

## European perspective of the phenomenon of human trafficking and its transboundary nature

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### Abstract

*The topic "Trafficking of human beings" as subject to advanced studies has been chosen due to a growing interest linked with the phenomenon in question. The study introduces a legal-criminal overview of the criminal activity consisted of the recruitment, transport, transfer or reception of persons by means of force or forms of fraud for exploitation purposes. Human trafficking represents a threat for the security of member states. The trend to penetrate to all spheres of the society has obliged the European states to draft a new directive reflecting the growing concern about the phenomenon in question, by respecting human rights in accordance with the legal framework under the United Nations, International Labor Organization (ILO), Council of Europe etc. The new European priorities aim at victims' identification, their protection and prevention of the phenomenon and more intense criminal prosecution of traffickers. With the view of fully developing this topic, the outline consists of four chapters preceded by a historical background of human trafficking. Special importance in this study, specifically in the second chapter, is attached to the assistance and protection of the victims of human trafficking. It is crucial that these victims exercise their rights effectively. Therefore, the European directives foresee assistance and support before, after and during the criminal proceeding. The third chapter refers to the relevant legal mechanisms in this field assuring the victims of trafficking legal defense, the right to information and their social, psychological and physical recovery. One of the "key" legal instruments is the Palermo Convention, which gives for the first time a detailed definition of the term of trafficking and smuggling and makes the differences between them. All legal instruments converge to one point: the consent of the human trafficking victim is not important when it is used any of the means of force, threat, coercion or fraud. Finally, apart from the conclusions of the present study, distinguished practical cases are introduced, as well as statistical data and difficulties encountered during the criminal process.*

**Keywords:** victims of trafficking, sexual exploitation, Palermo Convention, EU Directive and the right to information.

### Introduction

Trafficking in human beings is a very dangerous form of criminality in the modern society, which during the last decades has marked a growing increase and exhibited a number of serious consequences for human beings and the society. This criminal trend is displayed in different countries. In particular, it has been and continues to be present in those states which are involved with radical political, social, economic, cultural and other related changes. It is worth mentioning the states of the former socialist block, countries of Eastern Europe and Balkan countries. This is also demonstrated by the numerous researches and studies conducted in these states and regions and in other countries of the world, which fairly witness that trafficking of human beings, in particular of females for the purpose of prostitution, usually becomes prevalent during the socio-economic turmoil and riots, situations caused after major political transformations, during political turmoil, civil wars, local wars, recessions and major economic crises etc.<sup>1</sup> These situations are masterfully used by the organized crime coordinators. Typically, the victims are young women of different age groups, educational, cultural and social level etc.

The history of modern slavery is a recent phenomenon emerged due to the economic globalization. Increase of organized crime in countries characterized by socio-political instability during these twenty years has also led to the unlimited demand for supply with modern slaves.

Trafficking in human beings, particularly of females and children, is a serious and regular violation of many human rights guaranteed by the international conventions and national laws. In the first place it violates the person's freedom and security

<sup>1</sup> Dr.Rexhep Gashi " Trafficking in human beings in Kosovo during the post-war period"

and his right to life, and infringes a number of other freedoms and human rights. This form of organized crime exposes women and young girls in particular, to a number of violations of human rights and freedoms. Most of them are deprived of the freedom of movement and are practically imprisoned, becoming slaves, working in bars and cafes during the day and offering sexual services to a large number of clients. Even if they escaped from the trafficker, in many cases the victims of trafficking were violated their rights by the state bodies as some of the denouncers may be arrested and imprisoned for prostitution or violation of the immigration laws, thus being deprived of fundamental human rights.

Meanwhile, those that are accepted as victims of trafficking are often denied the right of compensation and indemnification and few of them enjoy adequate protection. Considering that trafficking in human beings is a very dangerous criminal phenomenon in the modern society with a series of long-term consequences for the individual and society in general, it is provided for as a criminal offence in the criminal legislations of the modern society countries and as such, they are also foreseen in a number of well-known international acts and conventions.

