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# Human rights-based approach to sex- trafficking of women and girls: the analysis of prostitution policies in Italy, Sweden, and the Netherlands

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## ABSTRACT

Sex-trafficking is an extremely complex crime that entails issues under criminal law, migration law, and human rights law. Further, it has a gendered nature and it is grounded in structural inequalities, hence the main international organs and institutions have advocated for a human rights-based approach to trafficking. The latter pursues the protection of the victims, addresses the root causes of trafficking, gives priority to human rights and victim-centered policies, and pursues the conviction of the traffickers and the redress of the victims. Given that most of the trafficked women and girls are introduced in the prostitution sector, the author examines the main prostitution policies in view of assessing whether they comply with the requirements of a human rights-based approach. Therefore, this study aims to understand which relationship exists between prostitution policies and sex-trafficking, and to assess whether the main policy regimes follow a human rights-based and victim-centered approach.

The research focuses on the cases of Italy, Sweden and the Netherlands which respectively constitute examples of the abolitionist, neo-abolitionist, and regulationist model. Italy is the only country ensuring residence permits to the victims regardless of their collaboration to the proceedings; Sweden scores the lowest traffic inflows and establishes several assistance programmes; the Netherlands directs its resources on the control of the legal sector. However, the analysed countries fail to fully implement a human rights-based and victim-centered approach given that they often pursue a salvationist approach that considers trafficked women and girls as helpless victims. Further, they usually follow a criminal justice approach, focusing on the conviction of the traffickers while ignoring the needs of the victims. Therefore, it is recommended to implement the mentioned approach and include the survivors in the drafting process of the response policies.

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## LIST OF ABBREVIATIONS

CEDAW = Committee on the Elimination of Discrimination against Women

CoE = Council of Europe

CRC = Convention on the Rights of the Child

ECHR = European Convention of Human Rights

ECOSOC = United Nations Economic and Social Council

ECtHR = European Court of Human Rights

EEM = Expertise Centre on Human Trafficking and People Smuggling

EU = European Union

Europol = European Police Office

GA = General Assembly

GEXcel = Centre of Gender Excellence

GRETA = Group of Experts on Action against Trafficking in Human Beings

ICAT = Inter-Agency Coordination Group against Trafficking in Persons

ICTY = International Criminal Tribunal for the former Yugoslavia

ILO = International Labour Organisation

Interpol = International Criminal Police Organisation

NGO = non-governmental organisation

OAS = Organization of American States

OHCHR = Office of the United Nations High Commissioner for Human Rights

OSCE = Organization for Security and Co-operation in Europe

THB = trafficking in human beings

UN = United Nations

UNHCR = United Nations High Commissioner for Refugees

UNICEF = United Nations Children's Fund

UNODC = United Nations Office on Drugs and Crime

## PREMISES

This thesis analyses the phenomenon of trafficking in human beings for the purpose of sexual exploitation, with a specific focus on women and girls. Further, it examines the main prostitution policy regimes in Europe. Therefore, other forms of sex-trafficking (bride-trafficking, pornography, etc.) fall outside of the scope of the research. Moreover, the thesis only examines the response of the destination countries, without exploring the obligations of the states of origin. As a matter of fact, the author does not intend to cover the entire phenomenon of sex-trafficking. She rather aims to incorporate a human rights-based approach to trafficking in order to highlight the importance of victim-centered responses to the violations of fundamental rights occurring during the trafficking cycle.

Furthermore, this work does not intend to express any opinion on the morality of sex work. Indeed, it exclusively focuses on the exploited victims of trafficking who are employed in the prostitution sector. Therefore, the thesis should not be read in order to attach any stigma or judgement to the already harmed victims of sex-trafficking.

## INTRODUCTION

Human trafficking is the world's second most profitable criminal enterprise, after drug trafficking. Several threats to human rights can be depicted during the trafficking cycle which goes from the recruitment of the victims to their exploitation. Trafficking can entail forced labour, debt bondage or sexual exploitation. With regard to the latter, it must be noticed that sex-trafficking constitutes a great part of the phenomenon, affecting remarkably women and children, especially girls. Therefore, it is fundamental to highlight the gendered nature of sex trafficking in order to have a deeper understanding of the crime.

It is common belief that sex-trafficking is deeply linked to the demand for sexual services. Therefore, several European countries developed prostitution policies to tackle the issues relating trafficking. Four main regimes can be depicted, namely abolitionism, prohibitionism, regulationism, and neo-abolitionism. Some of these regimes criminalise the intermediaries, some others the clients, and others regulate the market without recurring to criminalisation. All of them aim to reduce the trafficking inflows and ensure the respect of fundamental human rights.

Therefore, two questions arise from the states response. Indeed, it is necessary to assess which impact prostitution policies have on sex-trafficking by analysing not only the traffic inflows, but also the general conditions of the victims. Further, it is questioned which policy regime most efficiently complies with the criteria set by a human rights-based approach to trafficking. According to a human rights-based approach, states should recognise the primacy of human rights, address the root causes of trafficking, protect, and assist victims. The latter should not be criminalised and their redress should be ensured. The human rights-based approach requires states to consider all the elements of trafficking in human beings by embracing different legal frameworks. Thus, this multidisciplinary approach represents an umbrella of international criminal law, migration law and human rights law to be used for the analysis of the human rights violations deriving from sex-trafficking.

This approach highlights some of the main gaps of the policies adopted by the European countries by moving beyond the statistics of trafficked persons and focusing on the working conditions of those still exploited. Further, it analyses the increase of violence and the fear of the victims to be deported to their country of origin.

A human rights-based approach to sex-trafficking paves the way to another important question which concerns the compliance of European countries with a victim-centered approach.

In order to assess the impact of the prostitution policies on sex-trafficking and depict which policy regime better complies with a human rights-based approach to trafficking, this work is divided into three chapters. The first chapter explores the definition of sex-trafficking in view of underlying its abusive nature. Further, it considers the main legal sources and their application by the different international Courts, with a focus on the European Court of Human Rights. Then, it analyses the main human rights violations occurring during the cycle from a gender perspective, given the focus of the thesis on women and girls. In addition, a child-rights approach is followed during the analysis of the main provisions of asylum law, since great difference can be depicted between the residence permits granted to girls and those granted to adult women. Finally, the chapter depicts the concept of human rights-based approach and highlights its importance for a victim-centered response to sex-trafficking.

The second chapter describes the main prostitution policies and their impact on sex-trafficking, by including both empirical evidence and theoretical analysis. Further, it evaluates the response of Italy, Sweden, and the Netherlands by examining the national legal and institutional frameworks. Then, the analysis follows in view of assessing whether the policies adopted by the sample countries comply with the requirements of a human rights-based approach.

Finally, the third chapter explores the nature of the human rights-based approach as a victim-centered approach, in accordance with the guidelines set by the Office of the High Commissioner for human rights. Then, it analyses the main weaknesses of the policies developed by Italy, Sweden and Netherlands with regard to the attention given to the victims. Finally, the chapter includes the point of view of the survivors which once again restated the importance of addressing the root causes of human rights and develop policies which provide effective support to the victim, in compliance with the Palermo Protocol.



## RESEARCH METHODOLOGY

Concerning the research method, the thesis analyses the phenomenon of sex-trafficking from a gender-based perspective. Indeed, it focuses on female victims exploring the different violations of human rights suffered by women and girls. The latter also require a child-rights based approach since children are often entailed to different levels of protection compared to women. Therefore, the first chapter describes the legal framework of sex-trafficking through the analysis of the related international and European law. The study of the sources includes binding instruments from the United Nations and the Council of Europe. The most relevant are the Palermo Protocol, the Convention on Action against Trafficking in Human Beings, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW Convention), and the Convention on the Rights of the Child (CRC). These sources offer a deep understanding of sex-trafficking by offering a clear definition of the crime and depicting the legal obligations of the states with regard to the prevention and fight against trafficking. The study also focuses on other legal sources such as EU directives, general principles of law, and soft law instruments. The latter are necessary to assess the criteria to be followed for a human rights-based approach to trafficking. This approach requires a comprehensive analysis of the different legal frameworks which concern trafficking in human beings, hence it also includes the study of the relevant provisions under international criminal law and migration law.

The second chapter describes the relationship between prostitution and sex-trafficking, hence it analyses the main prostitution policy regimes, and their application in Italy, Sweden and the Netherlands. Therefore, this chapter follows a case study method grounded in a qualitative approach, rather than a quantitative approach. The assessment of the effectiveness of the national policy regimes is based not only on the statistical data, but also on the general working conditions of the victims of sex-trafficking. It follows that the analysis is based on the national legislation, especially criminal law and migration law. Further, in order to describe the conditions of the victims in the prostitution sector, the chapter analyses the critical literature, the European Commission reports, and the reports produced by NGOs such as ECPAT International.

Finally, the third chapter explores the guidelines of the OHCHR in view of assessing whether the analysed countries comply with the requirement of a victim-centered approach to trafficking. The

importance of such approach has been also confirmed by associations of survivors whose proposals of victim-driven response policies are analysed in this chapter.

## SEX-TRAFFICKING OF WOMEN AND GIRLS IN EUROPE

The following chapter offers the theoretical framework of this work, with the aim to define the phenomenon of sex-trafficking by exploring its legal definition. Importance is given to the means of force which highlight the abusive nature of this crime. However, the use of force is not a requirement when trafficking involves children.

The chapter analyses the causes of sex-trafficking and its main features, looking closely at its gendered nature. Then, it describes the attributes of the human rights-based approach to trafficking in order to stress its importance for the implementation of the relevant prostitution policies.

Further, it examines the states obligations under international and European law and focuses on the role of the international courts, with specific attention to the European Court of Human Rights. Finally, it describes the tasks of relevant actors such as the law enforcement, the prosecutors, the NGOs, and the intercultural mediators.

### 1.1 DEFINITION OF SEX-TRAFFICKING

The first exhaustive definition of trafficking in human beings has been offered in 2000 by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter referred to as Palermo Protocol). Indeed, the UN General Assembly describes human trafficking as entailing the *recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability for the purpose of exploitation*. Although the exploitation can take different forms, it is relevant to this research that the Palermo Protocol explicitly refers to sexual exploitation and exploitation of prostitution.<sup>1</sup>

The Protocol makes clear that the use of force is an essential feature of trafficking. Victims are sometimes kidnapped, transferred to another country with false documentation or without it, then they are subjected to sexual exploitation. In such cases, the traffickers achieve their goals through force,

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<sup>1</sup> UNGA, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) Res. 55/25, art 3(a)

coercion, or fraud. However, some victims can voluntarily engage into prostitution and later be exposed to exploiting environments where no relevance is given to their consent anymore. Thus, what is relevant is the predominant position of the trafficker who has total control over the exploitation of the victim, hence he can decide whether the victim must work or not and the victim's location for work.<sup>2</sup> Therefore, the analysis of the working conditions is more than needed because even those who initially agreed on prostitution could face exploitation at a later stage.

When the exploitation relates to children, the Palermo Protocol does not require the victims to prove the existence of the abovementioned means of force. As long as the victims are minors, their recruitment, transportation, transfer, harbouring or receipt for the purpose of exploitation is considered trafficking in human beings.<sup>3</sup>

The Protocol also mentions the condition of vulnerability of the victim. Indeed, the victim is often introduced to sex-trafficking by the so-called lover boy. The latter is usually the boyfriend of the young victim, who promises her love and security while he actually leads her to sexual exploitation. In some cases, the victims can be manipulated by other women, called madams, who are themselves victims of sex-trafficking and aim to achieve a better status with their traffickers.<sup>4</sup>

Furthermore, Article 3 of the Palermo Protocol must be read in order to include both the transfer of people within national borders and cross-borders trafficking. The latter is often resulting from a combination of push and pull factors. For example, unequal distribution of wealth and lack of opportunities in the labour market force victims to pursue better living conditions in countries with a more stable economic situation and high demand of cheap labour force. Further, in certain cases the geopolitical circumstances push the victims to flee their countries, in search of a place where the respect of their fundamental rights would be granted.<sup>5</sup>

With regards to children, the UN International Children's Emergency Fund highlights that sex-trafficking has its roots in poverty, limited work opportunities and lack of government actions.<sup>6</sup> Indeed, as noted by the UN Office on Drugs and Crime, child victims of sex trafficking usually come from large families residing in extremely poor countries.<sup>7</sup>

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<sup>2</sup> Mary Burke, *Human Trafficking: Interdisciplinary Perspectives* (2nd edn, 2018) pp 139-140

<sup>3</sup> UNGA, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) Res. 55/25, art 3(c)

<sup>4</sup> Mary Burke, *Human Trafficking: Interdisciplinary Perspectives* (2nd edn, 2018) p 144

<sup>5</sup> Conny RJJ Rijken and Dagmar Koster, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (Social Science Research Network 2008) pp 5-6

<sup>6</sup> United Nations Children's Fund (UNICEF), *The State of the World's Children: Special Edition* (2009)

<sup>7</sup> United Nations Office on Drugs and Crime (UNODC), *Trafficking in Persons: Global Patterns* (2006)

## 1.2 INTERSECTIONALITY AND GENDERED DIMENSION OF SEX-TRAFFICKING

In the period 2017-2018, the Directorate General for Migration and Home Affairs recorded 14 145 victims of trafficking in the 27 EU member states. Further, 60 percent of the registered victims were trafficked for sexual exploitation. Remarkably, 72 percent of all victims were female (women and girls). Similar trend can be noticed among young victims. Indeed, children represent the 22 percent of the total victims, 64 percent of them were trafficked for sexual purposes. Notably, 78 percent of trafficked children were girls.<sup>8</sup> Thus, this report shows the disproportionate risk for women and girls to incur in exploiting activities, to be trafficked and treated as commodities. This study supports the precedent findings of the Beijing Declaration and Platform for Action and the 2010 Declaration of the UN Economic and Social Council which affirmed that sex-trafficking is a form of violence against women, hence it highlighted the gendered nature of such crime. Further, these abuses are usually tolerated by the society which supports the cultural scheme of male dominance, power and control over women.<sup>9</sup>

Women are more vulnerable to the human rights violations deriving from sex-trafficking due to different factors. First, they usually have less opportunities than men with regard to the access to education and labour market. Further, they are often considered as a burden for the families, which should ensure them a living and pay for their dowry.<sup>10</sup> Indeed, in a society dominated by patriarchy, women should refrain from working and earn their own living, they should rather focus on family care duties. This means that they often hold a position of dependency from men. Moreover, women and girls are deemed as commodities which are easy to sell because they are considered attractive and, as stated by McCabe, the more attractive the product, the higher the sale price.<sup>11</sup> Therefore, young women and girls are particularly vulnerable, given the high demand for them in the prostitution market.

On the other hand, the transnational feminists refrain from framing the women as weaker than the men, hence seekers of their protection. Although it is true that women are more trafficked than men, this does not result from an alleged inferiority of women, it rather depends on their global national, racial, and socio-economic class status. Therefore, the transnational feminist theory introduces the concept of intersectionality which not only explores the gendered dimension of trafficking, but also examines the influence of race, sexuality, class and nationality.<sup>12</sup> Especially when it comes to the support and

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<sup>8</sup> Directorate General for Migration and Home Affairs, *Data Collection on Trafficking in Human Beings in the EU* (2020) p 6

<sup>9</sup> UN Secretariat, Beijing Declaration and Platform for Action 1995; ECOSOC Declaration on the Occasion of the 15th anniversary of the 4th World Conference on Women 2010

<sup>10</sup> Mary Burke, *Human Trafficking: Interdisciplinary Perspectives* (2nd edn, 2018) pp 243-244

<sup>11</sup> Kimberly McCabe, *The Trafficking of Persons: National and International Responses* (1st edn, 2008)

<sup>12</sup> Mary Burke, *Human Trafficking: Interdisciplinary Perspectives* (2nd edn, 2018) pp 104-107

assistance of victims, the main programmes have been proven less effective since they do not address the mentioned differences, but rather conceive all the victims in the same way.

