expert interviews. The arguments of the court in their judgement will be analyzed, along with comments from CMM in the court room in relation to the defendants’ criminal acts and criminal trends in trafficking victims in general. The two opposing approaches, according to Mildwater, Prieur and Rømer, will be analyzed in this section, the human rights-based approach and the law-enforcement approach.¹⁹⁵ Krieg argue that the human rights-based approach focuses on the protection of the individual harm and protection rather than on the collective and state interest.¹⁹⁶ Non-punishment is analyzed and understood based on the ratification made by Denmark to “provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so”.¹⁹⁷ According to Piotrowicz and Sorrentino’s human rights-based approach to non-punishment, an identification of

¹⁹² Kjærgaard, 2023

¹⁹³ Mildwater, 2023

¹⁹⁴ Koskenniemi, 1999, p. 124

¹⁹⁵ Mildwater, Prieur, Rømer, 2021, p. 3, Kreig 2009, p. 776

¹⁹⁶ Krieg, 2009, p. 785

¹⁹⁷ The Council of Europe Convention on Action against Trafficking in Human Beings 2005, Art. 26

trafficking victims should result in two things; the investigation of the criminal acts committed against them, and non-punishment of potential criminal acts committed as a result of trafficking.¹⁹⁸ The law-enforcement approach according to Kreig focuses on state interests and Dauvergnès theory of “securitization of migration”.¹⁹⁹ Mildwater, Prieur and Rømer means that this approach can lead to detention and deportation.²⁰⁰ The court cases, appeals and expert interviews will be understood through the argumentation of the scholars mentioned above in this section.

6.2.2 Analysis: A human rights-based approach versus a law-enforcement approach to non-punishment in court cases and appeals

The court makes the judgement that the defendants have committed criminal acts in all the six cases and three appeals, resulting in the defendants being sentenced to prison. Based on the court’s judgement of punishment for criminal acts, I make the conclusion that the defendants in these cases and appeals can be identified as criminals. In case 2 and appeal 3B, CMM comments on the criminal acts specifically relating their observations in relation to the defendant. In appeal 5B and case 6, CMM comments on their observations of trafficking victims and criminality trends in Denmark in general. In cases 1A, 3A, 4, 5A and appeal 1B CMM does not make any statement regarding the criminal acts committed by the defendant.

In case 4, the court argue in their judgement that the defendant should have realized that the residence permit given to them was false as it according to their own testimony was handed to them by the traffickers. The defendant claims that “the card he showed the police was one he had been given by the people in Italy. He didn't know how to travel, and he never had any papers so he didn't know it was fake.”²⁰¹ The defendant’s testimony is further explained, “because he was drugged on the journey from Italy, he doesn't remember anything. He knew first that he was in Denmark when he started walking around a bit. They had threatened him and told him not to contact anyone. He was afraid. That is why he did not contact e.g. the

¹⁹⁸ Piotrowicz, Sorrentino, 2017, p. 180

¹⁹⁹ Krieg, 2009, p. 785

²⁰⁰ Mildwater, Prieur, Rømer, 2021, p. 3

²⁰¹ Glostrup, 10/2 2020

authorities.”²⁰² The defendant “had to work, and when he had finished paying, he could go.”²⁰³ The court argue regarding the defendants judgement, “given his own explanation that he obtained the residence permit from people smugglers in Italy and that he was not in contact with anyone authorities in connection with the issue, the court also finds that must have realized this.”²⁰⁴ The court adds, “having been subjected to human trafficking cannot lead to a different outcome.”²⁰⁵ The court convicted the defendant for the use of false documents to 40 days in prison.

A human rights-based approach, as understood through Kreig’s argumentation and applied to the context of non-punishment of trafficking victims would consider that the crime took place because of threat. Leading to the conclusion that the real criminal in case 4 instead is the trafficker and the trafficking victim not only freed of deportation but of conviction of criminal acts at all.²⁰⁶ Instead, a law-enforcement approach is implemented where the the identification of a trafficking victim solely relates to border issues such as deportation or lack of deportation.

In case 1A, the court makes a judgement regarding the use of false documents where the defendant is sentenced to prison for 40 days along with a deportation and an entry ban to Denmark for six years.²⁰⁷ Two out of three voters argue, ”the defendant's circumstances explained how she acquired the passport...the defendant has produced it for necessary intentions for conviction.”²⁰⁸ One voter disagreed with the two others, “1 voter finds it predominantly questionable to establish that the defendant has shown the necessary intent.”²⁰⁹ In the appeal 1B, the defendant’s lawyer got a message through the Red Cross the day before the main hearing, “the defendant had stated to a street worker that she did not dare to appear in the high court.”²¹⁰ The court change the previous judgement in case 1A, “we have emphasized

²⁰² Glostrup, 10/2 2020

²⁰³ Glostrup, 10/2 2020

²⁰⁴ Glostrup, 10/2 2020

²⁰⁵ Glostrup, 10/2 2020

²⁰⁶ Krieg, 2009, p. 785, and The Council of Europe Convention on Action against Trafficking in Human Beings 2005, Art. 26

²⁰⁷ Københavns ,13/10 2009

²⁰⁸ Københavns, 13/10 2009

²⁰⁹ Københavns, 13/10 2009

²¹⁰ Østre, 26/11 2010

that you felt compelled to accept...to work as a prostitute for you to send money to your cancer-stricken mother in Nigeria...The defendant is a minor...has been exposed to human trafficking...this speaks against deportation”.²¹¹ The deportation was therefore acquitted as the defendant was identified as a trafficking victim and a minor by the Court.