The study and investigation of this criminal phenomenon is of scientific and social interest as trafficking of human beings is a serious form of criminality which causes serious and regular violations of many human rights and freedoms.

Definition and characteristics of trafficking in human beings.

Trafficking in human beings is a profitable crime based on the principles of demand and supply. This dangerous criminal phenomenon exhibits some specific phenomenological and victimological characteristics which are of interest for the purposes of study and analysis. Identification, study and analysis of these characteristics largely encourage the process of successful combat and prevention of this criminal phenomenon.<sup>1</sup> Some of the main factors leading to the supply of victims in the countries of origin are classified as pushing and pulling factors, where both factors are criminally used by the international criminal gangs.

Some of the pushing factors include poverty as a result of unemployment and in many cases the lack of education. As mentioned above, trafficking is a characteristic of the countries that are experiencing or have stepped out of the social transition. Life in disruptive families, domestic violence and gender discrimination accompany the long road of post-transition state recovery but are also the main factors influencing the growth of sexual exploitation.

Lack of alternatives in the social circle makes the victim vulnerable to criminal demands.

One of the main factors making an individual subject to exploitation is the hope for employment and financial remuneration, improved social position, manufacturing work demand for women and demand for a low paid work for men and women. The daily European life is perceived by these victims as "European magic", thus making the victims be unconditionally subject to exploitation.

Trafficking in human beings as a dangerous criminal phenomenon is provided for in a number of international conventions and other international acts. These international acts are basically approved by various international organizations and are linked with the definition of trafficking in human beings, its prevention and combat, treatment of the victims of trafficking, cooperation between states and many other relevant cases of that area.

According to article 3 of the UN Protocol on prevention, suppression and punishment of the trafficking of human beings, especially of women and children", trafficking means the recruitment, transport, transfer, hiding or reception of persons by means of threat, use of force and other means of coercion, fraud, forceful, deceitful acquisition or abuse of power or of vulnerable position or receipt or granting payments or benefits to obtain the consent of someone controlling another person for the purpose of exploitation.

Exploitation includes at least the exploitation for prostitution of others or other forms of sexual exploitation, labor or compulsory services, slavery or similar practices to slavery, removal of organs or robbery.<sup>2</sup>

The purpose of the UN Protocol is :

Prevention and fight against trafficking of human beings;

Protection and assistance to victims;

Respect of victims' rights;

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<sup>1</sup> [www.antislavery.org](http://www.antislavery.org)

<sup>2</sup> [www.unodc.org](http://www.unodc.org)

Prevention, investigation and prosecution;

Promotion of cooperation;

While the legal framework of the UN in the field of trafficking appears exhausted between UN Convention on transnational organized crime (signed in Palermo in 2000), additional Protocol on combating against trafficking human beings (in 2003), additional Protocol against the Smuggling of Human Beings (2003), Statute of the International Criminal Court (1998), Court Statute (International Criminal Court for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Ruanda (ICTR).

Pretty good efforts are made by European legislation for preventing and combating criminal phenomenon in trafficking persons. Such appears the Schengen agreement (1990), Article 2 of the Europol Convention (26.07.1995), the Treaty of Amsterdam (1997), Charter of Fundamental Rights of the EU (Nice 2000), the decision of Eurojust (28.02.2002), framework decision on the standing of victim (European Council 2001), 2002/629/GAI Framework Decision on combating against trafficking human beings (19 July 2002), framework decision on the European arrest warrant (13.06.2002), Brussels Declaration on Preventing and Combating Trafficking Human Beings (8 June 2003), framework decision on combating the sexual exploitation of children (22.12.2003) also the new Directive of 5 April 2011/36/EU replacing Framework Decision 2002/629/GAI1.