### 1.3 HUMAN RIGHTS-BASED APPROACH TO SEX-TRAFFICKING

At an international level, trafficking in human beings has been described not only as a crime, but also as a grave violation of human rights.<sup>13</sup> Similarly, at the European level, both the Council of Europe and the EU Institutions has supported such statement.<sup>14</sup> Indeed, the victims are frequently subjected to physical and sexual violence exerted by the clients or the traffickers. Further, they sometimes lack access to food, adequate shelter and medical attention. The absence of the latter is particularly dangerous given that the women and girls who are sexually exploited are at high risk of contracting sexually transmitted diseases.<sup>15</sup>

Other fundamental rights are at stake during the trafficking cycle. For example, the right to freedom of movement is infringed since the traffickers often retain the documents of the victims, hence they hinder them from exiting the prostitution market. Further, victims experience violations of their right to security, right to life, right to be free from gendered violence, right to highest attainable standard of physical and mental health, and right to freedom from torture and degrading treatment. Indeed, as seen above, the level of violence in the trafficking cycle is dramatic, sometimes lethal. Moreover, women involved in the prostitution sector usually cannot enjoy just and favourable work conditions, neither they can access to social security. Similarly, trafficked children do not enjoy the special protection which should be granted to them.<sup>16</sup> Further, victims' right to a fair trial and effective remedy are often neglected during criminal proceedings. Then, the victims often risk being repatriated due to the refusal of their asylum request. Although trafficking entails several violations of fundamental rights, the infringement of these rights is itself one of the causes of trafficking. Indeed, trafficking originates where the respect of human rights is not ensured. As noticed, poverty, economic inequality, violence, armed conflicts are some of the main root causes of trafficking in human beings.<sup>17</sup>

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<sup>13</sup> UNGA, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (2012) A/67/L.1 para 24

<sup>14</sup> Council of Europe, Convention on Action against Trafficking in Human Beings (2005) CETS 197, Preamble; European Parliament and Council of the European Union, Directive on preventing and combating trafficking in human beings and protecting its victims (2011) 2011/36/EU para 1

<sup>15</sup> Mary Burke, *Human Trafficking: Interdisciplinary Perspectives* (2nd edn, 2018) pp 139-141

<sup>16</sup> Office of the High Commissioner for Human Rights (OHCHR), *Human Rights and Human Trafficking* (2014) available at [https://www.ohchr.org/documents/publications/fs36\\_en.pdf](https://www.ohchr.org/documents/publications/fs36_en.pdf) (last visited 13 March 2021) p 4

<sup>17</sup> 'Human Trafficking: A Human Rights Violation' (*Laboratory to Combat Human Trafficking*, 10 December 2018) <https://combathumantrafficking.org/2018/12/human-trafficking-human-rights-violation/> (last visited 13 March 2021)

Although there is a clear connection between sex-trafficking and the violations of human rights, most states adopt response policies which address trafficking as a migration issue, a crime or a matter of public order. However, institutions such as the UN General Assembly and the Human Rights Council, treaty bodies and special procedures advocate for a human rights-based approach to trafficking which entails a victim-centered perspective on the human rights violations occurring in the trafficking cycle and on the states obligations under international law.<sup>18</sup>

The High Commissioner for Human Rights has depicted four pillars of such approach. First, the Commissioner establishes the primacy of human rights, hence the respect of human rights and the principle of dignity must be considered in the process of designing the anti-trafficking measures. The implementation of the latter must not adversely affect the rights of the victims. Further, a human rights-based approach pursues the prevention of trafficking by addressing its root causes, namely discrimination and unequal distribution of power. Among those causes, the High Commissioner explicitly mentions the demand for sexual services. Then, according to such approach, states should refrain from criminalizing the victims, they should rather ensure their protection by providing them with adequate assistance. In case of serious risk for the safety of the victims, states should refrain from repatriating them. Further, they should cooperate with NGOs in order to provide the victims with safe and adequate shelter. Finally, the Commissioner affirms that a human rights-based approach must aim to punish the perpetrators and redress the victims. With regard to children, the OHCHR affirms that a human rights-based approach is built on the basis of the Convention on the Rights of the Child, hence it requires states to develop anti-trafficking policies that consider the best interest of the child.<sup>19</sup>

Therefore, under a human rights-based approach every aspect of the response policies to trafficking is linked to the rights and obligations enshrined in the corpus of international human rights law. Therefore, this approach not only focuses on the right holders, buy it also identifies the duty-bearers and the obligations under international law.<sup>20</sup>

#### 1.4 SOURCES OF OBLIGATIONS

It is necessary to analyse the main legal sources in order to assess which obligations are pending on the states. Indeed, the latter are the first duty-bearers with regard to sex-trafficking and they should develop their response policies in accordance with both binding instruments and soft law guidelines. It

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<sup>18</sup> Office of the High Commissioner for Human Rights (OHCHR), *Human Rights and Human Trafficking* (2014) available at [https://www.ohchr.org/documents/publications/fs36\\_en.pdf](https://www.ohchr.org/documents/publications/fs36_en.pdf) (last visited 13 March 2021) pp 7-8

<sup>19</sup> OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2003) E/2002/68/Add.1

<sup>20</sup> Office of the High Commissioner for Human Rights (OHCHR), *Human Rights and Human Trafficking* (2014) available at [https://www.ohchr.org/documents/publications/fs36\\_en.pdf](https://www.ohchr.org/documents/publications/fs36_en.pdf) (last visited 13 March 2021) p 8

must be noticed that also the countries of origin hold certain obligations regarding the prevention of sex-trafficking. However, for the sake of this study, the analysis only focuses on the obligations held by the destination countries.

#### 1.4.1 Treaties

Already in 1949, the Fourth Geneva Convention prohibited the illegal transportation of women and children. Although the Convention was conceived to protect civilians in time of war, it created the basis for the following anti-trafficking provisions.<sup>21</sup> Indeed, in the following years, the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the 1969 Inter-American Convention of Human Rights, and the 1973 UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, all implicitly prohibited trafficking in women and children.<sup>22</sup> Moreover, the 1993 Hague Adoption Convention, the 2000 Optional Protocol II to the CRC, and the 2000 Palermo Protocol all explicitly prohibited trafficking in women and children for sexual purposes, such as forced prostitution and sexual slavery.<sup>23</sup>

Notably, the Palermo Protocol not only forbids sex-trafficking, but it also depicts states obligations related to the subject. Accordingly, states shall adopt the necessary measures to classify the conduct of traffickers as criminal offence. Further, states shall ensure the access to remedies, hence they shall offer the victims the possibility to obtain a compensation for the damage suffered. In doing so, they shall keep the victims' identity secret through confidential proceedings, in order to ensure their protection. Then, they shall provide legal assistance and counselling when necessary. Further, states shall also offer adequate shelter, medical and psychological assistance, and training opportunities in order to ensure the access of the victims to the legal labour market. Finally, the Palermo Protocol specifically refers to the child victims, requiring states to ensure the respect of their special needs by providing them with appropriate housing, education and care.<sup>24</sup>

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<sup>21</sup> International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (1949) 75 UNTS 287

<sup>22</sup> UNGA, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968) Res. 2391 (XXIII) art 1(b); Organization of American States (OAS), American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) art 4; UNGA, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents (1973) Res. 3166 (XVIII)

<sup>23</sup> Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoptions (adopted 29 May 1993, entered into force 1 May 2005) Preamble and art 1(b); UNGA, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (2000) A/RES/54/263 art 2(a); UNGA, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) Res. 55/25, art 3(a)

<sup>24</sup> UNGA, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) Res. 55/25, arts 5-6



Another international instrument, namely the CEDAW Convention, includes provisions on sex-trafficking. In fact, Article 6 CEDAW obliges states Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.<sup>25</sup> Also the CRC contains substantive reference to trafficking. Indeed, Article 35 CRC affirms that states Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.<sup>26</sup> This article must be read in line with Article 3(1) CRC which affirms the primacy of the “best interest of the child” in the interpretation of the Convention.<sup>27</sup>

At the European regional level, the Council of Europe outlines the main obligations for the states. First, states shall provide the competent authorities with qualified persons in preventing and combating trafficking, so that they can identify the victims of trafficking and offer them adequate protection. The latter entails accommodation, psychological and medical support, legal counselling and assistance, translation and interpretation services, and access to education for children. Further, states shall incorporate the concept of “reflection period” in their internal law. Such period should last at least 30 days, allowing the victim to escape the influence of the trafficker and take pondered decision on the possible cooperation with the law enforcement. During this period, no expulsion is allowed, and states shall also ensure the protection described above. Then, states shall issue a renewable residence permit when it is necessary due to the personal situation of the victim or because of their cooperation in the criminal proceedings. Although the renewal of such permit depends on the provision of internal law, repatriation should preferably be voluntary. Finally, states shall ensure the respect the victim’s right to compensation.<sup>28</sup>

Regarding child victims, further protection is offered by the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, also known as the “Lanzarote Convention”. According to such instrument, the member states shall criminalise all kinds of sexual offences against children. It also focuses on child prostitution and conviction of procuring.<sup>29</sup>

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<sup>25</sup> UNGA, Convention on the Elimination of All Forms of Discrimination against Women (1979) Res. 34/180 art 6

<sup>26</sup> UNGA, Convention on the Rights of the Child (1989) Res. 44/25 art 35

<sup>27</sup> *ibid* art 3(1)

<sup>28</sup> Council of Europe, Convention on Action against Trafficking in Human Beings (2005) arts 10-16

<sup>29</sup> Council of Europe, Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (2007) CETS 201

#### 1.4.2 Directives

The directives constitute important legal sources with regard to sex-trafficking at the European level. Indeed, the directives are binding instruments which establish obligations of result, hence they set the objectives to be accomplished by the member states and, at the same time, they allow them to choose the means to be used for reaching those goals.

The Directive 2004/81 of the Council of the European Union offers clear explanation of the obligations of member states concerning trafficking in human beings. States shall offer a reflection period to the victims of trafficking. However, they can interrupt it if the victim voluntarily renews the contact with the traffickers. During such period, the victims are entitled to the same kind of protection depicted in the Convention against THB from the Council of Europe. Further, victims can obtain a residence permit of at least 6 months if they decide to cooperate with the competent authorities, their presence in the country is needed for investigation purposes or they have closed all the relations with the alleged traffickers. For the duration of the residence permit, victims should also be granted access to the labour market, through educational and training programmes. Finally, the Council stresses the importance of a different approach to child victims, especially to the unaccompanied ones. States should ensure their education, their legal representation and the reunification with their families, in accordance with their best interest.<sup>30</sup>

Moreover, the Directive on preventing and combating trafficking in human beings and protecting its victims requires states to develop initiatives to prevent and combat THB from a gender perspective and a child-rights approach. Moreover, it affirms that states shall criminalise the purchase of services offered by the victims of trafficking if the users are aware that who offers the service has been trafficked.<sup>31</sup>

#### 1.4.3 General principle of law

Another category of sources is relevant to sex-trafficking, namely the general principles of law. According to Article 38 of the ICJ Statute, this category includes all the principles recognised by the states. Given that these principles entail legal obligations, they are binding on the states. A general

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<sup>30</sup> Council of the European Union, Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (2004) 2004/81/EC arts 6-11

<sup>31</sup> European Parliament and Council of the European Union, Directive on preventing and combating trafficking in human beings and protecting its victims (2011) 2011/36/EU paras 25-26

principle of law relevant to trafficking is that one cannot be held responsible for a crime he or she was compelled to commit.<sup>32</sup> Therefore, this principle promotes the decriminalisation of the victims.

#### 1.4.4 Soft law

The Recommended Principles and Guidelines on Human Rights and Human Trafficking constitute a great contribute to the prevention and the fight against sex-trafficking. Regardless of their non-binding nature they offer guidance in the development of response policies by advocating for the primacy of human rights, the prevention of trafficking through the analysis of its root causes, the extension of protection and assistance to all victims of trafficking, the punishment of perpetrators and the redress of the victims.<sup>33</sup> Further, the UNICEF Guidelines on the Protection of Child Victims of Trafficking restate the importance of the respect of the best interest and the views of the child, especially for the decisions relating the reunification of the child's family and the return of the child to the country or region of origin.<sup>34</sup>

Although these Guidelines belong to the category of soft law, they should not be deemed useless. The term "soft law" includes those prescriptions which lack the element of normativity but produce legal effects. Indeed, soft law instruments promote standards of good behaviour among the international community, hence they build a solid basis for state practice.

### 1.5 ANTI-TRAFFICKING ACTORS

Several actors are involved in the fight against trafficking in human beings for sexual exploitation. Although with some difficulties, the Courts ensure the application of the legislation through an extensive interpretation. Further, the law enforcement and the prosecutors work closely in the view of ensuring the conviction of the traffickers. On the other hand, the NGOs grant protection and assistance to the victims. Finally, the cultural mediators help ensuring the success of the rescue missions by creating a closer bond with the victims.

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<sup>32</sup> Office of the High Commissioner for Human Rights (OHCHR), Human Rights and Human Trafficking (2014) available at [https://www.ohchr.org/documents/publications/fs36\\_en.pdf](https://www.ohchr.org/documents/publications/fs36_en.pdf) (last visited 13 March 2021) p 9

<sup>33</sup> OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking (2003) E/2002/68/Add.1

<sup>34</sup> United Nations Children's Fund (UNICEF), Guidelines on the Protection of Child Victims of Trafficking (2006) pp 10-11

### 1.5.1 Courts

The international and regional courts play an essential role in monitoring the application of the relevant law and ensuring the accountability of the actors involved in sex-trafficking. The International Criminal Tribunal for the former Yugoslavia (ICTY) has been among the first judicial institutions to analyse trafficking-related issues. Indeed, the ICTY regarded rape as crime against humanity and considered the displacement and detainment of the women as signals of its systematic nature. The ICTY also analysed the features of sexual enslavement.<sup>35</sup>

Accordingly, trafficking-related practices were incorporated in the Statute of the International Criminal Court, allowing tribunals for wider ground of application. Indeed, Article 7 of the Rome Statute includes enslavement, rape, sexual slavery and enforced prostitution in the list of the crimes against humanity.<sup>36</sup>

Furthermore, the European Court of Human Rights also ruled on issues related to trafficking in human beings. In *Siliadin v. France*, the Court analysed the case of a Togolese girl of 15 years old who had come to France with a woman who promised her a visa and a place at school, in exchange for her housework. However, the girl soon became an unpaid housemaid, and her passport was taken from her. The Court declared that the applicant was held in servitude in violation of Article 4 ECHR, since the French family took advantage of her condition of vulnerability due to the young age and her illegal status. Although the family had total control over the girl's life and hindered her capacity to self-determination, the Court established that the girl had not been enslaved because her employers did not claim a right to legal ownership over her, reducing her to the status of an object. In order to reach this interpretation, the Court resorted to a modernisation of the concept of servitude, in accordance with the nature of the ECHR as a changing instrument which adapts to "present-day conditions".<sup>37</sup> However, the Court affirmed that the criminal law in force at the time had not protected the victim sufficiently, hence it defined positive States obligations concerning the adoption and effective implementation of criminal-law provisions which punish the practices set in Article 4 ECHR. Besides, the scope of such state obligation is not completely clear since it is not easy to understand which would be the implications in terms of State liability in case of them failing to adequately address the practices set in Article 4 as criminal offences.<sup>38</sup>

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<sup>35</sup> *Prosecutor v Akayesu* [1996] ICTR-96-4-I; *Prosecutor v Kumarac et al.* [2000] ICTY-IT-96-23 and IT-96-23/1 33-35

<sup>36</sup> UNGA, Rome Statute of the International Criminal Court (1998, last amended 2010) art 7(1)(c)(g)

<sup>37</sup> *Siliadin v France* [2005] ECHR 73316/01

<sup>38</sup> Rijken CRJJ and Koster D, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (Social Science Research Network 2008) pp 22-23

The mentioned case offers weak protection to adult women, since it is very hard to prove that the traffickers hindered their self-determination.<sup>39</sup> However, further protection has been offered by the *Rantsev v. Cyprus and Russia* case. The applicant was a Russian national, father of a young woman who died few days after her arrival to Cyprus where she was working in a night club. The applicant believed that his daughter was frauded with fake promises in order to let her leave the country. Then, she was introduced to the prostitution market once arrived in Cyprus. Indeed, at that time, it was common practice of the traffickers to use the temporary permit accorded to the performers as a trap for young women. The Court found that trafficking in human beings fell within the scope of Article 4 ECHR. Indeed, this article must be interpreted in accordance with other relevant international instruments, such as the Palermo Protocol and the Convention on Action against Trafficking in Human Beings.<sup>40</sup> This interpretation of the Court clearly follows the principle of systemic integration outlined by the Vienna Convention according to which the ECHR must be interpreted “in harmony with other rules of international law of which it forms part”.<sup>41</sup> Therefore, the Court found that Cyprus did not comply with the obligation to prevent trafficking-related exploitation due to its violation of Article 10 of the Palermo Protocol which requires States to adequately train their police forces on the subject of THB.<sup>42</sup>

In conclusion, trafficking of women for sexual purposes has been considered a form of modern-day slavery by several scholars.<sup>43</sup> However, the case law depicts another reality: trafficking is mainly treated as servitude in order to be punishable. Further, the ECtHR extended the meaning of Article 4 ECHR in order to ensure its compliance with other anti-trafficking instruments of international law. However, it is still hard to hold States accountable for their actions because the legal sources do not define precise criteria of protection that must be ensured. They rather give States room for designing their own policies. Therefore, the analysis of the latter is necessary to assess which guarantees the victims are entitled to.