In case 2, the Court convicted the defendant to one year of prison for cannabis production, but freed them of deportation. The court argued that "there is such a connection between the criminal offences committed by the defendant and the fact that the defendant must be considered to have been subjected to human abuse”.²¹² The court meant that “because of a debt the defendant had to work in drug production”²¹³ The court considered, “on the one hand, the quantity of hashish and the fact that the defendant participated in cannabis production of a professional nature, and on the other hand, that the defendant only had a subordinate role in cannabis production, just as the court emphasized that the defendant is a victim of human trafficking”²¹⁴

In case 2, CMM and a social worker made specific comments regarding the defendant, stating that there were several indicators discovered already when the defendant was convicted to prison, deportation and an entry ban in a judgement from 2014. The assessment made by CMM and the social worker was that the previous deportation in 2014 took place “without special consideration being given to indicators of human trafficking in his story”²¹⁵ and that, “there are several indicators that B has again been exposed to human trafficking, by the same trafficker who trafficked him back in 2013.”²¹⁶ The judgement made by the court in case 2 was that the defendant was convicted to prison for the criminal acts committed as a result of being trafficked. The identification of the defendant as a trafficking victim freed them of deportation.

Therefore, the court in case 2 interprets non-punishment as the law-enforcement approach understood through Kreig. The court focus mainly on migration and border security on behalf

²¹¹ Østre, 26/11 2010

²¹² Østre, 26/11 2010

²¹³ Svendborg, 3/4 2017

²¹⁴ Svendborg, 3/4 2017

²¹⁵ Svendborg, 3/4 2017

²¹⁶ Svendborg, 3/4 2017

of the state and exercise this in their judgement of the defendant being freed of deportation.²¹⁷ In contrast a human rights-based approach of non-punishment understood through Krieg, Piotrowicz and Sorrentino, could have led to a complete non-punishment of the defendant, freeing them also from prison, as the criminal acts were committed as a result of being trafficked according to the court.²¹⁸ Understanding case 2 through these two approaches to non-punishment exemplifies the conflict between the two argued by Mildwater, Prieur and Rømer.²¹⁹

A similar judgement as case 2 mentioned above, was made by the court in case 6, where the two defendants were convicted to nine respectively six months in prison for drug usage and theft.²²⁰ The court argued in their judgement that the defendants had committed a serious crime as a cause of being trafficked and that they therefore cannot be deported according to Denmark's international obligations. "Since the crime was committed under the influence of the fact that the defendants were exposed to human trafficking, but that it is serious crime that the defendants have committed, the Court finds that deportation will certainly be in violation of Denmark's international obligations²²¹ " CMM makes a general comment in case 6 about trends in trafficking victims, "back in 2018 they found that they were getting a lot of cases of the Moroccans who were victims of human trafficking. It was mostly Moroccan boys...criminal gangs who helped the young boys to come to Europe...they usually had to steal or rob for the gang".²²²

In case 3A, the defendant is sentenced to 40 days of prison for the crime of trick theft. The court argue that this type of criminal act cannot be paired with an identification as a trafficking victim and the defendant was therefore sentenced to deportation. The court argue that, "given the nature of the crime and the lack of connection to Denmark, and since...it will not conflict against Denmark's international obligations, T1 is deported from Denmark with an entry ban of 6 years"²²³ A similar judgement was made in the appeal 3B. The court comment their judgement of deportation and entry ban for 6 years, "we find that the crime for which the

²¹⁷ Krieg, 2009, p. 785

²¹⁸ Svendborg 3/4 2017 and Piotrowicz, Sorrentino, p. 180, Krieg, 2009, p. 785

²¹⁹ Mildwater, Prieur, Rømer 2021, p. 3

²²⁰ Københavns, 11/6, 2021

²²¹ Københavns, 11/6, 2021

²²² Københavns, 11/6, 2021

²²³ Hillerød, 23/04 2018, Østre, 3/8 2018

defendant in this case has been convicted...seem to have happened by chance and does not indicate an underlying organization.”²²⁴ Understood through Krieg’s discussion of the human rights-based and law-enforcement approach it could be understood that the court in this case has had a law-enforcement based approach.²²⁵ Case 3A led to detention and deportation, as Mildwater, Prieur and Rømer argued might be a possible outcome of this approach.²²⁶