## 1.2 General characteristics of the Palermo Protocol.

The Protocol over the Prevention, Suppression and Punishment of Trafficking humans, in particular women and children, Supplementing the United Nations Convention against Transnational Organized Crime<sup>2</sup> is one of the international legal acts of great importance in the field of preventing and combating trafficking of humans, in particular women and children. This protocol supplements the United Nations Convention against Transnational Organized Crime and is interpreted together with the Convention. The aims of this protocol are: a) to prevent and combat international trafficking of persons, paying attention to women and children; b) protect and assist victims of trafficking, while respecting their human rights; c) to promote and facilitate cooperation among States Parties in order to realize these objectives<sup>3</sup>. According to this protocol a) "Trafficking of persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons through the threat or use of force or other forms of coercion, fraud, takeover, devising or abuse of power or of a position of vulnerability or of the giving or receiving payments or benefits to achieve the consent of a person who controls another person, for the purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of the others or other forms of sexual exploitation, labor or services, slavery or practices similar to slavery, servitude or the removal of organs; b) the consent of a victim of trafficking for deliberate exploitation mentioned in subparagraph (a) of this article shall be irrelevant if are used the tools provided in subparagraph (a); c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking of persons" even if in it will not be included the remedies provided in subparagraph (a) of this section. d) "Child" means any person under 18 years old<sup>4</sup>.

This protocol contains provisions that refer to the protection of victims of trafficking; Prevention, cooperation and other measures and final provisions. It includes provisions relating to assistance for the protection of victims to trafficking of persons, the statute of the victim of trafficking, repatriation of victims of trafficking, prevention to trafficking of persons, exchanges of information and training on signatory states, border measures, security and control of documents etc.

It should be noted that most states have ratified this protocol and have also harmonized their legislation based on the provisions of this Protocol.

In the summary is said that the Palermo convention is important because for the first time provides a detailed and full definition of trafficking and smuggling as well as a clear distinction between them. This protocol applies to all people, particularly against women and children here are provided tools to strengthen law enforcement and strengthening border control. Primary goal is the capture and prosecution of traffickers but at the same time the protection of the victim. Help

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<sup>1</sup> [www.unodc.org](http://www.unodc.org)

<sup>2</sup> Protocol to prevent, suppress and punish trafficking in persons, especially women and children", adopted in Palermo Italy by the UN in 2000 and entered into force on 25 December 2003.

<sup>3</sup> Article 2 of the Protocol to Prevent, Suppress and Punish Trafficking in persons, in particular women and children, supplementing the United Nations Convention against Transnational Organized Crime.

<sup>4</sup> See Article 3 of the Protocol to Prevent, Suppress and Punish persons supplementing the United Nations Convention

from the victim is crucial for this purpose was law enforcement as it is the victim itself that provides the necessary evidence to successfully prosecute traffickers.

## **2. Protection to victims of trafficking and legal instruments for this purpose.**

Trafficking is considered as criminal evolution of slavery and as it was said above the victims are the key to the investigation and successful prosecution of traffickers. In Article 6 of the Convention against Organized Crime, a special attention is dedicated to "Assistance and protection of victims".

In this manner is urgently required to be protected the privacy and identity in cases where this is possible. The victim must be informed in real time and without hesitation about the condition of proceeding. Life insurance is being guaranteed to the victims since state authorities are informed about the fact of exploitation.

A fundamental right of trafficking victims relates to the right to compensation. This right is known according to the international legislation through views of some international standards concerning the fight against trafficking, the rights of victims of crime, immigrants' rights, Workers' rights and the rights of victims of violence due to gender. The conclusion is that the right to compensation mainly consists of the right to seek for compensation from the trafficker / exploiter and, in cases of violent crimes the right to compensation from state funds. These standards have developed the principal that profits made by traffickers through their exploitative activities, must be used in favor of trafficked persons individually or collectively<sup>1</sup>.

Even though, in some cases there have been successful law suits against traffickers / exploiters, those have been limited to cases where the trafficker or exploiter has been prosecuted and convicted, or is located and against him is filed civil suit. The civil lawsuit may be raised within the criminal process in all analyzed countries, except the United Kingdom. The measure of damage compensation awarded through such lawsuits is assessed in different ways in different countries. The civil lawsuit can be even raised outside criminal proceeding, for example, where there is no criminal process. The U.S. is the only country where the demand for victim compensation (in the U.S. is known as 'restitution', a kind of 'restitution') is automatically part of the criminal process in trafficking cases<sup>2</sup>.