### 1.5.2 Law enforcement and prosecutors

The analysis of the strategies adopted to combat trafficking in human beings shows that the investigation authorities usually focus on detecting and dismantling traffic networks, rather than prosecuting the single perpetrators. Nonetheless, it is very difficult to pull apart these criminal enterprises

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<sup>39</sup> Annoni A, ‘La tratta di donne e bambine nella recente giurisprudenza della Corte europea dei diritti dell’uomo’ (Deportate, Esuli, Profughe 2011) p 94

<sup>40</sup> *Rantsev v Cyprus and Russia* [2010] ECHR 25965/04

<sup>41</sup> United Nations, Vienna Convention on the Law of Treaties (1969) UNTS 1155, art 31(3)(c)

<sup>42</sup> *Rantsev v Cyprus and Russia* [2010] ECHR 25965/04

<sup>43</sup> Jakobsson N and Kotsadam A, ‘The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation’ (European Journal of Law and Economics 2013) p 88

due to their complex nature of transnational organisations.<sup>44</sup> Therefore, in accordance with Article 10 of the Palermo Protocol, States should promote the cooperation among law enforcement, immigration authorities and other relevant stakeholders.<sup>45</sup>

In order to ensure such cooperation, states can avail themselves of the support of agencies such as Interpol and Europol. The International Criminal Police Organisation, also known as Interpol, represents the most important transnational cooperation framework involving police forces. Since 2000, it has established a working group on female sex-trafficking which, in the following years, has extended its mandate to all matters of trafficking in human beings. In this vein, Interpol facilitates the exchange of information and best practices among countries and supports training programmes designed for the law enforcement.<sup>46</sup> Similar trainings have been conceived in the European context: in the so-called “twinning programmes”, police officers from the founding members of the European Union shared their knowledge with their colleagues from the countries which joined the EU later, in the view of promoting a proactive approach to investigation<sup>47</sup>. The importance of such programmes has been also highlighted in the Palermo Protocol which affirms that the trainings should focus on the prevention of THB, the prosecution of traffickers and the protection of the victims, by following a child-rights and gender perspective.<sup>48</sup> Another important actor in the action against human trafficking is represented by the European Police Office, also known as Europol. By coordinating operations and gathering information, it provides support to the law enforcement of the EU member states in their intelligence work.<sup>49</sup>

At the national level, the prosecutors are fundamental in order to bring the cases before the courts. They carry out investigations and gather information on the alleged traffickers in order to prove evidence of their criminal conduct and trigger adequate sanctions. In both the adversarial and the inquisitorial systems, they work closely to the police forces and offer them advice.<sup>50</sup> Given the complexity of THB, they often fail to convict the traffickers for the crime of trafficking, they rather gain conviction for certain components of the crime –violence, kidnapping, rape– which are easier to prove. Such difficulty also

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<sup>44</sup> Winterdyk J and others, *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (1st edn, 2012) pp 131-155

<sup>45</sup> UNGA, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) Res. 55/25, art 10

<sup>46</sup> Winterdyk J and others, *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (1st edn, 2012) p 138

<sup>47</sup> *ibid* at p 134

<sup>48</sup> UNGA, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) Res. 55/25, art 10(2)

<sup>49</sup> Winterdyk J and others, *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (1st edn, 2012) p 137

<sup>50</sup> *ibid* at p 155

derives from the fear of the victims and the witnesses to denounce the traffickers since they are afraid to be repatriated or to be subject to reprisals at the hand of the perpetrators.<sup>51</sup>

### 1.5.3 Non-governmental organisations

The victims of sex-trafficking are usually in a situation of vulnerability: they either have entered the country illegally or they do not have their documentation because it has been taken by their traffickers. This leads to the distrust of state-based organisations which tend to consider THB as a migration issue and often resort to the deportation of the victims. Further, victims often perceive the State officials as being corrupted hence they resort to them only as a last resort. On the contrary, the NGOs represent a safe environment where the victims can overcome their fears and ask for assistance. Although not all the NGOs have the same characteristics, they all provide similar assistance: shelter, psychological support, legal advice, documentation assistance and vocational trainings.<sup>52</sup>

### 1.5.4 Intercultural language mediators

The intercultural language mediators are bilingual and bicultural people who ensure that cultural differences do not hamper the communication between the law enforcement or the member of the NGOs and the victims of trafficking. Since the 70s it has becoming clear that interpreters must be aware that they are communicating across cultures as well as across languages.<sup>53</sup> Culture mediators are essential for the success of the rescue process, since they can reassure the victims that they will be understood. Thus, thanks to the culture mediator, it is easier to build a connection with the victims who are willing to trust the interpreter and cooperate with him/her. Many organisations employ former prostitutes as mediator in order to not only ensure better connection with the victims but also to empower the survivors and lift them from the dimension of victims.<sup>54</sup>

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<sup>51</sup> *ibid* at p 161

<sup>52</sup> Tzvetkova M, 'NGO responses to trafficking in women' (Gender & Development 2002) p 61

<sup>53</sup> Crisis Response and Policy Centre, *Handbook: Protection through cultural mediation* (2020) available at <https://data2.unhcr.org/en/documents/details/83858> (last visited 3 June 2021)

<sup>54</sup> Tzvetkova M, 'NGO responses to trafficking in women' (Gender & Development 2002) p 64

## RESPONSE OF THE EUROPEAN COUNTRIES

The following chapter describes the relationship between sex-trafficking and prostitution highlighting how most of the women and girls trafficked for the purpose of sexual exploitation are often introduced into the prostitution market. It further analyses the main policy regimes with regard to prostitution and prevention of trafficking. While some policy makers consider prostitution as threatening as sex-trafficking, some others make a clear distinction between the two crimes, claiming that prostitution is a job like any other, unless the sex workers have been trafficked. The focus is then moved to the case studies of Italy, Sweden and the Netherlands in order to assess which policy regime better ensures the compliance with a human rights-based approach to sex-trafficking. Therefore, the evaluation of the countries response includes the analysis of the relevant criminal law and migration law. Then, it explores the practices relating the assistance to and the redress of the victims.

### 2.1 PROSTITUTION POLICY REGIMES

Prostitution has been perceived in different ways by the European countries. Most of them consider it as a form of exploitation of women. This perspective has been supported by some feminist movements which claimed that prostitution encourages the idea of women as sexual objects and commodities that can be sold. On the other hand, other feminists considered this view to be a patriarchal imposition of morality on the free will of women. According to the latter, prostitution should be deemed as a profession such as any other, as long as the women involved in it freely decide to engage into sex work. This theory has been embraced by those countries who decided to legalize the prostitution. The analysis of these feminist theories enables one to understand the reasons for the choice to adopt a specific policy regime. Such assessment is necessary since the choice of different models results in different attitudes towards the victims. For example, it is not surprising that the states which favour a salvationist approach –according to which the trafficked women are only deemed as helpless victims– do not consult the survivors neither pursue their participation to the decision-making process.



It is noteworthy to analyse the orientation of the UN General Assembly in the Palermo Protocol. In fact, the latter leaves room for both interpretations by focusing on the recruitment, rather than on exploitation. According to Article 3, the trafficked person should find herself in a situation of dependency to another person who has control over her life. Further, trafficking is often associated with conditions similar to slavery, such as massive restrictions and physical or emotional manipulation. Thus, the Protocol implicitly makes a distinction between abusive conduct and exploitation. Indeed, not all the abusive conducts entail the level of gravity necessary to depict the exploitation. Therefore, the abusive conduct can still be criminalised under criminal law, but it does not lead to violation of human rights neither it passes the threshold of violence which entails exploitation. Thus, prostitution can still represent an abusive conduct without automatically entailing the level of exploitation typical of sex-trafficking.<sup>55</sup>

Although sex-trafficking and prostitution do not reach the same level of gravity, they are still interdependent. Indeed, the profitability of trafficking depends on the features of the market for commercial sex: the traffickers engage in such activities only when the market makes them lucrative.<sup>56</sup> Different factors contribute to assess the profit potential. First, large markets, such as those of high-income countries, make exploitation easier since more clients are able to pay for sexual services. On the other hand, these markets attract larger groups of trafficked people which are easier to detect. Thus, the population size is a tricky factor because greater profit comes with higher risk. Furthermore, greater immigration inflows to a country make it harder to detect trafficking activities in the mentioned country since it is not easy to distinguish the two phenomena. Thus, huge immigration inflows lower the risk for the traffickers to get caught. Moreover, the prohibition of street prostitution makes trafficking costly because traffickers have to pay for different locations, hence in-house prostitution is less appealing for the traffickers. Finally, clients are more afraid to purchase sexual services in the countries where prostitution is illegal because they are afraid to face undesirable consequences. Therefore, the size of trafficking is dependent on several factors. As highlighted by Jakobsson and Kotsadam, trafficking can be explained through the following equation:

$$\text{Trafficking}_i = \beta_0 \text{Law}_i + \beta_1 X_i + \varepsilon_i$$

“Trafficking<sub>i</sub>” represents the incidence of trafficking in a specific country “i”. “Law<sub>i</sub>” is a variable ranging from 1 to 3 where 1 is scored by countries which criminalize prostitution, while 3 is scored by those that

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<sup>55</sup> Rijken CRJJ and Koster D, ‘A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice’ (Social Science Research Network 2008) pp 2-3

<sup>56</sup> United Nations Office on Drugs and Crime (UNODC), *Global report on trafficking in persons* (2009) available at [https://www.unodc.org/documents/human-trafficking/Global\\_Report\\_on\\_TIP.pdf](https://www.unodc.org/documents/human-trafficking/Global_Report_on_TIP.pdf) (last visited 27 April 2021)

regulate the market. Thus, a higher level of traffic inflows is recorded in countries who do not ban prostitution. Further, “ $X_i$ ” is a variable that includes several factors, namely the GDP per capita, the population size, and the migration inflows. Finally, “ $\varepsilon_i$ ” constitutes a normally distributed error term.<sup>57</sup>

Since the policies adopted by each country have great influence on the size of trafficking, it is important to describe the main policy regimes. Outshoorn identified three different policy regimes relating to prostitution, namely abolitionism, prohibitionism and regulationism. According to the abolitionist model, prostitution is combated through the criminalisation of third parties, hence the prostitutes are not convicted. Further, prohibitionism requires a ban on prostitution and entails the liability of the prostitutes. Then, regulationism legalises prostitution and ensures that states have control over the prostitution market.<sup>58</sup> In the following years, a fourth regime –the neo-abolitionism– has been added. According to the latter, the fight against prostitution focuses on the criminalisation of the buyer, rather than of the prostitutes.<sup>59</sup> Therefore, while abolitionism criminalises all the activities related to prostitution, namely pimping, brothel-keeping and procuring, the neo-abolitionism forbids the purchase of sexual services by targeting the clients.

In 2006, the United Nations Office on Drugs and Crime (UNODC) conducted a study on the relationship between domestic law and trafficking. The data collected derive from governmental organisations, research institutions, and the International Labour Organisation (ILO). The UNODC only collected data available in English, French, Spanish and German, mainly coming from western sources institutions. The study shows that higher traffic inflows are registered in those countries which adopt the regulationist model. On the other hand, abolitionist and neo-abolitionist countries score similar levels of traffic inflow. According to this research, it is making procuring illegal that is crucial to decrease trafficking, rather than criminalising the purchase or selling of sexual services.<sup>60</sup> Besides, it must be noticed that the data available for the research do not depict the actual reality of states, given that the victims often refuse to report the violations. Further, if the information on victims come from countries with a lot of resources and good legal systems, they can depict higher levels of traffic inflow compared to those recorded in those countries which do not invest on the detection of trafficking. Therefore, the analysis of these data can be misleading.<sup>61</sup>

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<sup>57</sup> Jakobsson N and Kotsadam A, ‘The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation’ (European Journal of Law and Economics 2013) pp 95-97

<sup>58</sup> Outshoorn J, *The Politics of Prostitution: Women’s Movements, Democratic States and the Globalisation of Sex Commerce* (2004) pp 1-20

<sup>59</sup> Iceland Ministry of Justice and Ecclesiastical Affairs, Excerpts from the general penal code no. 19/1940 (2009) Chapters XXII-XXIII

<sup>60</sup> United Nations Office on Drugs and Crime (UNODC), *Trafficking in Persons: Global Patterns* (2006)

<sup>61</sup> Jakobsson N and Kotsadam A, ‘The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation’ (European Journal of Law and Economics 2013) pp 93

The analysis of the quantity of trafficking alone does not offer a precise framework of the phenomenon. A comparison with drug trafficking helps to understand the welfare consequences of the imposition of stricter rules. The prohibition of a certain good from the market increases the cost for suppliers, raises the price and reduces the quantity consumed.<sup>62</sup> In most of the cases, the reduction of consumption leads to higher levels of violence, the establishment of black-market cartels, and lower quality of the drugs supplied.<sup>63</sup> Scholars, such as Jakobsson and Kotsadam, affirm that a similar reasoning can be applied to sex-trafficking. Therefore, even though stricter regulations lead to a decrease of trafficking, they also result in the increase of violence in the black market. Thus, the study of traffic inflows is necessary to understand the impact of the prostitution policies. However, it does not sufficiently describe the phenomenon of sex-trafficking, since it does not include the evaluation of the welfare conditions of the women and girls engaged in the prostitution sector.<sup>64</sup>

On the other hand, some scholars believe that violence in trafficked prostitution does not depend directly on the policy model adopted. According to them, violence is an intrinsic element of trafficking in human beings, since traffickers need to constantly remind to the victim that they hold the control over their lives. The intensity of violence rather depends on other factors, namely the complexity of the criminal organisation responsible of trafficking, the level of law enforcement and the anti-trafficking control measures. Besides, they notice a higher level of violence in the countries which adopt the abolitionist or the neo-abolitionist model. This violence may result from the fear of the exploiters to be perceived as too permissive and to lose control over the victims. Further, these scholars highlight that in some countries the violence documented in indoor prostitution is higher than the one recorded in outdoor prostitution.<sup>65</sup> Therefore, when considering the welfare conditions of the victims, it must be taken into account whether the states adopt regulations which lead to a shift to indoor prostitution. In conclusion, given the scarcity of reliable data, it is not possible to claim the existence of higher levels of violence in the countries that adopt the abolitionist or the neo-abolitionist model. However, the analysis of the policy regimes cannot ignore such strong indicators.

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<sup>62</sup> Becker G and others, 'The market for illegal goods: The case of drugs' (Journal of Political Economy 2006) pp 38–60

<sup>63</sup> Miron JA and Zwiebel J, 'The economic case against drug prohibition' (Journal of Economic Perspectives 1995) pp 175–192

<sup>64</sup> Jakobsson N and Kotsadam A, 'The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation' (European Journal of Law and Economics 2013) p 89

<sup>65</sup> Di Nicola A and others, 'Study on National Legislation and Prostitution and the Trafficking in Women and Children' (Zurich Open Repository and Archive 2005) available at [https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/study\\_on\\_national\\_legislation\\_and\\_prostitution\\_en\\_6.pdf](https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/study_on_national_legislation_and_prostitution_en_6.pdf) (last visited 6 May 2021) p 131

## 2.2 MIGRATION LAW

According to the human rights-based approach, sex trafficking cannot be solely analysed on the grounds of criminal law. Such approach requires the exam of all the legal frameworks which concern trafficking, namely human rights law and migration law. The latter plays a significant role in the fight against sex-trafficking, given that more than half victims in the European Union are third-country nationals.<sup>66</sup> The victims of trafficking often refuse to denounce criminal acts when they fear they could be repatriated to their country, hence a more permissive migration law can help the victims overcoming their fears. Thus, before moving to the analysis of the case studies, it is necessary to assess which level of protection is granted to the victims of sex-trafficking at international and European level.