Piotrowicz and Sorrentino argue that if a state implements a human rights-based approach to non-punishment, the identification of trafficking victims should lead to non-punishment of criminal acts committed as a result of being trafficked.²²⁷ But in case 3A and appeal 3B the court makes a different assessment to CMM, that the defendant is not a trafficking victim. According to the argumentation made by Piotrowicz and Sorrentino an agreement of identification could be considered as a first step of non-punishment, in case 3A and appeal 3B, the court did not agree which led to punishment instead of non-punishment.²²⁸

6.2.3 Expert interviews: a human rights-based approach versus a law-enforcement approach to non-punishment

This section contains the expert interviewees experience of the human rights-based approach versus the law-enforcement approach to non-punishment.

The identification of trafficking victims and its application in the charges against victims is commented by Lüttichau,” they also need to be convincing in court then to explain about that they have been abused or forced to commit these crimes”²²⁹ and adds, ” we can’t prove any of the information they give us.”²³⁰ A group CMM encounter is mentioned by Lüttichau, ”a lot of North African young boys, where we think that they are forced to commit crimes by the gangs.”²³¹ Lüttichau mention a case with two Moroccan boys where the judge argued that

²²⁴ Østre, 3/8 2018

²²⁵ Krieg, 2009, p. 785

²²⁶ Mildwater, Prieur, Rømer, 2021, p. 3

²²⁷ Piotrowicz, Sorrentino, 2017, p. 180

²²⁸ Piotrowicz, Sorrentino, 2017, p. 180

²²⁹ Lüttichau, 2023

²³⁰ Lüttichau, 2023

²³¹ Lüttichau, 2023

they had a consistent story, “so, then they get less punishment.”²³² Lea Balskilde, Senior Advisor at the Danish Refugee Council, mention the Moroccan young men involved in criminal networks,” we see them as victims, but they are also criminals, they are both...there is a victim identification... they need to be treated like that.”²³³ And adds,” NGOs and CMM should advocate for people’s rights not to be put into detention if you are assessed as a victim of trafficking.”²³⁴

Mildwater suggests that many possible victims of trafficking are never even recognized as trafficked, partially because law enforcement have such a narrow definition of the indicators “in these cases if law enforcement does not contact the CMM or an NGO the person risks being placed in prison or a deportation camp. Then if they do not seek asylum or are unable to do so, HopeNow risk finding them in prison many months after they have already been tried and convicted.”²³⁵

The criminalizing of migrants is widespread and has many forms according to Mildwater, “sex workers some of whom are trafficked women... receive large fines on the spot for illegal work, 3000-3500 DKK.They can also be charged under the law’s of vagrancy. If they don't produce the required amount of money to pay the on the spot fine , they risk being placed in prison and deported.”²³⁶ Regarding the courts Mildwater argue, “the general complaint about the judicial system is that they don't fully comprehend the complexities of human trafficking and they often don't have the necessary training to recognize indicators of trafficking, or the modus operandi of trafficker’s. ”²³⁷ And yet, courts in Denmark make their own decision regarding a trafficking victims identification that lay the basis of their convictions.

Philip Hyldgaard, Chief Operations Officer at A21 Global, argue that Denmark, “do not have a victim-centered approach”²³⁸ and argue that, “the victim is a victim and not just a

²³² Lüttichau, 2023

²³³ Balskilde, Lea, Senior Advisor, Danish Refugee Council, 7th of March 2023, Copenhagen

²³⁴ Balskilde, 2023

²³⁵ Mildwater, 2023

²³⁶ Mildwater, 2023

²³⁷ Mildwater, 2023

²³⁸ Hyldgaard, Philip Chief Operations Officer, A21 Global, 2023, zoom

witness.”²³⁹ Balskilde comments, “in Denmark, if you do not cooperate about your return, you can risk being put into detention”²⁴⁰ and, “if you do not cooperate about your return you might be forcefully deported.”²⁴¹ Balskilde, “I think that it is horrible that people are put into detention if they are vulnerable...But that is just the way it is in Denmark right now.”²⁴²

Laura Linde, PhD Fellow at the University of Copenhagen, mention the criticism Denmark receive from GRETA and other experts, “the offer is roughly put to be sent home with some money... then we cross our fingers that they will not end up in a new situation of exploitation, it is relevant to consider, whether that is enough/sufficient.”²⁴³ Linde also comments the non-punishment consideration in Denmark, meaning “you cannot deport a victim of human trafficking”²⁴⁴ and, “dealings, fraud of documents, illegal stays, working without a working permit ...the overall approach is that this person should not be punished for those because they occurred when the person was in a situation of exploitation and thereby did not have a real choice but was in fact forced.”²⁴⁵ Regarding a victim-centered approach, Hyldgaard comments, “until we flip the scale on human trafficking being a low risk and high reward we will not see an end to human trafficking”²⁴⁶ and adds,