In particular focus from international legislations is set children and women's rights. The States Parties shall adopt appropriate measures for the prevention of trafficking phenomenon, and in particular for the protection from re-victimization. The focus on women and children is based on three factors:

These two groups are considered vulnerable groups;

Statistical data reinforce the need to focus on these groups;

Trafficking is often related to sexual exploitation, regardless of other known forms of trafficking and "Target" group are children and women.

It should be accepted that given the reported figures, trafficking of females and children is a major problem but the most striking focus on trafficking women against men, is related to assumptions against gender and in particular with the vulnerability of females. This makes that many immigrant women are seen as trafficked and men are seen as irregular immigrants<sup>3</sup>.

Human rights are a concern not only for the arrival of the trafficked person but, also for possible tortures that this person undergoes during transport. Cases of inhuman tortures and humiliating treatment are common during transport. The statistical data have reported that physical and verbal violence is exercised by traffickers and smugglers<sup>4</sup>.

Palermo Convention pays a special importance to human rights, specifically in its Article 6 is stipulated that: States should take in consideration the physical, psychological and social recovery of the traffic victims. In particular legal measures should be taken to: A) adequate housing; B) advice and information concerning their legal rights; C) medical, psychological and material help; D) employment, education and training opportunities.

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<sup>1</sup> See Article 3 of the Protocol to Prevent, Suppress and Punish persons supplementing the United Nations Convention.

<sup>2</sup>Zimmerman C, 2007 "Trafficking of human beings".

<sup>3</sup> Iom " Direct assistance to victims of trafficking", 2007.

<sup>4</sup> Terres des hommes "Child protection unit- A New Reality for child protection".

The High Commissioner of the United Nations for Human Rights has processed recommended principles and guidelines on Human Rights and Human Trafficking, which provide an important guiding framework for criminalizing trafficking of persons and the development of a legislative framework.

Palermo Convention is not the only "bible" that preaches the protection of women and children's rights. The legal framework in this area appears complete but not exhaustive. With importance in this field is presented:

The Convention on the elimination of all forms of discrimination against Women<sup>1</sup>;

Hague Convention on the civil aspects of International kidnapping;

Convention on Children's rights<sup>2</sup>;

Hague Convention on children's protection and the collaboration about abroad adoptions (1993);

UNHCR Guidelines on unaccompanied children, on unaccompanied children seeking asylum;

ILO Convention concerning the prohibition and immediate measures to eliminate severe forms of labor<sup>3</sup>;

Palermo Protocol to prevent, suppress and punishment of human trafficking, especially to women and children (2000)<sup>4</sup>;

### **2.1 The new European perspective.**

The new EU directive on trafficking human beings is a very substantial document, comparing to the previous document. This directive reflects "increasing concerns of member states in connection with the development of the phenomenon of trafficking human beings". It reflects an integrated approach, holistic of human rights in relation to the issue built upon pre-existing legal frameworks provided from UN, International Labor Organization (ILO), Council of Europe and the Charter of Fundamental Rights of the EU. Regarding the EU's strategy towards eradicating human trafficking, for 2012 – 2016 in June by the European Union it is summarized in five priorities approach

Identification, protection and assistance to victims of trafficking;

Accelerating the prevention in trafficking persons;

Efficient growth of criminal prosecution toward traffickers;

Increased coordination and cooperation between stakeholders and policy coherence;

Effective response to new concerns related to forms of human trafficking;

Under Directive 36/2011 of the EU, vulnerable position refers to the lack of an acceptable alternative except being subjected to abuse. In the concept of exploitation is included exploitation, for prostitution, forced labor or services including begging, slavery, servitude, and exploitation of criminal activity or the removal of organs. Also according to this directive, the consent of the victim of human trafficking is not important when any of the means of force, intimidation, coercion and fraud is being used.