The Convention relating to the Status of Refugees depicts the conditions necessary to be entitled to the refugee status. According to Article 1, each individual who is far from the country of her/his nationality or her/his former habitual residence should obtain a refugee status, if she/he has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.<sup>67</sup> Further, the Convention defines the principle of non-refoulement, according to which States shall not expel or return refugees to the frontiers of territories where their life or freedom would be threatened due to their race, religion, nationality, membership of a particular social group or political opinion. However, this principle can be limited in case of those refugees who, having been convicted by a final judgement of a particularly serious crime, constitute a danger to the community of the host country.<sup>68</sup>

Although the Convention allows for limits to the prohibition of refoulement, the latter is considered an absolute principle under human rights law. The principle of non-refoulement should be extended to all the persons who face particular risks in their country of nationality, regardless of them meeting the requirements set in article 1. Further protection should be granted to those among them who risk being subjected to torture and inhuman and degrading treatment or punishment. In such cases, the protection offered by the states can either be subsidiary or complementary protection. The former refers to the protection resulting from international law other than refugee law, hence to EU law. On the other hand, complementary protection refers to the guarantees conferred by the domestic law, different from those deriving from refugee law and international law.<sup>69</sup>

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<sup>66</sup> European Commission, Directorate General for Migration and Home Affairs, *Data Collection on Trafficking in Human Beings in the EU* (2020) p 6

<sup>67</sup> UNGA, Convention relating to the Status of Refugees (1951) Res. 429 (V) art 1

<sup>68</sup> *ibid* art 3

<sup>69</sup> Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), *Guidance Note on the Entitlement of Victims of Trafficking, and Persons at Risk of Being Trafficked, to International Protection* (2020) paras 6-8

The Convention does not offer adequate protection to the victims of trafficking since the latter are not usually trafficked for the reasons highlighted in article 33, namely race, religion, nationality, membership of a particular social group or political opinion. On the contrary, they are trafficked due to their potential economic value, hence they are deemed to be commodities. However, it is not excluded that the grounds set in the Convention could be relevant in targeting and selecting the victims since some specific ethnic groups or minorities are particularly vulnerable.<sup>70</sup> As a matter of fact, the Inter-Agency Coordination Group against Trafficking in Persons (ICAT) extends the interpretation of article 33 by declaring that the persecution feared by an individual or group can include the exploitation on the basis of the ethnicity or the reprisal enacted by the traffickers in case of the victim returning to her/his country of origin. The concept of persecution can also derive from the discriminatory conduct of the national authorities or the members of the community which tend to ostracise and punish the victims of trafficking, especially if the latter have been sexually exploited.<sup>71</sup> Another extensive interpretation has been offered by the UN Refugee Agency which affirms that women should be seen as a particular social group, given that, in many countries, they are subjected to unequal treatment.<sup>72</sup> Further, according to the relevant case-law, women who have been victims of sexual violence in the past should be deemed to belong to a particular social group, given their common characteristics and exposure to ill-treatment.<sup>73</sup> Further, in many countries, these women are considered different from the overall society, hence they should be regarded as a particular social group in virtue of the distinct identity that the society confers on them.<sup>74</sup>

Therefore, better protection can be ensured to the victims of trafficking by analysing sex-trafficking from a gender perspective. This view is supported by the UN Refugee Agency in its Guidelines on gender-related persecution. According to the UNHCR, in individual cases, being trafficked for sexual purposes –prostitution or sexual exploitation in general– can entitle the victims to obtain the refugee status, if the state has failed to provide them with adequate protection.<sup>75</sup> In addition, the Istanbul Convention explicitly recognises gender-based violence against women as a form of persecution within the meaning of article 1 of the Convention relating to the Status of Refugees.<sup>76</sup> As mentioned in the

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<sup>70</sup> *ibid* at para 17

<sup>71</sup> Inter-Agency Coordination Group against Trafficking in Persons (ICAT), *Trafficking in Persons and Refugee Status* (2017) Issue Brief No. 3

<sup>72</sup> United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked* (2006) HCR/GIP/06/07 paras 37-39

<sup>73</sup> *Hoxha and Another v Secretary of State for the Home Department* [2005] UKHL 19 para 37

<sup>74</sup> *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC) paras 160-166

<sup>75</sup> United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (2002) HCR/GIP/0201 para 18

<sup>76</sup> Council of Europe, *Convention on preventing and combating violence against women and domestic violence* (2011) art 60(1)

previous chapter, sex-trafficking has been internationally recognised as a form of violence against women.<sup>77</sup> Therefore, the victims of sex-trafficking should be granted access to the protection ensured by the Refugee Convention on the ground of their subjection to gender-based violence.

In the view of the European court of human rights, trafficking also entails forms of servitude as defined by article 4 ECHR.<sup>78</sup> Therefore, the refolement of trafficked victims can entail a violation of the obligation to protect against the possibility of being subjected to slavery, servitude or forced labour. Indeed, in case of refolement, the victims would be repatriated to a country in which they are more likely to be re-trafficked.<sup>79</sup> Thus, according to this interpretation, the principle of non-refoulement is respected on the ground of article 4 ECHR, rather than on the basis of the Convention relating to the Status of Refugees.

Furthermore, trafficking in human beings results in different forms of violence, namely physical, sexual and psychological violence. This violence often reaches a level that amounts to inhuman and degrading treatment, or torture, as defined by article 3 ECHR.<sup>80</sup> Refouling the victims can expose them to a higher risk of being re-trafficked, and once again being subjected to violence. Thus, the respect of the principle of non-refoulement implicitly follows from the respect of article 3 of the Convention.<sup>81</sup> Further, the prohibition of torture is considered a peremptory norm of general international law or *jus cogens*, hence no derogation to such principle is allowed under international law.<sup>82</sup>

The victims of sex-trafficking find often difficult to access to the protection offered by the Refugee Convention, given the strict requirements set in article 33. However, different international institutions tried to ensure protection through a gendered approach to trafficking. First, they highlighted the distinct identity of trafficked women who should then belong to a “specific social group”, in accordance with article 33 of the Refugee Convention. Further, they stressed the enslaving and violent nature of trafficking, linking the respect of the principle of non-refoulement with the European Convention of Human Rights and the *jus cogens*.

At the European level, both the Council of Europe and the Council of the European Union pursue the protection of the alleged victims through the provision of temporary residence permits. As explained above, States shall provide a “reflection period” which should last for at least 30 days. During this period,

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<sup>77</sup> UN Secretariat, Beijing Declaration and Platform for Action 1995; ECOSOC Declaration on the Occasion of the 15th anniversary of the 4th World Conference on Women 2010

<sup>78</sup> *Rantsev v Cyprus and Russia* [2010] ECHR 25965/04; *Siliadin v France* [2005] ECHR 73316/01

<sup>79</sup> Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), Guidance Note on the Entitlement of Victims of Trafficking, and Persons at Risk of Being Trafficked, to International Protection (2020) para 32

<sup>80</sup> Organization for Security and Co-operation in Europe (OSCE), *Trafficking in Human Beings Amounting to Torture and Other Forms of Ill-Treatment* (2013)

<sup>81</sup> Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), Guidance Note on the Entitlement of Victims of Trafficking, and Persons at Risk of Being Trafficked, to International Protection (2020) para 33

<sup>82</sup> United Nations, Vienna Convention on the Law of Treaties (1969) UNTS 1155, art 53

the victims can freely choose whether to cooperate with the law enforcement, without fearing any repatriation, since the expulsion is not allowed. Further, states should grant a renewable residence permit when it is necessary due to the personal situation of the victim or because of their cooperation in the criminal proceedings. In renewing such permit, states should bear in mind that the repatriation should preferably be voluntary in order to avoid any further harm to the victim.<sup>83</sup>

Further analysis of the EU Directive depicts the precariousness of the protection offered to third-country nationals. Although it offers guidance to the EU states, the Directive is formulated in vague terms hence the states are free to determine the level of protection to be granted to the victims. The Directive does not include a penalty clause hence the states are not subjected to sanctions in case they do not comply with the legislation. Moreover, the EU member states can autonomously determine the quality of the health care services offered to the victims since the Directive only refers to “appropriate standard of living and access to emergency medical treatment” without defining what such requirement entails. Further, each state can decide the duration of the reflection period. In addition, the family members of the victims are excluded from obtaining short-term residence permits, translation and interpretation are no longer provided free of charge and free legal aid is not a requirement anymore.<sup>84</sup> Therefore, this analysis highlights the vulnerability of third-country nationals and the lack of adequate legal protection for this category of victims in the European system.

The European institutions also focus on children by highlighting the importance of the “best interest of the child” which should guide any decision concerning children. Indeed, the extension of the reflection period and/or the residence permit should be granted in the view of the best interest of the child. The primacy of this principle has been affirmed in several judgement of the ECtHR. In *Jeunesse v. Netherlands*, the Court affirmed that the interest of controlling immigration cannot justify the intervention in family life.<sup>85</sup> In this vein, in *Neulinger and Shuruk v. Switzerland*, the Court restated the “paramount importance” of the best interest of the child. If the decision to avoid the repatriation of a child complies with the doctrine of the best interest of the child, it can be pursued even though it hinders the possibility of a family reunification.<sup>86</sup> It has been argued that such decision was in contrast with the provision of the 1980 Hague Convention which established the primacy of the principle of family reunification. However, the decision does not depict the conflict between these principles, it rather

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<sup>83</sup> Council of Europe, Convention on Action against Trafficking in Human Beings (2005) CETS 197, arts 10-16; Council of the European Union, Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (2004) 2004/81/EC arts 6-8

<sup>84</sup> Meng-Hsuan C, ‘The European Union and the Fight against Human Trafficking: Comprehensive or Contradicting?’ (St Antony’s International Review 2008) pp 76-81

<sup>85</sup> *Jeunesse v Netherlands* [2012] ECHR 12738/10

<sup>86</sup> *Neulinger and Shuruk v Switzerland* [2010] ECHR 41615/07

highlights that the principle of the best interest of the child exceeds any other rule. This concept is particularly relevant with regards to the child victims who have been exploited in the context of the family, since for them the family represents a risk, rather than a safe haven. Furthermore, in *Khan v. France* the Court affirmed the importance of identifying the age of the child victims.<sup>87</sup> Accordingly, the Council of Europe requires states to establish the identity and locate the families of third-country nationals who are unaccompanied minors.<sup>88</sup>

## 2.3 CASE STUDIES

It is now necessary to examine the actual application of the mentioned policy regimes. This research focuses on the case studies of Italy, Sweden and the Netherlands, which respectively represent the choice of the abolitionist, neo-abolitionist and regulationist model. The analysis of the prohibitionist model is excluded from this study since such model also prosecutes the prostitutes, in clear contrast with the requirement to not criminalise the victims. Further, the analysis of the case studies explores the main features of the countries and their legal and institutional frameworks. Then, it examines the enacted policies with a qualitative approach in order to reach a deeper understanding of the shortcomings of the applied prostitution models. Further, the comparative analysis aims to assess whether these policies reflect a human rights-based approach to sex-trafficking, as advocated by the UN High Commissioner for Human Rights.

### 2.3.1 Italy

A recent report from the Directorate General for Migration and Home Affairs of the European Commission describes Italy as one of the EU member states with the largest number of registered victims. In the period 2017-2018, the country registered 1988 victims of trafficking, 1743 of which were women.<sup>89</sup> Further, 70 percent of the victims had been trafficked for sexual purposes.<sup>90</sup> With regard to child victims, in 2017, the department of Equal Opportunities of the Italian Government recorded 200 child victims of trafficking, 196 of which were girls. Further, 96 percent of them had been trafficked for sexual

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<sup>87</sup> *Khan v France* [2019] ECHR 12267/16

<sup>88</sup> Council of Europe, Convention on Action against Trafficking in Human Beings (2005) CETS 197, arts 10,14; Council of the European Union, Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (2004) 2004/81/EC art 10

<sup>89</sup> European Commission, Directorate General for Migration and Home Affairs, *Data Collection on Trafficking in Human Beings in the EU* (2020) pp 10-18

<sup>90</sup> European Commission, *Together Against Trafficking in Human Beings: Italy* (2019) available at [https://ec.europa.eu/anti-trafficking/member-states/Italy\\_en](https://ec.europa.eu/anti-trafficking/member-states/Italy_en) (last visited 9 April 2021)



purposes.<sup>91</sup> Italy is mainly a destination country for trafficking.<sup>92</sup> However, as to child victims, Italy can also be a transit and source country.<sup>93</sup>

### 2.3.1.1 Legal framework

In 1958, the Italian government introduced the Law No. 75/1958, so-called Merlin Law from the name of the socialist politician Angelina Merlin who drafted it. According to the latter, indoor prostitution was banned and the parallel activities to prostitution –pimping, pandering and procuring– were criminalised.<sup>94</sup> The Law No. 75/1958 is considered as the first step of the adoption of the Italian abolitionist model. This model reflects the aim of shifting to a victim-centered approach that discourages prostitution by convicting the activities which rotate around it, rather than by criminalising the prostitutes. Although prostitution has been seen as harmful to the dignity of those engaged in the sex market, the Italian government avoided the criminalisation in order to prevent further damages for the victims.<sup>95</sup> In the last 20 years, different ministers proposed the transition to either a regulationist or a neo-abolitionist model. However, none of these proposals obtained the final vote of the Senate.

All forms of trafficking in human beings are forbidden in Italy. Article 601 of the Italian Criminal Code criminalises the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or necessity, for the purpose of exploitation, including sexual exploitation. This provision is also valid in case of child victims, regardless of the means used to enact the described exploitation.<sup>96</sup> It is noteworthy to say that the Italian criminal code incorporates the provision of article 3 of the Palermo Protocol since it does not require child victims to prove the existence of improper means of exploitation. However, the Italian law does not fully align with the Palermo Protocol because it does not explicitly affirm that the consent of the child is not necessary to identify a violation.<sup>97</sup> On the other hand, under the Italian Criminal Code children obtain greater protection than those ensured to adults. Indeed, the Italian law criminalises only the intermediaries when the prostitutes

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<sup>91</sup> ECPAT International, *ECPAT Country Overview: Italy* (2019) available at [https://www.ecpat.org/wpcontent/uploads/2019/02/ECO\\_Italy\\_FINAL\\_6February2019.pdf](https://www.ecpat.org/wpcontent/uploads/2019/02/ECO_Italy_FINAL_6February2019.pdf) (last visited 6 April 2021)

<sup>92</sup> European Commission, *Together Against Trafficking in Human Beings: Italy* (2019) available at [https://ec.europa.eu/anti-trafficking/member-states/Italy\\_en](https://ec.europa.eu/anti-trafficking/member-states/Italy_en) (last visited 9 April 2021)

<sup>93</sup> ECPAT International, *ECPAT Country Overview: Italy* (2019) available at [https://www.ecpat.org/wpcontent/uploads/2019/02/ECO\\_Italy\\_FINAL\\_6February2019.pdf](https://www.ecpat.org/wpcontent/uploads/2019/02/ECO_Italy_FINAL_6February2019.pdf) (last visited 6 April 2021)

<sup>94</sup> Law No. 75/58 (1958) arts 2-7

<sup>95</sup> Montalti L, 'La regolamentazione della prostituzione: uno sguardo d'insieme' (DirittoConsenso 2021)

<sup>96</sup> Criminal Code, R.D. 19 October 1930 No.1398, Book II, Title XII, art 601

<sup>97</sup> ECPAT International, *ECPAT Country Overview: Italy* (2019) available at [https://www.ecpat.org/wpcontent/uploads/2019/02/ECO\\_Italy\\_FINAL\\_6February2019.pdf](https://www.ecpat.org/wpcontent/uploads/2019/02/ECO_Italy_FINAL_6February2019.pdf) (last visited 6 April 2021)

are adult. On the contrary, if the victims are children, it convicts both the intermediaries and the clients.<sup>98</sup> Although child prostitution has been criminalised, it has not been classified as violence against minors. In fact, the Criminal Code considers only performing sexual acts with minors below 14 years of age as “aggravated sexual violence” which is punished with a harsher penalty if the abuser offers money in exchange of the sexual acts.<sup>99</sup> This provision results from the incorporation of the Lanzarote Convention into the domestic legal order.<sup>100</sup>