” ...we treat someone who has just been gang raped, raped multiple times, cheated of their finances, trapped in a country that they don’t know anything about, don’t speak the language, have been tricked and defrauded, and we treat them like criminals. That's what has to change.”²⁴⁷

²³⁹ Hyldgaard, 2023

²⁴⁰ Balskilde, 2023

²⁴¹ Balskilde, 2023

²⁴² Balskilde, 2023

²⁴³ Linde, Laura, PhD Fellow at the University of Copenhagen, 15th of March 2023, Zoom

²⁴⁴ Linde, 2023

²⁴⁵ Linde, 2023

²⁴⁶ Hyldgaard, 2023

²⁴⁷ Hyldgaard, 2023

6.2.4 Conclusion: a human rights-based approach versus a law-enforcement approach to non-punishment

Identified trafficking victims are criminalized in Denmark, as seen in the cases and appeals in this study. Within these cases and appeals an analysis has been made on the basis of Krieg's twofolded approach, the human rights-based approach versus the law-enforcement approach in relation to the non-punishment ratifications against trafficking that Denmark has made. Most of the cases can be understood through Krieg's perspective of having a law-enforcement approach where Denmark and its borders are protected.²⁴⁸ This leads to a "securitization of migration", according to Dauvergne's argument.²⁴⁹ Mildwater, Prieur and Rømer states that the law-enforcement approach could lead to detention and deportation as some of the cases and appeals within this study shows.²⁵⁰ The cases and appeals do not seem to apply a non-punishment as a result of a defendant(s) identification as a trafficking victim, according to the argument by Piotrowicz and Sorrentino.²⁵¹

Gallagher argue that a lack of identification of a trafficking victim is a reason for criminalization.²⁵² Piotrowicz and Sorrentino argue that trafficking victims who are forced to criminal acts face a greater risk of not being identified as trafficking victims, which can be understood as that an identification would lead to a lack of criminalization.²⁵³ In the expert interview, Linde make the following comment to the non-punishment of a trafficking victim, "overall approach is that this person should not be punished".²⁵⁴ But the arguments of Gallagher, Piotrowicz and Sorrentino, along with Linde's comment is contradicted by Lüttichaus experience, who in the interview mention a case of two Moroccan boys who, as identified trafficking victims, "get less punishment."²⁵⁵ Identified trafficking victims are criminalized in Denmark, as the non-punishment is not implemented to include criminal acts a victim committed whilst trafficked. There are however those who are not identified that are

²⁴⁸ Krieg, 2009, p. 785

²⁴⁹ Krieg, 2009, p. 785

²⁵⁰ Mildwater, Prieur, Rømer, 2021, p. 3

²⁵¹ Piotrowicz Sorrentino, 2017, p. 180

²⁵² Gallagher. 2011, p. 296

²⁵³ Piotrowicz, Sorrentino, 2017, p. 177

²⁵⁴ Linde, 2023

²⁵⁵ Lüttichau, 2023

also criminalized, Mildwater comments, "finding them in prison many months after they have already been tried and convicted."²⁵⁶ Hyldgaard argue that Denmark as a result of criminalizing their victims and not protecting them, "do not have a victim-centered approach."²⁵⁷

The issue lies to some extent in identification and lack of such at times as mentioned by Mildwater. But also that identification does not lead to a non-punishment as understood by Piotrowicz and Sorrentino, protection from prosecution, detention or criminal records of trafficking victims.²⁵⁸ This leads to a double victimization of Danish trafficking victims as argued by Piotrowicz and Sorrentino, "first, by the process leading to their enslavement itself and, second, by the system's failure to identify them as victims...held legally and criminally liable for acts committed in the exploitation stage of the trafficking process."²⁵⁹

6.3 The implementation of international law in national law

6.3.1 Introduction: The implementation of international law in national law

This section contains an analysis of the implementation of international law in national law in the court cases, appeals and expert interviews. Two judgements by the court are especially considered in this analysis, a claim of deportation for the defendant or of being freed of deportation. To further analyze international law implications in Danish national law, Moore's understanding of the local and the global is contextualized by the data within the scope of this study, as the defendants travel physically from the local to the global.²⁶⁰ Nader's scholarship to "study up" is understood in combination with Moore as the "rich versus poor", in the local rich state of Denmark with its borders facing the global in individuals from poorer states who are exploited within Denmark as trafficking victims.²⁶¹ Koskenniemi's argument that international law cannot be understood as an instrument to fight evil, but that it must be understood through signed treaties outworked in practice through national law is also analyzed

²⁵⁶ Mildwater, 2023

²⁵⁷ Hyldgaard, 2023

²⁵⁸ Piotrowicz, Sorrentino, 2017, p. 176

²⁵⁹ Villacampa, Torres, 2019, p. 4

²⁶⁰ Moore, 2004, p. 81

²⁶¹ Nader, 1969, p. 306

within these cases. ²⁶² International human rights law and its impact leading to change in national criminal law in positive obligations to protect trafficking victims according to Milano is also analyzed through the cases, appeals and expert interviews. ²⁶³ The national law of the Aliens Act §26 stating that “a foreigner must be deported in accordance with §§22-24 and 25, unless this would certainly be in conflict with Denmark’s international obligations”²⁶⁴ will be analyzed in relation to Denmark’s international law ratifications against trafficking.