A special protection in this directive is dedicated to the child and cases where the exploitation object is the child. This constitutes a punishable offense of human beings trafficking, despite not being included to any of the means set forth in the definition of persons trafficking.

### **3. Definition of smuggling, its elements and the distinction between persons' trafficking and smuggling of immigrants.**

Smuggling of immigrants, means allowing to obtain, directly or indirectly a financial benefit or another property benefit from illegal entry of a person in a State Party of which the person is not a citizen or permanent resident.

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<sup>1</sup> Zimmerman C & C Watts (2006 " Stolen smiles, health, physical and psychological consequences of women and adolescent, trafficked in Europe London UK: London School of Hygiene and Tropical Medicine.

<sup>2</sup> CRC 1989.

<sup>3</sup> ILO Convention, No. 182, 1999

<sup>4</sup> This protocol supplements the UN Convention against Transnational Organized Crime, 2000

5 Directive 2011/36 of the EU and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

This definition<sup>1</sup> includes three base elements: Action (through the boarder of another country), means (allowing illegal entry) and the purpose (material or financial benefit)

Smuggling of persons often is undertaken in dangerous or degrading conditions, involves immigrants who have consented to illegal passing. Trafficking victims, on the other side have not consented or even if they initially gave consent, this consent is meaningless from repressive actions, fraudulent or abusive of traffickers.

Smuggling of immigrants ends with the arrival of immigrants in the destination, while trafficking involves continuous exploitation of the victims, in such a way to generate profits for traffickers<sup>2</sup>.

Smuggling of immigrants is always with international character. The same cannot be done for the phenomenon of trafficking, not always this phenomenon has international character as trafficking can be performed regardless of whether the victims are from another country or are just being sent from one place to another within the same country.

Trafficking in Persons Protocol creates a category of victims are called victims of human trafficking. Immigrants who cross the border illegally are not victims but subjects to cross smuggling. But however this does not exclude the fact that immigrants may be victims of other crimes during illegal border crossing

Direct purpose of smuggling of immigrants is financial or material benefit. Direct purpose of trafficking in persons is exploitation. This use generates material or financial benefit for traffickers.

So the difference between smuggling of persons and their trafficking stands in consent, exploitation, international character, victims and sources of profitability.

#### **4. Difficulties encountered in the criminal process.**

Trial Chamber of the Tribunal admitted about the trafficking of women in time of war that slavery can happen even when victims still enjoy de jure condendo a certain freedom of movement but, the situation in which they find themselves leaves them with no real choice between the alternative of escaping and that to perform an independent life<sup>3</sup>. Even though, this decision is taken at a time of war, this Court has jurisdiction over crimes against humanity only if they have occurred during wartime in the territory of former Yugoslavia. View expressed by the Court on slavery should serve as a precedent for similar cases occurring in peacetime.

If it is thought that slavery is characteristic feature of human trafficking, it should also be taught to the idea that at least its worst forms, trafficking must qualify as a crime against humanity.

Before starting the interview trafficking victims are informed orally and in written form over their rights and responsibilities that he/she has, in case that he decides to offer a secret information<sup>4</sup> over crime and responsible authors without being shown as witness. Also it must be informed of rights and duties in cases when his testimony is necessary. Trafficking victims are informed of their rights, compensation opportunities, and personal safety for themselves and their families, maintaining the secrecy of his location and dealing with the trafficker when needed. and confrontation with the trafficker when needed and agree to all these rights and obligations for a more efficient exercise of criminal prosecution.

Initially all trafficking victims unconditionally agree to give their contribution, in most cases, at a later time, victims lack the relationship of economic or emotional dependency by their traffickers. They begin to show their location and all data of dilation. Thus in this way traffickers re-victimize these victims, by tempting and showing "remorse" and all criminal proceedings collapses like a castle of sand. So the testimony of the victim plays a decisive role in the criminal process<sup>5</sup>.

#### **4.1 CONCLUSIONS**

According to statistical data<sup>6</sup>, it is clear that this dangerous form of criminality was present significantly in countries that have undergone major political and social changes in the political post- transition 1990.