The analysis of the sole criminal law is not sufficient to assess the level of protection offered to the victims by the Italian system, hence it is necessary to also analyse the relevant provisions of migration law. The Italian law does not provide a reflection period, as defined by both the Council of Europe and the Council of the European Union. However, according to Article 18 of the Legislative Decree No. 286/1998, the victims of trafficking are entitled to a temporary humanitarian residence permit which is not conditional upon the victim willingness to cooperate with the law enforcement. This permit lasts six months, with the possibility to renovate it for one year or more, if required by the circumstances. Further, the temporary permit can be converted into a definitive permit for educational or working reasons.<sup>101</sup> During this period, the victims gain access to a specific assistance programme which provides them with accommodation, food and medical support.<sup>102</sup> Either the victim decides to interrupt the programme or violate the rules of conduct set by the programme, she/he loses the right to legally reside in the country.<sup>103</sup> In order to obtain such permit, the victim can follow two possible paths: the first one –the judicial path– entails the cooperation with the law enforcement, the second one –the social path– requires the submission of a statement on behalf of the victim by the social services or the accredited NGOs.<sup>104</sup>

Further, the Legislative Decree No. 286/1998, in compliance with the principle of non-refoulement, prohibits the repatriation of a third-country national to a country in which he/she will face the risk to be persecuted for reasons of race, sex, language, nationality, religion, personal conditions, membership of a particular social group or political opinion.<sup>105</sup> In addition, the expulsion of minors is forbidden, unless they are reconciled with their parents or tutors, in case they have been repatriated.<sup>106</sup> Further protection has been granted by the Legislative Decree No. 24/2014 that requires the competent authorities to provide

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<sup>98</sup> Criminal Code, R.D. 19 October 1930 No.1398, Book II, Title XII, art 600bis

<sup>99</sup> *ibid* art 609quater

<sup>100</sup> Council of Europe, Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (2007) CETS 201, art 19

<sup>101</sup> Legislative Decree No. 286/98 (1998) art 18

<sup>102</sup> Law No. 228/2003 (2003) art 13

<sup>103</sup> Legislative Decree No. 286/98 (1998) art 18(4)

<sup>104</sup> European Commission, *Together Against Trafficking in Human Beings: Italy* (2019) available at [https://ec.europa.eu/anti-trafficking/member-states/Italy\\_en](https://ec.europa.eu/anti-trafficking/member-states/Italy_en) (last visited 9 April 2021)

<sup>105</sup> Legislative Decree No. 286/98 (1998) art 19(1)

<sup>106</sup> *ibid* art 19(2)(a)

the unaccompanied child victims of trafficking in human being with adequate information on their rights, especially relating to the possibility to seek international protection. If the age of the victim cannot be verified through the prescribed procedure, he/she should be presumed to be a minor.<sup>107</sup>

### 2.3.1.2 Institutional framework

Since 2000, Italy has elaborated a tripartite structure for assisting the victims of trafficking in human beings. This structure, which is coordinated and supervised by the Department for Equal Opportunities, entails the Programmes for temporary assistance and long-term social protection, the Free Helpline (Numero Verde Anti-tratta), and the Programme for assisted voluntary return.<sup>108</sup> In the period 2016-2018, the Department for Equal Opportunities formulated a National Action Plan which aimed to identify, protect and assist the victims, prevent trafficking in human beings and punish the traffickers. In order to enact such plan, the government has also cooperated with NGOs and other relevant stakeholders.<sup>109</sup> Accordingly, it required these organisations to be registered on the list of organizations implementing activities for immigrants.<sup>110</sup>

One of the most important institutions relating trafficking is the Department for Equal Opportunities of the Italian Presidency of the Council of Ministers which acts as national observatory on trafficking in human beings. Indeed, this Department collects documents and reports on THB and gathers information on the national and international legal framework, in order to provide a reliable database for the registered NGOs and local authorities working in this field.<sup>111</sup> Further, in order to grant compensation for the victims, it has been established an Annual Fund for Anti-Trafficking Measures which is fed with the assets confiscated following a judgement of conviction.<sup>112</sup>

Finally, the investigations on trafficking are in charge of the District Anti-Mafia Directorates (*Direzioni Distrettuali Antimafia*) and coordinated by the National Anti-Mafia Directorate (*Direzione Nazionale Antimafia*).<sup>113</sup>

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<sup>107</sup> Legislative Decree No. 24/2014 (2014) art 4

<sup>108</sup> European Commission, Together Against Trafficking in Human Beings: Italy (2019) available at [https://ec.europa.eu/anti-trafficking/member-states/Italy\\_en](https://ec.europa.eu/anti-trafficking/member-states/Italy_en) (last visited 9 April 2021)

<sup>109</sup> Council of Ministers, Piano nazionale d'azione contro la tratta e il grave sfruttamento 2016-2018 (2016)

<sup>110</sup> European Commission, Together Against Trafficking in Human Beings: Italy (2019) available at [https://ec.europa.eu/anti-trafficking/member-states/Italy\\_en](https://ec.europa.eu/anti-trafficking/member-states/Italy_en) (last visited 9 April 2021)

<sup>111</sup> *ibid*

<sup>112</sup> *ibid*

<sup>113</sup> 'Direzione nazionale antimafia e antiterrorismo' (Ministry of Justice, 3 February 2021) available at [https://www.giustizia.it/giustizia/it/mg\\_2\\_10\\_1.page#](https://www.giustizia.it/giustizia/it/mg_2_10_1.page#) (last visited 12 May 2021)

### 2.3.1.3 Analysis

Notably, most of the assistance programmes for the victims of trafficking in human beings developed by the Italian government are led by Catholic organisations which believe that the prostitution cannot ever result from a free choice of the sex-workers. According to such NGOs, the prostitutes need to be *rescued, saved, freed, redeemed, and rehabilitated*. They impose a new lifestyle to the victims, in view of restoring their lost dignity and integrity.<sup>114</sup> Therefore, they reinforce the narrative that depicts the trafficked women either as victims or criminals. These organisations resort to the rescue model: they proceed with the identification of victims, then they locate them into different structures where they are granted adequate food, shelter, medical assistance, and legal support. Once they reach the accommodation, the victims are requested to avoid any interaction with their past contacts, including the eventual client-saviour. The structures hosting the victims often follow quite a rigid approach: they set a precise schedule in the view of organising the whole day of the victims by even imposing specific sleeping hours. Notably, during this period the victims are not economically independent because they do not have any source of income, as the opportunity to do an internship is reserved to those who cooperate with the law enforcement. Thus, the victims are unable to support their families by sending the profit gained through prostitution. Whereby, a closer look at the assistance instruments reveal that they usually imply several restrictions which lead the victims to quit the programmes.<sup>115</sup>

Regarding the identification of the victims, Italy encounters problems in assessing the age of the victims. The Legislative Decree No. 24/2014 provides that the age of the victim should be assessed on the basis of his/her documents. If these documents are not available or reliable, the authorities should resort to the radiography of the wrist.<sup>116</sup> However, the accuracy of such exam has been questioned by the international scientific community because it does not consider personal factors such as ethnicity, diet, socio-economic level, or diseases connected to the bone growth.<sup>117</sup> Therefore, the Directive No. 17272/7 of the Ministry of Internal Affairs provides that, when the exam entails a margin of error, the authorities should give the individual the benefit of the doubt so that if there is a possibility that the individual is a child, she/he should be treated as such.<sup>118</sup> Such Directive incorporates the recommendation of the UN Committee on the Rights of the Child which affirms that the assessment of the age must be conducted in a scientific,

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<sup>114</sup> Crowhurst I and Bertone C, 'Caught in the Victim/Criminal Paradigm: Female Migrant Prostitution in Contemporary Italy' (Journal of the Association for the study of Modern Italy 2012) p 497

<sup>115</sup> Savia F, 'La Donna Deviante. La Prostituzione Coatta' (ADIR-L'altro diritto 2007) available at <http://www.adir.unifi.it/rivista/2007/savia.htm> (last visited 13 May 2021)

<sup>116</sup> Legislative Decree No. 24/2014 (2014) art 4(2)

<sup>117</sup> 'Questioni Maggiormente Rilevanti in Ordine Alla Legislazione Italiana a Tutela Delle Vittime Di Tratta' (Associazione per gli Studi Giuridici sull'Immigrazione 2013) available at [http://www.asgi.it/wpcontent/uploads/2015/04/Trafficking\\_2013\\_ASGI1.pdf](http://www.asgi.it/wpcontent/uploads/2015/04/Trafficking_2013_ASGI1.pdf) (last visited 13 May 2021) p 10

<sup>118</sup> Ministry of Internal Affairs, Directive No. 17272/7 (2008) p 3

safe, child and gender-sensitive and fair manner, and, in the event of remaining uncertainty, should give the individual the benefit of the doubt.<sup>119</sup> Further, the Directive extend the application of the Decree of the President of the Republic No. 448/88 –which provides that, if doubts relating the age of the victim persist after the exam, the victim should be presumed to be a minor– to the migration matters.<sup>120</sup>

#### 2.3.1.4 Conclusions

The Italian abolitionist model enacts a victim-centered approach by criminalising procuring –and the clients if the victims are children– rather than convicting the victims. The system also provides trafficked women and girls with assistance programmes, under the coordination of the Department for Equal Opportunities and the registered NGOs. However, these programmes are usually led by Catholic organisations which pursue the rehabilitation of women by imposing strict codes of conduct. Further, the victims of sex-trafficking cannot access to any reflection period. Nonetheless, they can obtain a temporary renewable residency permit regardless of their cooperation with the law enforcement. Finally, under migration law, the victims cannot be repatriated if there is a reasonable risk that they will be prosecuted in their country of origin. If the victim is a child, the principle of non-refoulment is non derogable, except for the cases of reconciliation with other family members. Since children are ensured better protection, it is important to precisely determine the age of the victims. However, Italy still relies on an exam that has been highly contested by the international community.

#### 2.3.2 Sweden

In 2020, the Directorate General for Migration and Home Affairs of the European Commission elaborated a report on the scale of the THB in the EU member countries. However, the government of Sweden did not provide any data on identified and presumed victims.<sup>121</sup> Therefore, the analysis of the current situation is based on the data gathered by the Migration Agency and by the relevant NGOs. According to the former, in 2019 the Swedish police investigated 272 cases of trafficking, with 106 of them relating to sex-trafficking. In addition, the Migration Agency reported 481 cases of suspected victims, 202 of them were related to trafficking for sexual purposes. Among those 481 suspected cases,

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<sup>119</sup> United Nations Committee on the Rights of the Child, General comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin (2005) CRC/GC/2005/6 para 31

<sup>120</sup> *ibid* p 3

<sup>121</sup> European Commission, Directorate General for Migration and Home Affairs, *Data Collection on Trafficking in Human Beings in the EU* (2020) p 12

92 concerned minors. Besides, NGOs identified 284 victims in the period 2018-2019.<sup>122</sup> Notably, these reports do not offer disaggregated data, hence it is hard to understand the level of involvement of women and girls in sex-trafficking in Sweden. However, the analysis of past reports –such as the one offered by the Swedish Institute– clearly depicts the gendered nature of trafficking in the country. Indeed, among the 169 suspected victims identified in 2017, 108 were women.<sup>123</sup> Further, Sweden is mainly a destination country<sup>124</sup>, hence the following analysis focuses on the transfer and receipt of the victims to the country, and their exploitation in the Swedish prostitution market.

### 2.3.2.1 Legal framework

Sweden has been the first country in the world to criminalise the purchase of sexual services through the introduction of the Govern Bill on Violence against Women, so-called Kvinnofrid 1997/98. This Bill results from years of protests and activism enacted by the feminist movement and the shelter movement respectively in the 70s and 80s.<sup>125</sup> Such movements created awareness on the issue of violence against women. In response to the demonstrations, the Swedish government, in 1977, established the Sexual Crimes Committee with the aim of conducting an extensive survey on prostitution.<sup>126</sup> In the following years, the government established the Commission on Violence against Women (1993) and the Prostitution Investigation (1995).<sup>127</sup> Therefore, the Kvinnofrid (1998) was conceived to finally provide a solution to the discussed issue of prostitution. Such Bill shifted the attention from the prostitutes to the clients following the idea that prostitution is bonded to the demand, hence that it is possible to combat prostitution only by addressing such demand. This provision complies with the requirement set in international treaty law according to which states shall take measures to discourage the demand that fosters trafficking-related exploitation.<sup>128</sup>

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<sup>122</sup> United States Department of State, Office to monitor and combat trafficking in persons, 2020 Trafficking in Persons Report (2020) available at <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> (last visited 13 May 2021) p 468

<sup>123</sup> Olsson AJ, Prostitution policy in Sweden –targeting demand (The Swedish Institute 2019) available at [https://sharingsweden.se/app/uploads/2019/02/si\\_prostitution-in-sweden\\_a5\\_final\\_digi .pdf](https://sharingsweden.se/app/uploads/2019/02/si_prostitution-in-sweden_a5_final_digi .pdf) (last visited 13 May 2021) p 32

<sup>124</sup> United States Department of State, Office to monitor and combat trafficking in persons, 2020 Trafficking in Persons Report (2020) available at <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> (last visited 13 May 2021) p 468

<sup>125</sup> Olsson AJ, Prostitution policy in Sweden –targeting demand (The Swedish Institute 2019) available at [https://sharingsweden.se/app/uploads/2019/02/si\\_prostitution-in-sweden\\_a5\\_final\\_digi .pdf](https://sharingsweden.se/app/uploads/2019/02/si_prostitution-in-sweden_a5_final_digi .pdf) (last visited 13 May 2021) p 9

<sup>126</sup> The Swedish Institute, *The Ban against the Purchase of Sexual Services. An evaluation 1999-2008* (2010) available at [https://ec.europa.eu/antitrafficking/sites/default/files/the\\_ban\\_against\\_the\\_purchase\\_of\\_sexual\\_services.\\_an\\_evaluation\\_19\\_99-2008\\_1.pdf](https://ec.europa.eu/antitrafficking/sites/default/files/the_ban_against_the_purchase_of_sexual_services._an_evaluation_19_99-2008_1.pdf) (last visited 13 May 2021) pp 4-5

<sup>127</sup> Olsson AJ, Prostitution policy in Sweden –targeting demand (The Swedish Institute 2019) available at [https://sharingsweden.se/app/uploads/2019/02/si\\_prostitution-in-sweden\\_a5\\_final\\_digi .pdf](https://sharingsweden.se/app/uploads/2019/02/si_prostitution-in-sweden_a5_final_digi .pdf) (last visited 13 May 2021) p 11

<sup>128</sup> Office of the High Commissioner for Human Rights (OHCHR), *Human Rights and Human Trafficking* (2014) available at [https://www.ohchr.org/documents/publications/fs36\\_en.pdf](https://www.ohchr.org/documents/publications/fs36_en.pdf) (last visited 13 March 2021) p 44

According to the neo-abolitionist model –which is the model adopted by Sweden– prostitution is not compatible with freedom of the individual and gender equality.<sup>129</sup> Indeed, prostitution cannot be deemed as a profession such as any other since it always entails certain levels of exploitation.<sup>130</sup> The prostitutes engage into the sex market only because they lack viable alternatives to escape poverty, hence they are never truly free to choose their job.<sup>131</sup> Given that Sweden treats prostitutes as victims, it is not surprising that the adopted model avoids their criminalisation.