6.3.2 Analysis: The implementation of international law in national law in the court cases and appeals

In each of the six cases and three appeals within this study where the court make a judgement to the defendant’s identification as a trafficking victim, the Aliens Act §26²⁶⁵ is mentioned along their considerations. When the court identifies the defendant as a trafficking victim the direct outcome is either a claim or an acquittal of deportation. According to the argument of Koskenniemi it can therefore be said that the court’s identification of a trafficking victim within these cases and appeals directly relate to a decision of deportation as an application of their understanding of Denmark’s national law within their international law obligations.²⁶⁶

An example of this is found in appeal 1B, where the court makes the direct relation between the identification of the defendant as a trafficking victim and an acquittal of deportation. The court in appeal 1B argue, “there was such a connection between the offence condition, and...that T may be considered to have been exposed to human trafficking, that this spoke against deportation... acquitted of the deportation claim.”²⁶⁷ Another example is found in case 2, “there is such a connection between the criminal offences committed by the defendant and the fact that the defendant must be considered to have been subjected to human abuse (that this militate against deportation, cf. §26 a of the Aliens Act)”.²⁶⁸ As the identification of

²⁶² Koskenniemi, 1999, pp. 122

²⁶³ Milano, 2018, pp. 126, 127

²⁶⁴ Danske Love, 'Udlændingeloven, Kapitel 4: Udvisning, §22-27', <<https://danskelove.dk/udlaendingeloven>>, accessed 14/5/2023 2023.

²⁶⁵ Love, 'Udlændingeloven, §26, Stk. 2',

²⁶⁶ Koskenniemi, 1999, pp. 122

²⁶⁷ Østre, 26/11 2010

²⁶⁸ Svendborg, 3/4 2017

the defendant as a trafficking victim lead being freed of a deportation claim by the court, the same can be said about a lack of identification leading to a deportation claim. An example of this from case 3A, “given the nature of the crime and the lack of connection to Denmark...it will not conflict against Denmark's international obligations, T1 is deported from Denmark with an entry ban for 6 years...”²⁶⁹ The positive obligation in the protection of trafficking victims understood through Milano’s argumentation of implementing international human rights law in national law, only reaches as far as a protection of a deportation claim from Denmark in these cases.²⁷⁰ But one could question whether or not protection against deportation could be considered as a sufficient implementation Denmark’s positive obligations to protect trafficking victims.

In the appeal 3B, CMM made a comment on the criminal actions of the defendant that they had been in a vulnerable situation as a child residing in an orphanage in a foreign country and under threat by the gang Loyal to Family (LTF) in Denmark.²⁷¹ The court made a different judgement to CMM, arguing that the crime committed was unrelated to an identification of the defendant as a trafficking victim. “...the High Court agreed...T1 had been exposed to human trafficking...the crime committed was marked by coincidence...that he was under pressure was therefore disregarded, and it could not be assumed that the crime was a result of human trafficking. Both defendants...deported with an entry ban for 6 years.”²⁷² Through Nader’s scholarship of “studying up” it could be assessed that “up” is the rich state of Denmark and “down” is the poor trafficking victim in relation to the state in this case.²⁷³ Moore’s discussion on the local and the global intermingles applied in this case as the local seem to have changed for the defendant quite a bit over time. From the local home to an orphanage in a foreign country, to a global context of trafficking where the local looks different depending on the trafficker deciding where their profit is the greatest. In this case, the trafficking victim is deported out of Denmark into the global and again found in a “no-mans-land” and a new “local”.²⁷⁴

²⁶⁹ Hillerød, 23/4 2018

²⁷⁰ Milano, 2018, pp. 126, 127

²⁷¹ Østre, 3/8 2018

²⁷² Østre, 3/8, 2018

²⁷³ Nader, 1969, pp. 306

²⁷⁴ Moore, 2005, p. 81

The defendant in case 5A was sentenced to prison for nine months for the crime of theft and fraud. The defendant in case 5A had a previous judgement in 2017 resulting in an entry ban and the court argue that the defendant therefore intentionally or negligently entered Denmark illegally. However, two out of three in the Court in this case made a vote that the defendant committed these crimes as a result of being a trafficking victim. The court argued that this had an implication to if the defendant should be deported or not. "...foreigners who have been subjected to human trafficking should not, as a rule, be deported with a travel ban, but only sent home." ²⁷⁵ The court also considered the relationship between the criminal acts and the identification of the defendant as a trafficking victim, arguing that "The Court has also given considerable weight to the fact that the defendant committed the crime as a result of being a victim for human trafficking." ²⁷⁶ The considerations of international law implemented as national law by the court in case 5A results in that the defendant cannot be deported. The court argue, "in accordance with the opinion of the Board for International Recruitment and Integration, the deportation claim is then not accepted as a result, cf. Section 26 a of the Aliens Act." ²⁷⁷ The only implication of international law to national law in practice, found in "Denmark's international obligations"²⁷⁸ relates to deportation.