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<sup>1</sup> Protocol on smuggling of migrants.

<sup>2</sup> Minimum standards for the care of victims of trafficking in Kosovo, Pristina, 2010.

<sup>3</sup> jurisprudence of the Court for war crimes in Yugoslavia ICTY ( Kuranac issue and others).

<sup>4</sup> Standard guidance on operational procedures for the implementation of transnational referral mechanism on victims of trafficking, Tirana, October 2009

<sup>5</sup> Surtes, Rebecca (2007) "Listening to the victims, the experiences of identification, return and assistance in South-Eastern Europe,

<sup>6</sup>Taken from the database of Police and prosecution office in South Eastern Europe.

The trend is growing, starting from quantitative data. Constantly are being perfected the used techniques. Already in rare cases is found that trafficking of persons to be realized through force, in most cases this form of criminality is enabled through fraud for a better life, a significant income for the victim it self and for its family members. Regardless of the victim's consent is not *conditio sine qua non*, for initiation of criminal proceedings, the entire criminal process depends on the victim's testimony. In most cases, this evidence is subject to substantial changes which "undermine" the process of investigation and trial. Criminal codes of developing countries, in accordance with international legal acts, this offense provided through highly detailed description of the objective side and its subjective side. The legal framework exists and is exhaustive but it lacks the full will of law enforcement authorities.

Despite efforts to coordinate the efforts of the prosecution-police-court, necessarily arises to create a task force that would improve the fight against trafficking. In particular to the mental health of the victim should be paid primary attention between centers administered by the state. Despite the identification of the victims of trafficking only a small number of authors are criminally prosecuted. Victims should be informed immediately of their rights,

In particular the right to compensation. The rights of victims also become perceptible from the latter when assisted by legal advisers. Continuous staff training and law enforcement bodies and education in schools, in the risky countries to the phenomenon of trafficking would prevent these criminal phenomena and to make aware the victims that is never too late to deal with the trafficker. Legal amendments should be carried out regarding the re-integration of the victim; these improvements should include psychological counseling, the continuous medical assistance, work programs that generate revenue, financial support for housing (when the victim does not return home) as well as education and professional training.

The Criminal process can not focus on the good will of the victims. In particular I refer to the perfection of means of testing research. Experience has shown that the use of advanced communication techniques and social networks make almost impossible the interception of telematics-electronic communications. Because the techniques used by traffickers are using modernized social networks, by using social networks, I recommend the collection of evidence between advanced techniques. For this purpose should be revised criminal codes and criminal procedure codes for countries with high-risk.

Despite disproportion reference contained in the report by police and conviction of traffickers, victims of trafficking categorically should not be punished for the crime of prostitution. One victim is such, despite the evidence that has to prove the guilt of the author responsible for its trafficking.

## REFERENCES

- Council of Europe Convention on action against trafficking in human beings  
<http://www.stabilitypact.org/trafficking/>, 10.06.2007
- ICMPD, AGIS training material for judges and prosecutors in member countries of the EU, accession and candidate countries, 2006.
- IOM direct assistance to victims of trafficking, 2007.
- UNOHCHR (2002), Principles and Guidelines on Human Rights and human trafficking. New York: United Nations E/2002/68/Add.1.
- ICMPD Hearing the victims, the experience of identification and aid returns in South East Europe, 2007.
- Law no.9062, date 08.05.2003 "Family code".
- Law no.9959 date 17.07.2008 "For the foreigners".
- Zimmerman, C. 2007 Trafficking of Women and health: Conceptualizing and findings about women trafficked in Europe. Information taken from "Gender violence & Health Centre's caring for trafficked woman: Handbook for health professionals. <http://www.studiocelentano.it>
- <http://www.revistagiuridica.it>
- [www.unodc.org](http://www.unodc.org)
- "Trafficking with Persons in Kosovo after the war", Dr.Rexhep Gashi.
- The U.S. Department of State for South Eastern Europe, 2014.