The criminalisation of the clients has been pursued through Chapter 6, Section 11 of the Swedish Criminal Code which provides that a person who obtains a sexual relation in return for payment is liable of purchasing sexual services. The crime is triggered even if the compensation has been only promised or if someone other than the person who avails of the sexual service has promised the compensation.<sup>132</sup> The Criminal Code also prohibits procuring by punishing those who profit from another person's engagement in casual sexual relations in return for payment. In addition, the Code punishes the eventual owner of the flat where the prostitution occurs, if he/she was aware of the situation and failed to solve the rent agreement. Further, procuring is considered aggravated if it involves elements of trafficking in human beings.<sup>133</sup> The Criminal Code contains a definition of trafficking that fully complies with the one provided by the Palermo Protocol. Further, the Code explicitly mentioned the prohibition of trafficking for sexual purposes in Chapter 4, Section 1a.<sup>134</sup>

With regard to minors, Sweden has been one of the first country in the world to ratify the Convention on the Rights of the Child, even though it has fully incorporated it only in 2020.<sup>135</sup> Protection to children is offered by the Criminal Code which clearly criminalises the purchase of sexual acts from children. Indeed, a person who induces a child under eighteen years of age to undertake a sexual act in return for payment is guilty of exploitation of a child through the purchase of a sexual act.<sup>136</sup> If the child is under 15 years of age, the person who avails of the sexual act is always liable of rape.<sup>137</sup> Finally, the Criminal Code punishes trafficking of children for sexual purposes, regardless of the means used by the

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<sup>129</sup> The Swedish Institute, *The Ban against the Purchase of Sexual Services. An evaluation 1999-2008* (2010) available at [https://ec.europa.eu/antitrafficking/sites/default/files/the\\_ban\\_against\\_the\\_purchase\\_of\\_sexual\\_services.\\_an\\_evaluation\\_1999-2008\\_1.pdf](https://ec.europa.eu/antitrafficking/sites/default/files/the_ban_against_the_purchase_of_sexual_services._an_evaluation_1999-2008_1.pdf) (last visited 13 May 2021) p 4

<sup>130</sup> Ministry for Foreign Affairs, *Handbook: Sweden's feminist foreign policy* (2019) available at <https://www.government.se/492c36/contentassets/fc115607a4ad4bca913cd8d11c2339dc/handbook---swedens-feminist-foreign-policy---english.pdf> (last visited 13 May 2015) p 71

<sup>131</sup> Olsson AJ, *Prostitution policy in Sweden –targeting demand* (The Swedish Institute 2019) available at [https://sharingsweden.se/app/uploads/2019/02/si\\_prostitution-in-sweden\\_a5\\_final\\_digi\\_.pdf](https://sharingsweden.se/app/uploads/2019/02/si_prostitution-in-sweden_a5_final_digi_.pdf) (last visited 13 May 2021) p 14

<sup>132</sup> Criminal Code (brottsbalken, SFS 1962:700) Chapter 6, Section 11

<sup>133</sup> *ibid* at Chapter 6, Section 12

<sup>134</sup> *ibid* at Chapter 4, Section 1a

<sup>135</sup> ECPAT International, *Global Monitoring Report on the status of action against commercial sexual exploitation of children – Sweden* (2011) available at [https://www.ecpat.org/wpcontent/uploads/2016/04/A4A\\_V2\\_EU\\_SWEDEN.pdf](https://www.ecpat.org/wpcontent/uploads/2016/04/A4A_V2_EU_SWEDEN.pdf) (last visited 13 May 2021) p 13

<sup>136</sup> *ibid* at Chapter 6, Section 9

<sup>137</sup> *ibid* at Chapter 6, Section 4



traffickers.<sup>138</sup> In order to convict someone of trafficking of children for sexual purposes, the prosecutor only needs to prove the intent to exploit, the use of improper means is not required. The legislation has been worded in a way that does not even require that the sexual acts have been performed; if the sexual exploitation takes place, the person responsible of promoting the sexual intercourse can be convicted for the crime of procuring. Indeed, while sex-trafficking is considered the process of putting a person in a situation where he/she is meant to be exploited, procuring entails the resulting exploitation itself.<sup>139</sup>

Since Sweden is mainly a destination country for sex-trafficking it is necessary to examine migration law and the protection offered to the victims. The Swedish Aliens Act, in compliance with the provisions of the Council of Europe and the Council of the European Union, provides a reflection period of 30 days, during which the victims can decide whether to cooperate or not with the investigation authorities.<sup>140</sup> In 2007, the Swedish government introduced an amendment in view of the harmonisation with the EU Directive on the victims of trafficking in human beings. This amendment offers to the victim the possibility to request a temporary residence permit of at least 6 months. However, victims are required to cooperate with the law enforcement, and to cut all links with the individuals accused of being their exploiters.<sup>141</sup> Another way to legally reside in the country is through the request of a residence permit on the ground of exceptionally distressing circumstances. In this case, the competent authorities examine the overall alien's state of health and his/her situation in the country of origin. This measure is also available for children.<sup>142</sup> With regard to the latter, the Aliens Act explicitly affirms that attention should be given to the child's health and development, and to his/her best interest.<sup>143</sup>

### 2.3.2.2 Institutional framework

The Swedish system relies on several institutions in preventing and combating sex-trafficking. The Swedish Police Authority (Polismyndigheten) –which has also been appointed National Rapporteur– prevents crimes, monitors the public order, conducts the identification of the victims, and carries out criminal investigations.<sup>144</sup> The investigations are also led by the Swedish Prosecution Authority (Åklagarmyndigheten). Then, the Swedish Gender Equality Agency (Jämställdhetsmyndigheten) coordinates the work to prevent and eliminate prostitution. In addition, it guides the National Task Force

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<sup>138</sup> *ibid* at Chapter 4, Section 1a

<sup>139</sup> Lindholm J and Cederborg AC, 'Legal Assessments of Child Victims of Human Trafficking for Sexual Purposes' (Behavioral Sciences & the Law 2016) p 220

<sup>140</sup> Aliens Act (2005:716) Chapter 5, Section 15

<sup>141</sup> *ibid*

<sup>142</sup> *ibid* at Chapter 5, Section 6

<sup>143</sup> *ibid* at Chapter 1, Sections 10-11

<sup>144</sup> Polislag (1984:387)



against Prostitution and Human Trafficking (NMT) in its activities to support the municipalities, governmental authorities and NGOs in human trafficking cases.<sup>145</sup> At the local level, the work of the Regional Coordinators is fundamental given that they offer first assistance in cases of trafficking. Then, the Swedish Crime Victim Compensation and Support Authority (Brottsoffermyndigheten) –which is led by a Director-General appointed by the Government, and subordinate to the Ministry of Justice– ensures the respect of the right of the victims to an adequate compensation.<sup>146</sup>

### 2.3.2.3 Analysis

According to the Swedish government, the introduction of the Kvinnofrid resulted in the decrease of trafficking. In the years immediately following the Bill, the number of women in street prostitution declined by 30-50 percent, and numbers of buyers declined by 75-80 percent.<sup>147</sup> Although it has been argued that prostitution has simply shifted to the online market, it has been proven that online prostitution has increased in line with other sold services, hence the hypothesis of a shift as a result of criminalisation is not supported by the available data.<sup>148</sup> Further, the investigations conducted by the Swedish police on the basis of tape phone conversation prove that the new legislation has made it harder for traffickers to profit from their victims. Street prostitution is not viable, indoor prostitution is more costly, and the clients are afraid to be convicted for the purchase of sexual services.<sup>149</sup> Therefore, traffickers have been effectively discouraged from undertaking their criminal activities in the country.

Although the number of prostitutes in the country has decreased, the Swedish Ministry of Justice and the Police has claimed that the level of violence to which the prostitutes are subjected has increased since the prostitutes are exposed to more dangerous clients. Further, it has been claimed that prostitution has moved to a less visible and controllable area of the sex market. In addition, the probability of the clients denouncing the pimps has noticeably decreased, since the clients are afraid of getting convicted.<sup>150</sup> Accordingly, the victims are reluctant not only when it comes to denouncing the traffickers, but also when they request a reflection period. Indeed, the victims can apply for such period only through the

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<sup>145</sup> Olsson AJ, Prostitution policy in Sweden –targeting demand (The Swedish Institute 2019) available at [https://sharingsweden.se/app/uploads/2019/02/si\\_prostitution-in-sweden\\_a5\\_final\\_digi\\_.pdf](https://sharingsweden.se/app/uploads/2019/02/si_prostitution-in-sweden_a5_final_digi_.pdf) (last visited 13 May 2021) p 7

<sup>146</sup> European Commission, *Together Against Trafficking in Human Beings: Sweden* (2018) available at [https://ec.europa.eu/anti-trafficking/member-states/sweden\\_en#\\_ftn10](https://ec.europa.eu/anti-trafficking/member-states/sweden_en#_ftn10) (last visited 14 May 2021)

<sup>147</sup> Jakobsson N and Kotsadam A, 'The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation' (European Journal of Law and Economics 2013) p 99

<sup>148</sup> Olsson AJ, Prostitution policy in Sweden –targeting demand (The Swedish Institute 2019) available at [https://sharingsweden.se/app/uploads/2019/02/si\\_prostitution-in-sweden\\_a5\\_final\\_digi\\_.pdf](https://sharingsweden.se/app/uploads/2019/02/si_prostitution-in-sweden_a5_final_digi_.pdf) (last visited 13 May 2021) p 8

<sup>149</sup> Jakobsson N and Kotsadam A, 'The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation' (European Journal of Law and Economics 2013) p 100

<sup>150</sup> Rijken CRJJ and Koster D, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (Social Science Research Network 2008) 17

investigation officers. Therefore, they often refrain from filing a request, since they fear the interaction with the law enforcement.<sup>151</sup>

#### 2.3.2.4 Conclusions

The Swedish neo-abolitionist model combats sex-trafficking by addressing the demand for prostitution. As for the abolitionist policy regime, it condemns prostitution and its exploitative nature, and criminalises procuring. However, this model mainly focuses on the clients whose conduct is criminalised under the Criminal Code. Although the neo-abolitionism of Sweden has resulted in the decrease of prostitution, it has been noticed that the level of violence has increased among the victims. Further, the latter are not granted adequate protection under migration law. Indeed, the access to a residence permit is conditional to their collaboration with the law enforcement, and the request for a reflection period can be filed only through the investigation officers. This approach needs to be changed: Sweden should disconnect migration law and criminal law and ensure that the residence permit is granted regardless of the cooperation with the law enforcement. Finally, Sweden ensures the protection of the rights of the children by considering their best interest. However, the absence of reliable disaggregated data hinders the possibility of assessing the actual level of protection ensured.

#### 2.3.3 The Netherlands

The Netherlands is mainly a destination country for trafficking in human beings, but it is also a country of origin and transit. A report by CoMensha for the period 2013-2017 registered 958 victims in the country. Among them, 72 percent were female, and 45,9 percent were under the age of 23. About 58 percent of the presumed victims were trafficked for sexual purposes.<sup>152</sup> In the period 2017-2018, the Netherlands has been one of the five EU member states with the largest number of registered victims, amounting to 1624 victims, of which 1109 were women.<sup>153</sup> With regard to child victims, in the period 2015-2016, the country registered one of the highest proportions of child victims in the EU (28 percent).<sup>154</sup> However, such percentage has dramatically decreased in 2019, which recorded 8 percent of

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<sup>151</sup> Council of Europe, Group of Experts on Action against Trafficking in Human Beings, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Sweden* (2014) p 41

<sup>152</sup> European Commission, *Together Against Trafficking in Human Beings: Netherlands* (2019) available at [https://ec.europa.eu/anti-trafficking/member-states/netherlands\\_en](https://ec.europa.eu/anti-trafficking/member-states/netherlands_en) (last visited 14 May 2021)

<sup>153</sup> Directorate General for Migration and Home Affairs, *Data Collection on Trafficking in Human Beings in the EU* (2020) pp 10-18

<sup>154</sup> *ibid* at p 20

child victims.<sup>155</sup> Both the CRC Committee and the Committee on the Elimination of Discrimination against Women have shown concern on the number of women and girl –aged 15 to 17– victims of sex-trafficking in the country.<sup>156</sup>

### 2.3.3.1 Legal framework

In October 2000, the Dutch authorities abrogated the ban on brothels in the Netherlands. Voluntary prostitution was no longer prohibited and the brothels which complied with specific licensing conditions were declared legal.<sup>157</sup> In order to carry out their activities, the managers of the brothels need to obtain a permit from the local municipality. Such permit is granted when the brothels' manager proves to neither employ women without residence or work permit, nor minors or non-consenting adults.<sup>158</sup> Indeed, the Dutch system allows prostitution only if the sex-workers are not minors, the limit has been set at 18 years of age.<sup>159</sup> Child prostitution is criminalised –the penalty applies to the clients– regardless of the means of coercion. Thus, any person who intentionally induces a person, whom he knows or has reasonable cause to suspect is under the age of eighteen years, to engage in sexual acts in return of a compensation is liable to imprisonment.<sup>160</sup> Noteworthy, the Criminal Code does not punish the client for engaging in sexual acts with minors, unless he/she is below 12 years of age.<sup>161</sup> The Code rather criminalise the intent of the client to buy the consent of the child. According to the Dutch system, the exploitation of children in prostitution is always considered as trafficking in human beings.<sup>162</sup>

The Netherlands has adopted a regulationist policy regime, according to the belief that “one cannot regulate what is forbidden”.<sup>163</sup> According to the Dutch authorities, legalizing prostitution helps the state freeing the legal market from exploitation. Further, it allows the state to shift the resources to the fight

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<sup>155</sup> Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, *Human Trafficking Victims Monitoring Report 2015-2019 Management Summary* (2021) p 3

<sup>156</sup> ECPAT International, *Global Monitoring Report on the status of action against commercial sexual exploitation of children – Netherlands* (2011) available at <https://www.ecpat.org/wp-content/uploads/2016/04/NETHERLANDS%20nd.pdf> (last visited 14 May 2021) p 12

<sup>157</sup> Huisman W and Kleemans E, ‘The Challenges of Fighting Sex Trafficking in the Legalized Prostitution Market of the Netherlands’ (Springer Science 2014) available at <https://searchproquestcom.ezproxy.its.uu.se/docview/1509177543?pq-origsite=summon> (last visited 14 May 2021) p 215

<sup>158</sup> Rijken CRJJ and Koster D, ‘A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice’ (Social Science Research Network 2008) p 18

<sup>159</sup> Dutch Criminal Code (1881, amended 1994) Part XVIII, Section 273f

<sup>160</sup> *ibid* at Part XIV, Section 248b

<sup>161</sup> *ibid* at Part XIV, Sections 242-249

<sup>162</sup> ECPAT International, *Global Monitoring Report on the status of action against commercial sexual exploitation of children – Netherlands* (2011) available at <https://www.ecpat.org/wp-content/uploads/2016/04/NETHERLANDS%20nd.pdf> (last visited 14 May 2021) p 35

<sup>163</sup> Outshoorn J, *The Politics of Prostitution: Women's Movements, Democratic States and the Globalisation of Sex Commerce* (1st edn 2004) 167

against trafficking in human beings. The Dutch government believes that sex-trafficking can be reduced, since the prostitution market is occupied by consenting sex-workers of legal age. Indeed, the fear of losing the licence, ensures the cooperation of the brothels' owners in refraining from hiring minors and non-voluntary workers.<sup>164</sup> After the adoption of the regulationist model, fighting sex-trafficking has become the priority. The criminalisation of trafficking has been pursued through the provision in Section 273f of the Criminal Code which fully complies with the formulation offered by the Palermo Protocol. The Code also criminalises procuring in those cases in which the perpetrators benefit from the exploitation of the victims.<sup>165</sup>

Given that the Netherlands is mainly a destination country, it is necessary to analyse the protection to the victims granted by Migration Law. Chapter B9 of the Aliens Act Implementation Guidelines (the B9 regulation) provides a reflection period of at least three months, during which the victims can decide whether to cooperate with the investigation authorities. In case they opt for the cooperation, they are also granted a temporary residence permit that last for the entire duration of the criminal investigation or the proceedings. At the end of this period, the victims can request a residence permit on humanitarian grounds which is released when the proceedings are still ongoing or result in a conviction. It is also possible to obtain a permit till the judgement, which did not result in a conviction, becomes irrevocable. Besides, the residence permit is given in exceptional, individual cases, such as those relating to victims who risk facing reprisals by returning to their country of origin. Finally, these residence permits are granted to minors, even though they do not collaborate with the investigation authorities.<sup>166</sup>

### 2.3.3.2 Institutional framework

The National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children is considered one of the fundamental institutions of the Dutch system. His mandate has been extended in 2012 in order to address the sexual violence against children. His tasks include researching on the development of trafficking and sexual violence, assisting the government in the process of designing the response policies and examining their impact, reporting on his activities to the Minister of Justice.<sup>167</sup> The traffickers are prosecuted through the Public Prosecution Service which avails itself of the collaboration of about 20 prosecutors specialised in THB. Further, the Expertise Centre on Human Trafficking and

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<sup>164</sup> Huisman W and Kleemans E, 'The Challenges of Fighting Sex Trafficking in the Legalized Prostitution Market of the Netherlands' (Springer Science 2014) available at <https://searchproquestcom.ezproxy.its.uu.se/docview/1509177543?pq-origsite=summon> (last visited 14 May 2021) pp 217-221

<sup>165</sup> Dutch Criminal Code (1881, amended 1994) Part XVIII, Section 273f

<sup>166</sup> Lower House of the States General, Aliens Act Implementation Guidelines 2000, Chapter B9

<sup>167</sup> Aronowitz A and others, *The Palgrave International Handbook of Human Trafficking* (1st edn, 2020) p 1321

People Smuggling (EMM) is an agency, co-run by the national police, which gathers information on suspected trafficking situations in order to eventually launch new investigations. Finally, the Dutch judicial system includes judges specialised in THB in order to deal properly with the cases of trafficking.<sup>168</sup>