6.3.3 Expert interviews: The implementation of international law in national law

This section focuses on the expert interviews and their experience regarding the movement of trafficking victims and their experience in the implementation of international law to national law in Denmark.

Lüttichau mention that IMM are in contact with those who, "doesn't have a permission to stay in Denmark" ²⁷⁹ the identification of a trafficking victim result in, "they don't get an entry ban and an expulsion." ²⁸⁰ Mildwater comments on the system she argue places a heavy emphasis on trafficking victims being returned home as fast and efficiently as possible, "if they do not cooperate or, if they are in an open camp run away, they risk being imprisoned. We have

²⁷⁵ Københavns, 24/6 2021

²⁷⁶ Københavns, 24/6 2021 1

²⁷⁷ Københavns, 24/6 2021 1

²⁷⁸ Love, 'Udlændingeloven, Kapitel 4: Udvisning, §22-27',

²⁷⁹ Lüttichau, 2023

²⁸⁰ Lüttichau, 2023

documented for over a decade multiple of these cases and only in 2022 a trafficked woman was in prison for a whole year...residency permits are rarely if ever provided.“²⁸¹ Hyldgaard comments similarly, “...dealing with a foreigner then we have got to first deal with that issue, it becomes a migration issue...they are first of all a criminal because they have entered this country illegally”²⁸² Mildwater comments, “many of our clients try the route of seeking asylum, but this will never provide them with residency, because trafficking is regarded as a private matter and does not in itself grant grounds for protection as a refugee in Denmark”²⁸³ and “being a witness against your trafficker does in no way give you residency permanently, clients are terrified the traffickers will find them if they return home and or there will be retribution against their family.”²⁸⁴

Lüttichau comment the return offered to trafficking victims, “a lot of them, unless they are really terrified of their home country, they would like to return home.”²⁸⁵ However, Lüttichau mention, “some of them they just leave so we don't know what they chose to do.”²⁸⁶

Balskilde says that some wish to voluntarily return but, “most of the people we see, they would rather stay in Denmark... do whatever to not go back to your home country where the situation might be even worse.”²⁸⁷ Linde is of a similar opinion as Balskilde, “their biggest fear in general was to be deported, and sent back to their country of origin”²⁸⁸ but, “the majority were sent home.”²⁸⁹ When commenting on reasons for why trafficking victims wanted to stay in Denmark, Linde said, “I think because many of them wanted a brighter future, and Europe is seen as a place, where you can earn money “²⁹⁰ Balskilde argue, “the Danish Authority will talk about...voluntary return... it is not a voluntary return, if it is not

²⁸¹ Mildwater, 2023

²⁸² Hyldgaard, 2023

²⁸³ Mildwater, 2023

²⁸⁴ Mildwater, 2023

²⁸⁵ Lüttichau, 2023

²⁸⁶ Lüttichau, 2023

²⁸⁷ Balskilde, 2023

²⁸⁸ Linde, 2023

²⁸⁹ Linde, 2023

²⁹⁰ Linde, 2023

indeed voluntary, it is accepted.”²⁹¹ Hyldgaard suggest that trafficking victims should get ”a pathway to stay in Denmark.”²⁹²

6.3.4 Conclusion: The implementation of international law in national law

Within these cases, appeals and interviews an analysis has been made about the implementation of international law in national law. Moore’s discussion of the local and the global has been discussed where the two intermingle as trafficking victims travel across borders through local contexts depending on the will of the traffickers. Trafficking victims in these cases exist in a “no-mans-land” of the global, and when deported out of Denmark finding a new “local”.²⁹³ Denmark in these cases and appeals is considered as a part of “studying up” in this analysis, according to scholarship of Nader, and the trafficking victims are considered poor in relation to the state.²⁹⁴ The international law outworked in national law in these cases and appeals is, according to Koskenniemi’s argumentation of implementation, solely found in the court’s decision regarding deportation.²⁹⁵ Milano’s argument of positive obligations in protection of trafficking victims through international human rights law in national law could possibly, but perhaps insufficiently, relate to the protection against deportation in these cases.²⁹⁶ “Denmark’s international obligations”²⁹⁷ as referred to in the Aliens Act §26²⁹⁸ seem to solely relate to the court refraining to deport trafficking victims in the cases and appeals within this study.