In 2004, the Dutch government issued the National Action Plan (Ordering bescherming van de prostitutiesector) which required the municipalities to define legal standards for organized prostitution, and to supervise both the legal and illegal sectors of the sex industry.<sup>169</sup> However, since the municipalities predominantly focused on the legal sector, the Committee on the Right of the Child found such plan to be inadequate. Therefore, in 2006, the government issued the Addendum to the National Action Plan which focuses on the identification of the victims, their protection and the repatriation procedures. In addition, the Addendum establishes the Centre on Youth Prostitution.<sup>170</sup> The latter focuses on the rehabilitation of child-victims of trafficking and on the prosecution of the offenders.<sup>171</sup> Other shelter services are offered to adult victims, namely the Categorical Accommodation and Assistance for Victims of Trafficking in Human Beings (COSM) and the Central Agency for the Reception of Asylum Seekers (COA).<sup>172</sup>

### 2.3.3.3 Analysis

The Dutch regulationism has been conceived in order to define specific rules for the regulated prostitution sector and invest the resources in fighting trafficking in human beings. It was believed that the legal sector would have been efficiently monitored, consequently the investigation authorities could have been focused on the prostitution outside the regulated sector.<sup>173</sup> However, most of the resources have been allocated in the legal sector, where the officers assess whether the brothels respect the requirements set in the Criminal Code.<sup>174</sup> Further, the investigation authorities are often lacking

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<sup>168</sup> European Commission, Together Against Trafficking in Human Beings: Netherlands (2019) available at [https://ec.europa.eu/anti-trafficking/member-states/netherlands\\_en](https://ec.europa.eu/anti-trafficking/member-states/netherlands_en) (last visited 14 May 2021)

<sup>169</sup> Gibly J, 'Safe Sex for Sale: Is Legalizing Sex Work the Answer to Sex Trafficking in the Netherlands?' (International Journal of Undergraduate Research and Creative Activities, 2012) p 4

<sup>170</sup> ECPAT International, *Global Monitoring Report on the status of action against commercial sexual exploitation of children – Netherlands* (2011) available at <https://www.ecpat.org/wp-content/uploads/2016/04/NETHERLANDS%202nd.pdf> (last visited 14 May 2021) p 18

<sup>171</sup> *ibid* at p 23

<sup>172</sup> European Commission, Together Against Trafficking in Human Beings: Netherlands (2019) available at [https://ec.europa.eu/anti-trafficking/member-states/netherlands\\_en](https://ec.europa.eu/anti-trafficking/member-states/netherlands_en) (last visited 14 May 2021)

<sup>173</sup> Huisman W and Kleemans E, 'The Challenges of Fighting Sex Trafficking in the Legalized Prostitution Market of the Netherlands' (Springer Science 2014) available at <https://searchproquestcom.ezproxy.its.uu.se/docview/1509177543?pq-origsite=summon> (last visited 14 May 2021) p 221

<sup>174</sup> Rijken CRJJ and Koster D, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (Social Science Research Network 2008) p 18

experience on THB. Although the Task Force to Combat Human Trafficking has issued toolkit for helping the various agencies in the investigation process and exchange of relevant data, some cities and municipalities are still not following these indications.<sup>175</sup>

As a matter of fact, the feeling that the legalised sector is more controlled pushed the traffickers to the illegal sector.<sup>176</sup> As stated by the National Rapporteur, the reported victims of sexual exploitation are increasingly found in the less visible sectors, such as home prostitution and escort prostitution. In the period 2017-2019, more than 89 percent of victims were reported from these sectors.<sup>177</sup>

Noticeably, the regulated prostitution sector is not immune from exploitation. During the period 2006-2012, twelve criminal investigations –predominantly relating pimps who had intimate relationships with the victims– exposed human trafficking features behind the legalized prostitution sector in the Red-Light District.<sup>178</sup> The “Sneep case” represents another example of how family relations can be functional to manipulate the victims and exploit them. In such case, a group of German pimps travelled with their female relatives to Amsterdam, where they established their prostitution business based on the sexual exploitation of the latter.<sup>179</sup> The regulation of the prostitution sector has mainly concerned business owners, who have been requested to comply with stricter rules. Nevertheless, law makers did not consider the exploitation exerted by the pimps.<sup>180</sup>

The last consideration relates to the provision of the temporary residence permit. As provided by the B9 regulation, the victims can obtain such permits only if they cooperate with the investigation authorities. However, this kind of requirement once again hinders the victims from seeking assistance, because they are afraid that such request would result either in the repatriation or in the criminal proceeding.

#### 2.3.3.4 Conclusions

The Dutch regulationist model provides the legalisation of the prostitution market, in order to invest all the resources in preventing and combating trafficking in human beings. This model still criminalises

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<sup>175</sup> Huisman W and Kleemans E, ‘The Challenges of Fighting Sex Trafficking in the Legalized Prostitution Market of the Netherlands’ (Springer Science 2014) available at <https://searchproquestcom.ezproxy.its.uu.se/docview/1509177543?pq-origsite=summon> (last visited 14 May 2021) p 221

<sup>176</sup> *ibid* at 222

<sup>177</sup> Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, *Human Trafficking Victims Monitoring Report 2015-2019 Management Summary* (2021) p 3

<sup>178</sup> Verhoeven M and others, ‘Relationships between suspects and victims of sex trafficking. Exploitation and domestic violence parallels in Dutch trafficking cases’ (European Journal on Criminal Policy and Research, 2014)

<sup>179</sup> Huisman W and Kleemans E, ‘The Challenges of Fighting Sex Trafficking in the Legalized Prostitution Market of the Netherlands’ (Springer Science 2014) available at <https://searchproquestcom.ezproxy.its.uu.se/docview/1509177543?pq-origsite=summon> (last visited 14 May 2021) p 218

<sup>180</sup> *ibid* at p 219

child prostitution and prevents it through the establishment of an age limit for working in brothels. However, the practice shows that sex-trafficking of women and girls still persists in the country and that trafficking inflows are some of the highest among the EU countries. This can be partially explained with the shift of trafficking to the illegal sector, where there is less control. However, it must be noticed that features of trafficking can be also found in the legal sector, such as demonstrated by the “Sneep case”.

## VICTIM-CENTERED APPROACH TO SEX-TRAFFICKING

As highlighted in the previous chapters, states should follow a human rights-based approach to trafficking. By focusing on the human rights implications of THB, such approach also requires states to develop victim-centered responses. However, the states practice shows that the governments usually opt for criminal justice models which pursue the conviction of the perpetrators and grant assistance to the victims only in the view of their collaboration to the criminal proceedings. Therefore, the following chapter analyses the shortcomings of the criminal justice model. Then, it describes the features of the victim-centered approach, by also considering the proposals of the survivors. Indeed, the latter provide clear guidance on how to develop victim-centered policies. Finally, the chapter includes a qualitative analysis of the case studies of Italy, Sweden and the Netherlands in the view of evaluating their compliance with the requirement of a victim-centered approach.

### 3.1 LIMITS OF THE CRIMINAL JUSTICE MODEL

Trafficking in human beings is mostly deemed as a crime under either criminal law or migration law. Indeed, states often refrain from analysing the whole spectrum of human rights violations occurring in the trafficking cycle and the consequences of those on the victims, they rather focus on the criminalisation of the perpetrators. Instead of pondering the needs of the victims, states only consider the victims as instrumental to the law enforcement purposes.<sup>181</sup> Further, the criminal justice approach focuses on trafficking and trafficking-related law enforcement activities, such as supervising commercial sexual organizations, monitoring illegal border crossing, and pursuing investigations against the perpetrators.<sup>182</sup> Therefore, the practice of states does not comply with the standards set by the UN General Assembly and

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<sup>181</sup> Rijken CRJJ and Koster D, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (Social Science Research Network 2008) p 1

<sup>182</sup> Centre of Gender Excellence (GEXcel), *GEXcel Work in Progress Report Volume XIII: Proceedings GEXcel Theme 7: Getting Rid of Violence TRANSdisciplinary, TRANSnational and TRANSformative Feminist Dialogues on Embodiment, Emotions and Ethics* (2012) p 157



the Human Rights Council which advocate for a human rights-based approach entailing a victim-centered perspective.<sup>183</sup> A similar approach is pursued by the OHCHR which affirms that the assistance and protection of the victims should not be dependent on their willingness to provide evidence during the criminal proceedings.<sup>184</sup> States must ensure the respect of the victims' rights, dignity and physical or psychological well-being regardless of their participation to the proceedings.<sup>185</sup> In this view, the Council of Europe affirmed that the protection of the victims and the respect of their rights must be the paramount objectives of the action against THB.<sup>186</sup> This provision does not exclude the necessity of repressive measures, it simply considers them part of a wider approach –the human rights-based approach– which also ensures protection to the victims.

Besides, it is important to understand why the victims are considered instrumental to the prosecution. The complex nature of the crime of THB makes it difficult for the investigation authorities to collect hard evidence. Thus, the testimonies of the victims are often the easiest available tool for ensuring the success of the prosecution.<sup>187</sup> However, the witnesses are usually in a condition of vulnerability due to their dependency on the traffickers. Most victims in Europe hold the status of illegal immigrant, they are deprived of their documents by the traffickers, and they fear the repatriation. Further, in most of the cases, the traffickers know the relatives of the victims who are hence exposed to potential reprisals.

According to the criminal justice model, victims deserve assistance and protection only as long as they are useful for prosecution.<sup>188</sup> At the European level, an example of such approach is noticed in the Directive on the Residence Permit Issued to Third-Country Nationals who are Victims of THB, who Cooperate with the Competent Authorities. This directive provides a residence permit in order to grant protection to the victims of trafficking. However, such assistance is offered only to those victims who decide to cooperate with the law enforcement.<sup>189</sup> By doing so, the Council of the EU creates a huge gap of protection where the victims of THB, who illegally entered European Union, are not provided with assistance. In most of the EU countries, the expulsion, which is not pondered in the view of the victims' safety and well-being, is triggered with the end of the reflection period unless the victims decide to

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<sup>183</sup> Office of the High Commissioner for Human Rights (OHCHR), *Human Rights and Human Trafficking* (2014) available at [https://www.ohchr.org/documents/publications/fs36\\_en.pdf](https://www.ohchr.org/documents/publications/fs36_en.pdf) (last visited 13 March 2021) pp 7-8

<sup>184</sup> OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking (2003) E/2002/68/Add.1, guideline 6, point 1

<sup>185</sup> *ibid* guideline 6, point 4

<sup>186</sup> Council of Europe, Convention on Action against Trafficking in Human Beings (2005) CETS 197, Preamble

<sup>187</sup> Rijken CRJJ and Koster D, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (Social Science Research Network 2008) p 9

<sup>188</sup> Winterdyk J and others, *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (1st edn, 2012) p 164

<sup>189</sup> Council of the European Union, Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (2004) 2004/81/EC

cooperate with the competent authorities. Although trafficked people can request a residence permit on humanitarian grounds, these permits are often denied by the state authorities.<sup>190</sup>

The criminal justice model has also encountered criticism from the feminists involved in contemporary anti-trafficking research and advocacy. According to them, such model has failed to comprehensively protect trafficked persons and ensure their enjoyment of social and economic rights outside the scope of criminal investigations.<sup>191</sup> In this vein, the OSCE Office of the Special Representative and Co-ordinator for Combating THB has recently listed the shortcomings of the criminal justice model. Trafficked persons are often subjected to double-victimisation since they are asked to prove their victimhood by describing several times the details of the violence they have been exposed to.<sup>192</sup> Thus, they are never allowed to move on with their life and heal from the suffering until the conviction is achieved. They also need to prove themselves innocent for other crimes, mainly connected to migration law, labour law, and criminal law. Further, they often lack legal representation and adequate compensation. This can be explained by different factors. First, the prosecutors tend to consider the cases of trafficking in human beings as prostitution-related crimes because those crimes are easier to prove. Therefore, this results in minor sentences which do not fully address the gravity of the phenomenon. Further, the compensation procedures present in most of the country have rarely proven themselves adequate in ensuring the redress of the victims.<sup>193</sup> Thus, states hardly comply with the Palermo Protocol with regard to the provision of a compensation mechanism.<sup>194</sup> Finally, the length of the investigations and the proceedings further harm the victims by hindering them from overcoming the stigma attached to sex-trafficking.

### 3.2 VICTIM-CENTERED APPROACH AND SURVIVOR-DRIVEN POLICY SUGGESTIONS

The Organisation for Security and Co-operation in Europe (OSCE) has recently claimed the importance of understanding the concept of vulnerability in the context of trafficking in human beings.<sup>195</sup>

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<sup>190</sup> Rijken CRJJ and Koster D, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (Social Science Research Network 2008) pp 11-13

<sup>191</sup> Centre of Gender Excellence (GEXcel), *GEXcel Work in Progress Report Volume XIII: Proceedings GEXcel Theme 7: Getting Rid of Violence TRANSdisciplinary, TRANSnational and TRANSformative Feminist Dialogues on Embodiment, Emotions and Ethics* (2012) p 156

<sup>192</sup> OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Ending Impunity Delivering Justice through Prosecuting Trafficking in Human Beings* (2020) available at <https://www.osce.org/cthb/470955> (last visited 9 June 2021) pp 15-23

<sup>193</sup> *ibid*

<sup>194</sup> UNGA, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) Res. 55/25, art 3(a)

<sup>195</sup> OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Ending Impunity Delivering Justice through Prosecuting Trafficking in Human Beings* (2020) available at <https://www.osce.org/cthb/470955> (last visited 9 June 2021) p 18

By analysing the root causes of such vulnerabilities, states would be able to prevent trafficking, elaborate more efficient response policies and avoid causing further harms to the victims. Given the nature of victims as vulnerable actors in the trafficking cycle, the law enforcement should pursue a different approach to investigation. Accordingly, the investigation authorities should refrain from relying solely on the victims, they should rather conduct proactive investigations, according to which the evidence is not dependent on any report from the survivors.<sup>196</sup> Instead of resorting to victim testimonies, the investigation authorities should conduct periodic risk assessments for areas at higher risks, such as in the hospitality, tourism, adult entertainment in order to evaluate their exposure to THB. Such evaluation would be also useful in detecting crimes such as tax evasions and money laundering. The law enforcement should also run covert operations which would facilitate the collection of hard evidence without involving the victims in the investigations.<sup>197</sup> Similar results can be achieved through the use of technology. Further, states should create specialised units and ensure their cooperation with the prosecutors. Besides, when the involvement of the victims cannot be avoided, prosecutors and judges should consider the personal circumstances and vulnerabilities of each survivor and ensure that victim-friendly procedures –such as remote video testimony and legal and psychological support– have been implemented. Finally, these procedures should involve survivors and language mediators, who can create a bond with the victims who are hence led to trust the competent authorities.<sup>198</sup> Therefore, states should pursue victimless prosecution since it hinders the re-victimisation of the survivors even though it often results in more lenient sentences because judges are not directly confronted with the suffering of the victims.

A similar victim-centered approach has been pursued by organisations of survivors such as Survivor Alliance, which have formulated policy suggestions addressing the systemic issues encountered by the victims of sex-trafficking and their actual needs. While highlighting the issues that make the survivors vulnerable to exploitation, the organisation also restates that the competent authorities should refrain from condemning them to a permanent condition of victimhood.<sup>199</sup> The main needs listed by Survivor Alliance –namely housing, legal assistance, employment– are also basic human rights as protected by the Palermo Protocol.<sup>200</sup> In the view of addressing these problems, the organisation has recommended the states to establish public housing preference for survivors, in order to avoid reliance on the religious

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<sup>196</sup> *ibid* at p 23

<sup>197</sup> *ibid* at pp 18-19

<sup>198</sup> *ibid* at pp 18-21

<sup>199</sup> Julia Owen, 'Centering Survivors in the Anti-Trafficking Movement: Survivor-Driven Policy Suggestions' (Laboratory to Combat Human Trafficking 2021) available at <https://combathumantrafficking.org/2021/02/centering-survivors/> (last visited 11 June 2021)

<sup>200</sup> UNGA, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) Res. 55/25, art 6(3a,b,d)

institutions. Further, states should ensure financial assistance to the victims and developing educational and training programmes in the view of empowering the survivors and offering them new job opportunities. These trainings should be non-judgemental and should be implemented even in case of recidivism of the survivors. Further, survivors should be involved in the decision-making process.<sup>201</sup> In this vein, also other organisations, such as the OSCE, have recommended the states to establish survivors' committees so that the victims can be involved in the drafting process of the anti-trafficking strategies in the view of ensuring that all their needs are taken into account. In order to consider the specific needs of the victims, states are recommended to adopt a gender sensitive approach. With regards to child-victims, it must be noticed that the latter hold specific needs which can only be addressed by the provision of specialised age-sensitive services. Finally, states are recommended to ensure cooperation with international institutions and law enforcement agencies in order to target the entire trafficking chain.<sup>202</sup>

In conclusion, both the OSCE and the survivors' organisations advocate for a victim-centered approach, according to which priority should be given to the vulnerabilities and the needs of the victims. Although it is not possible to prove that such victims' organisations are representative of all survivors, it is noteworthy that their recommendations fully comply with the provisions of the Palermo Protocol.