According to Milano’s argumentation of positive obligations, Denmark does so poorly.²⁹⁹ An example of this can be found in the interview with Lüttichau who comment on the implications of IMMs identification of trafficking victims, not legally in Denmark, “they

²⁹¹ Balskilde, 2023

²⁹² Hyldgaard, 2023

²⁹³ Moore, 2005, p. 81

²⁹⁴ Nader, 1969, p. 306

²⁹⁵ Koskenniemi, 1999, pp. 122

²⁹⁶ Milano, 2018, pp. 126, 127

²⁹⁷ Love, 'Udlændingeloven, Kapitel 4: Udvisning, §22-27',

²⁹⁸ Love, 'Udlændingeloven, §26, Stk. 2',

²⁹⁹ Milano, 2018, pp. 126, 127

don't get an entry ban and an expulsion.”³⁰⁰ Another example of positive obligations poorly outworked in Denmark is commented by Balskilde regarding the voluntary return programs, ”it is not indeed voluntary, it is accepted.”³⁰¹ Hyldgaard suggest that trafficking victims should get ”a pathway to stay in Denmark.”³⁰² Prieur however argue that legal pathways are not of the greatest impact, but that social and medical assistance of trafficking victims is.³⁰³ Linde has experienced through her meetings with trafficking victims, ”their biggest fear in general was to be deported”³⁰⁴ but, ”the majority were sent home.”³⁰⁵ Prieur question why trafficking victims should collaborate with Danish Police when there is a limited chance to residency.³⁰⁶ An example of this mentioned by Mildwater in relation to Denmark's protection of trafficking victims, “being a witness does in no way give you residency.”³⁰⁷

7 Discussion

This study set out to research how a trafficking victim can be a criminal and what the convictions and criminalization of trafficking victims tell us of how international human rights law is implemented in Denmark. The findings indicate that within the current judicial system in Denmark traffickers can flourish and continue their profit on others with little risk of conviction of their criminal acts. But trafficking victims however face the reality of the threats brought by the trafficker and are convicted of criminal acts committed whilst trafficked, the Danish courts fulfilling the threats echoed by the trafficker.³⁰⁸ Convictions depend on the severity of the crime. It is a troubling horizon if trafficking victims continue to be punished in Denmark. They might be underrepresented as identified trafficking victims given their small chances of a victim-centered and human rights-based approach by the

³⁰⁰ Lüttichau, 2023

³⁰¹ Balskilde, 2023

³⁰² Hyldgaard, 2023

³⁰³ Prieur, 2019, p. 173

³⁰⁴ Linde, 2023

³⁰⁵ Linde, 2023

³⁰⁶ Prieur, 2019, p. 160-161

³⁰⁷ Mildwater, 2023

³⁰⁸ Rijken, 2009, p. 217

Danish Courts. Mildwater comments on the lack of identification, "finding them in prison many months after they have already been tried and convicted."³⁰⁹ Trafficking victims in Denmark face a double victimization, "by the system's failure to identify them as victims...held legally and criminally liable for acts committed in the exploitation stage of the trafficking process."³¹⁰

Truly there must be a better way to protect victims than to put them in prison and just send them "home." But as this study has shown in the court cases, appeals and expert interviews, trafficking victims are convicted of crime. According to the human-rights based approach and the law-enforcement approach theorized by Krieg, Denmark in the scope of this study acts out of a law-enforcement approach failing to protect the individual.³¹¹ Trafficking victims are identified to receive the social support of repatriation, or an acquittal of deportation but "just" sent to prison for criminal acts, an example of Denmark's security of state sovereignty through a "securitization of migration."³¹² As mentioned by Lüttichau the trafficking victims "get less punishment."³¹³

If the implementation of international human rights law leads to imprisonment of trafficking victims in national law one must ask what and who international human rights law set out to protect? The practical implications relate solely to border control and securitization of migration, relating to the protection of the state, the very antithesis of international human rights law. Victims are imprisoned and punished who have gone through gross human rights violations. Denmark fails to implement the signed treaties of international human rights law and outwork them within the scope of this study, as is suggested by Koskenniemi,³¹⁴

One limitation to this study is that it would have been insightful to include expert interviews within law enforcement, such as prosecution, courts and the Danish Police. This could potentially have contributed to a more diverse understanding of the research questions from their perspective and experience. Another limitation of this study is the lack of insight into

³⁰⁹ Mildwater, 2023

³¹⁰ Villacampa, Torres, 2019, p. 4

³¹¹ Krieg, 2009, p. 785

³¹² Dauvergne, 2008, p. 94-95, 113

³¹³ Lüttichau, 2023

³¹⁴ Koskenniemi, 1999, pp. 124

how many identified trafficking victims are convicted for criminal acts in Denmark due to a lack of court cases and statistics published. A third limitation of this study is that no criminalized trafficking victims have been interviewed, this could have given valuable insight into their own experience in relation to the actors mentioned in this study. For future research I suggest expert interviews with the law enforcement in Denmark, trafficking victims convicted for crimes whilst trafficked, along with statistics and a larger collection of cases of criminalized trafficking victims. Other areas of future research that I suggest based on this study is to research if there is a difference between the type of criminal act committed and the punishment of trafficking victims in Denmark, as criminal gangs could potentially thrive in Denmark if trafficking victims continue to be punished and they go unpunished. Another suggestion for future research is the implementation of international human rights law in Danish national law in human trafficking, based on the criticism mentioned by for example GRETA regarding the lack of implementation of non-punishment in Danish law.

8 Conclusion

This study has aimed to answer the following two research questions:

- a) How can a trafficking victim be a criminal?
- b) What does the conviction and criminalization of trafficking victims tell us of how international human rights law is implemented in Denmark?

These questions have firstly been explored through discourse analysis of six court cases and three appeals with identified trafficking victims convicted for criminal acts committed whilst trafficked in Denmark. The second data set consisted of six expert interviews, chosen for their expertise in working with trafficking victims in Denmark. The two approaches to human trafficking, the human rights-based approach and the law-enforcement approach has been analyzed in relation to non-punishment of trafficking victims along with an analysis of international human rights law implemented in Denmark's national law.

This study does in no way seek to exhaust the answers to these questions, but based on this study three things can be said. Firstly, the lack and inconsistency of identification of

trafficking victims by law enforcement leads to trafficking victims being convicted of criminal acts committed whilst trafficked. Secondly, an identified trafficking victim according to the Palermo Protocol, the basis of CMM and IMMs identification processes, merely lead to a “social worker assessment” and is not enough proof in court, hence not protecting the victim of the non-punishment ratified by Denmark. Thirdly, the conviction and criminalization of trafficking victims in Denmark tell us that their international human rights law implications to national law relates solely to a claim or an acquittal of deportation within the scope of the data in this study. The only application of international law in national law when it comes to identified trafficking victims committing criminal acts whilst trafficked in Denmark, is through the legal instances making their own conclusion that the defendant is a trafficking victim resulting in an acquittal of deportation. It is possible that the convictions the trafficking victims committed have been reduced, but this is not mentioned in the cases and appeals analyzed for this study. Every case and appeal led to prison for the trafficking victims. Based on this study, it can be said that a victim can be a criminal due to the lack of non-punishment through the implementation of international human rights law in Danish national law of identified trafficking victims in Denmark.

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10 Appendix

10.1 Appendix 1 list of court cases and appeals, content analysis table

	Id. as THB by CMM/IMM	Id. as THB by the Court
(1) A. Københavns Byrets dom 131009		
(1) B. Østre Landsrets dom 261110	x	x
(2) Retten i Svendborg 030417	x	x
(3) A. Hellerød Rets dom 230418	x	
(3) B. Østre Landsrets dom 030818	x	x
(4) Retten i Glostrup 100220	x	x
(5) A. Københavns Byrets Dom 240621	x	x
(5) B. Østre Landsrets Dom 190821	x	
(6) Københavns Byret 110621	x	x

THB = Trafficking in Human Beings/trafficking victim
Id. = Identified
CMM = The Danish Center Against Human Trafficking
IMM = Danish Immigration Services

10.2 Appendix 2 content analysis table

	Days in custody	Crime	Prison	Deportation
(1) A. Københavns Byrets dom 131009	21	False documents	40 days	x
(1) B. Østre Landsrets dom 261110		False documents	40 days	
(2) Retten i Svendborg 030417	59	Cannabis production	1 year	
(3) A. Hellerød Rets dom 230418	22	Theft	40 days	x
(3) B. Østre Landsrets dom 030818	124	Theft	40 days	x
(4) Retten i Glostrup 100220	11	False documents	40 days	
(5) A. Københavns Byrets Dom 240621	122	Theft, fraud	9 months	
(5) B. Østre Landsrets Dom 190821	178	Theft, fraud	1 year and 9 months	x
(6) Københavns Byret 110621	141	Drug usage, theft	AA 9 months, AB 6 months	

10.3 Appendix 3 list of expert interviews

Balskilde, Lea, Senior Advisor, Danish Refugee Council, 7th of March 2023, Copenhagen

Hyldgaard, Philip, Chief Operations Officer, A21 Global, 24th of February 2023, Zoom

Kjærgaard, Karin, Founder and Director, EXIST, 1st of March 2023, Copenhagen

Linde, Laura, PhD Fellow at the University of Copenhagen, 15th of March 2023, Zoom

Lloren, Julliette, Project leader, HopeNow, 7th of March 2023, Frederiksberg

Mildwater, Michelle, Director, Founder and Traumatherapist, HopeNow, 7th of March 2023, Frederiksberg

Thalia von Lüttichau, Ingrid, Social worker, Center mod Menneskehandel (CMM), 23rd of March 2023, Copenhagen