### 3.3 SHORTCOMINGS OF THE APPROACHES ADOPTED BY THE ANALYSED COUNTRIES

Although the criminal justice system and the victim-centered social justice system pursue different objectives and hold divergent programmatic mandates, they should not be deemed as oppositional schemes. It is true that criminal justice system focuses on the conviction of the perpetrators while the social justice system directs its attention to the victims. While the supporters of a criminal justice model advocate for stricter legislation on migration law and criminal law, the supporters of a social justice model are opposed to stricter regulations, given that they often result in less protection for the victims. However, the states practice shows that state actors and anti-trafficking NGOs more often cooperate in the view of combating sex-trafficking.<sup>203</sup> Therefore, it is important to analyse the contribute of both models in the action against THB and their implementation within the context of the sample countries.

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<sup>201</sup> Owen J, 'Centering Survivors in the Anti-Trafficking Movement: Survivor-Driven Policy Suggestions' (Laboratory to Combat Human Trafficking 2021) available at <https://combathumantrafficking.org/2021/02/centering-survivors/> (last visited 11 June 2021)

<sup>202</sup> OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Ending Impunity Delivering Justice through Prosecuting Trafficking in Human Beings* (2020) available at <https://www.osce.org/cthb/470955> (last visited 9 June 2021) pp 24-30

<sup>203</sup> Centre of Gender Excellence (GEXcel), *GEXcel Work in Progress Report Volume XIII: Proceedings GEXcel Theme 7: Getting Rid of Violence TRANSdisciplinary, TRANSnational and TRANSformative Feminist Dialogues on Embodiment, Emotions and Ethics* (2012) p 158

### 3.3.1 Italy

The case of the “picture of shame” certainly represents an emblematic episode within the context of Italy. In August 2008, one of the most famous Italian newspaper published a picture of a Nigerian trafficked woman, semi naked, lying on the floor of a police cell. This picture had been taken during the late-night anti-street prostitution raids ordered by the mayor of Parma. As a consequence of the publication, several critiques were moved to the local administration and the police forces due their alleged abusive conduct towards the woman. The mayor of the city tried to defend his decisions through a salvationist approach which is grounded in the idea of a state-saviour that give back to the victims their lost dignity.<sup>204</sup> Accordingly, he affirmed the irreconcilability of prostitution with the empowerment of women. Further, he affirmed that the woman had behaved hysterically, beaten herself and the officers, and thrown herself on the floor.<sup>205</sup> Then, he tried to justify the uncooperative behaviour of the woman with the fear of the pimp reprisals or of the rituals connected to her culture.<sup>206</sup> Thus, by only highlighting the cultural fears supposedly associated with Nigerians, the mayor neglected other important factors which hinder trafficked women from denouncing their abusers. As proved by some studies and reports based on interviews with migrant prostitutes, the police officers are usually perceived as dangerous since the victims have often experienced abuse by the law enforcement.<sup>207</sup>

Further, even if the woman was lying on the floor half naked, the discussion did not concern whether it was right to publish the picture or not. This can be explained by the sexualisation of women, especially of black women, which are shown as bodies, primarily as objects of erotic desire, not worth of empowerment.<sup>208</sup> Black women bodies in Italy are automatically connected to prostitution-related crimes, hyper-sexuality and anti-social behaviours.<sup>209</sup> Although the state adopts a salvationist approach, not all the women are deemed to deserve such salvation. Especially black women are depicted as un-rescuable due to their culture, hence this racialised assumption gravely impact the assistance model for

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<sup>204</sup> Crowhurst I and Bertone C, ‘Caught in the Victim/Criminal Paradigm: Female Migrant Prostitution in Contemporary Italy’ (Journal of the Association for the study of Modern Italy 2012) pp 499-500

<sup>205</sup> ‘Prostituta fotografata in cella. Schifani chiede chiarimenti’ (La Repubblica 2008) available at <http://www.repubblica.it/2008/08/sezioni/cronaca/prostitutareazioni/prostitutareazioni/prostitutareazioni.html> (last visited 11 June 2021)

<sup>206</sup> Crowhurst I and Bertone C, ‘Caught in the Victim/Criminal Paradigm: Female Migrant Prostitution in Contemporary Italy’ (Journal of the Association for the study of Modern Italy 2012) p 500

<sup>207</sup> Massari M, ‘The other and her body: Migrant prostitution, gender relations and ethnicity’ (Cahiers de l’Urmis 2009) available at <http://urmis.revues.org/index787.html> (last visited 13 June 2021)

<sup>208</sup> Carter DM, *States of grace: Senegalese in Italy and the new European immigration* (1st edn, 1997) p 186

<sup>209</sup> Angel-Ajani A, ‘A question of dangerous races?’ (Punishment & Society 2003)

the victims of sex-trafficking.<sup>210</sup> Therefore, the picture of shame raises polemics not because of the violation of the right to privacy and dignity of the woman, who is portrayed naked without her consent. The picture is scandalous because she is recognised either as a victim or as a criminal beyond rescue. The woman is constrained into the victim/criminal binary, and she is worth the attention only as victim or criminal, not as ‘just’ a woman.<sup>211</sup>

The concept of “ideal victim” is relevant for this analysis. Accordingly, only those women whose characteristics comply with traditional sexual and gender ideologies deserve protection and assistance from the state.<sup>212</sup> The victim should be a young, defenceless, preferably white woman who was forced into prostitution.<sup>213</sup> The civil society more easily sympathises with innocent victims, rather than with illegal migrants or prostitutes since the latter are considered responsible for their own situation. Thus, only the idea of a passive victim can strengthen the narrative of the heroic Western man who rescues trafficked women and restore their lost dignity.<sup>214</sup> However, the majority of the victims are neither white or Western women, they rather come from developing countries or from the former Eastern bloc.<sup>215</sup> Some of them are forced into prostitution, some others accept sex work, but are later forced to perform it under exploitative conditions. However, the status of victim of sex-trafficking should not be denied to them only because they have accepted to engage into prostitution.<sup>216</sup>

Furthermore, the Committee on the Elimination of Discrimination against Women has claimed that Italy lacks adequate mechanisms to identify and refer victims of trafficking in need of protection. It often considers them either as offenders or irregular migrants.<sup>217</sup> Therefore, the constraint of a victim/criminal binary and the stereotyped concept of “ideal victim” negatively impact the assistance of victims. This results in the failure to ensure a victim-centered approach because the Italian authorities rely on stereotyped models, rather than entertaining a dialogue with the survivors in view of addressing their actual needs.

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<sup>210</sup> Crowhurst I and Bertone C, ‘Caught in the Victim/Criminal Paradigm: Female Migrant Prostitution in Contemporary Italy’ (Journal of the Association for the study of Modern Italy 2012) pp 500-501

<sup>211</sup> Butler J, *Frames of war* (1st edn, 2009)

<sup>212</sup> Baker CN, ‘Moving Beyond “Slaves, Sinners, and Saviors”’: An Intersectional Feminist Analysis of US Sex-Trafficking Discourses, Law and Policy’ (Journal of Feminist Scholarship 2018)

<sup>213</sup> Doezema J, ‘Loose women or lost women: The re-emergence of the myth of “white slavery” in contemporary discourses of “trafficking in women’ (Gender Issues 2000)

<sup>214</sup> Baker CN, ‘An intersectional analysis of sex trafficking films’ (Meridians 2014)

<sup>215</sup> Doezema J, ‘Loose women or lost women: The re-emergence of the myth of “white slavery” in contemporary discourses of “trafficking in women’ (Gender Issues 2000) p 31

<sup>216</sup> Rodríguez-López S, ‘(De)Constructing Stereotypes: Media Representations, Social Perceptions, and Legal Responses to Human Trafficking’ (Journal of Human Trafficking 2018) p 66

<sup>217</sup> Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding observations on the seventh periodic report of Italy* (2017) para 29

### 3.3.2 Sweden

The concept of the “ideal victim” is present also in other EU countries, among them Sweden applies it in a way which results in divergent levels of protection for victims who have been trafficked within the borders and victims who are third-country nationals. Given that the majority of the prostitutes in the region are migrants –70 to 80 per cent– it is essential to analyse how migration law intersect with criminal law.<sup>218</sup> Indeed, a double standard can be depicted in the country: the social welfare policies mainly affect nationals by offering them mental support and assistance in the view of exiting the prostitution sector. The foreigners instead are targeted with repressive measures such as deportation and eviction.<sup>219</sup> The adoption of this double standard is grounded in the West’s anxiety over the post-Cold War era relating migration and transnational criminal organisations. The action against human trafficking was instrumentalised to justify the tightening of immigration policies and the introduction of repressive measures.<sup>220</sup>

It has been noticed that Sweden implements the migration policies in a discriminatory way, especially towards Nigerians. The latter fear the law enforcement that often resorts to violence towards them. Nigerian women are also checked more often and tend to be deported more easily.<sup>221</sup> Further, it is very hard for migrants to access to the formal labour market since Sweden requires third-country nationals to hold a work permit. However, the latter can be requested only by the employers who are often not willing to engage in such bureaucratic process.<sup>222</sup> Further, Sweden does not offer adequate protection to the victims of sex-trafficking which are third-country nationals. Indeed, while providing a reflection period, access to welfare services, and a temporary residence permit during the criminal procedure, it does not allow the victims to request a permanent residence permit on the ground of their status of victims of THB. After the six months of temporary permit, they have to leave the country.<sup>223</sup>

The inability of Sweden to target the right actors –pimps and traffickers– can be noticed with regard to the eviction practiced by the competent authorities. Such actions gravely affect the life of the victims, rather than those of the perpetrators. The police check the papers of the prostitutes in the streets. Then, they contact the landlords claiming that if they do not evict the sex workers from their apartments, they

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<sup>218</sup> European Network for HIV/STI Prevention and Health Promotion among Migrant Sex Workers (TAMPEP) *Sex work in Europe: a mapping of the prostitution scene in 25 European countries* (2009)

<sup>219</sup> Vuolajärvi N, ‘Governing in the Name of Caring—the Nordic Model of Prostitution and Its Punitive Consequences for Migrants Who Sell Sex’ (Sexuality Research and Social Policy 2019) p 152

<sup>220</sup> O’Connell Davidson J, *Modern slavery: the margins of freedom* (1st edn, 2015) p 3

<sup>221</sup> Vuolajärvi N, ‘Governing in the Name of Caring—the Nordic Model of Prostitution and Its Punitive Consequences for Migrants Who Sell Sex’ (Sexuality Research and Social Policy 2019) p 159

<sup>222</sup> *ibid* at p 160

<sup>223</sup> Mörner N, *Stepping up the work against human trafficking. Presentation at the Nordic NGO-meeting organized by the Swedish platform civil society against human trafficking* (2018)

would be accused of pimping. Indeed, according to the criminal law, landlords and hotel owners providing accommodation to sex-workers can be accused of pimping. These repressive measures result in the shift to street prostitution and the increase of the level of violence. Indeed, since the victims are afraid to lose their accommodation, they hardly denounce violence at the hands of the clients.<sup>224</sup>

Therefore, the failures of the Swedish system can be summarised in two points. First, by considering the trafficking in human beings as only a migratory problem, the authorities fail to recognise the status of victim and only focus on that of illegal immigrant.<sup>225</sup> Further, Sweden adopts an approach which keeps the victims of THB in the condition of recipients of help rather than bearers of equal rights.<sup>226</sup> Therefore, by giving priority to the criminal justice model, the Swedish authorities fail to ensure a victim-centered approach.

### 3.3.3 The Netherlands

As for Sweden, also the Netherlands has adopted a criminal justice approach to sex-trafficking.<sup>227</sup> Accordingly, the provisions under criminal law do not aim to improve the welfare conditions of the sex workers, they rather focus on regulating the prostitution sector, protecting minors from sexual abuse, and preventing forced prostitution.<sup>228</sup> A great example of such provisions is represented by the B9 regulations which entail the possibility, for the victims of THB, to request a temporary residence permit. However, given that such permit is released only if the victims decide to cooperate in the proceedings, it is evident that the Dutch authorities prioritise the success of the proceedings over the interest of the victims.<sup>229</sup> Such approach is in contrast with the orientation of the High Commissioner on Human Rights which clearly states that the assistance and protection of the victims of THB should not be dependent on their cooperation with the competent authorities.<sup>230</sup>

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<sup>224</sup> Vuolajärvi N, 'Governing in the Name of Caring—the Nordic Model of Prostitution and Its Punitive Consequences for Migrants Who Sell Sex' (Sexuality Research and Social Policy 2019) pp 171-172

<sup>225</sup> Rodríguez-López S, '(De)Constructing Stereotypes: Media Representations, Social Perceptions, and Legal Responses to Human Trafficking' (Journal of Human Trafficking 2018) p 68

<sup>226</sup> Vuolajärvi N, 'Governing in the Name of Caring—the Nordic Model of Prostitution and Its Punitive Consequences for Migrants Who Sell Sex' (Sexuality Research and Social Policy 2019) p 173

<sup>227</sup> Centre of Gender Excellence (GEXcel), GEXcel Work in Progress Report Volume XIII: Proceedings GEXcel Theme 7: Getting Rid of Violence TRANSdisciplinary, TRANSnational and TRANSformative Feminist Dialogues on Embodiment, Emotions and Ethics (2012) p 159

<sup>228</sup> Gibly J, 'Safe Sex for Sale: Is Legalizing Sex Work the Answer to Sex Trafficking in the Netherlands?' (International Journal of Undergraduate Research and Creative Activities, 2012) p 3

<sup>229</sup> Rijken CRJJ and Koster D, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (Social Science Research Network 2008) p 10

<sup>230</sup> OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking (2003) E/2002/68/Add.1, guideline 6, points 1,4



The only available instrument to extend the stay in the country is represented by the residence permit on humanitarian grounds or on other grounds, namely asylum or stay with partner. However, the burden of the proof is put on the victims who need to demonstrate the existence of the risk for reprisals. The existence of such risk is often very difficult to prove given that the violent actions could be directed against the relatives in the home country of the victim. Therefore, the Dutch Minister for Immigration and Integration entertained relations with several organisations which are meant to assist the victims in proving this evidence.<sup>231</sup> The analysis of the practice of the NGO in the country shows that these organisations usually align with the criminal justice approach of the law enforcement.<sup>232</sup> Indeed, the victims not only are required to cooperate with police forces, but they should also collaborate with the state funded NGOs, which function as proxy enforcers of anti-trafficking policies, as formulated by the government.<sup>233</sup> Therefore, the NGOs are considered “gatekeepers”, responsible of the implementation of the state-sponsored criminal justice approach.<sup>234</sup>

It is evident that the Dutch authorities often misconceive trafficking as a migration problem and use it for tightening the repressive measures under migration law. As highlighted by different studies, the police often hold raids on houses occupied by illegal migrants and in the streetwalkers’ district in the view of expelling those who do not have a valid residence permit from the Dutch territory. It is high probable that among those expelled there would be victims of THB. Further, due to the expulsion, it would be more difficult to collect hard evidence of the crime.<sup>235</sup> Therefore, considering THB as only a migration problem, hinders the Dutch authorities from identifying the victims properly and from addressing their personal needs.

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<sup>231</sup> Rijken CRJJ and Koster D, ‘A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice’ (Social Science Research Network 2008) p 13

<sup>232</sup> Musto JL, ‘Carceral protectionism and multi-professional anti-trafficking human rights work in the Netherland’ (International Feminist Journal of Politics 2010) pp 381-400

<sup>233</sup> Centre of Gender Excellence (GEXcel), GEXcel Work in Progress Report Volume XIII: Proceedings GEXcel Theme 7: Getting Rid of Violence TRANSdisciplinary, TRANSnational and TRANSformative Feminist Dialogues on Embodiment, Emotions and Ethics (2012) p 159

<sup>234</sup> Musto JL, ‘The NGO-ification of the anti-trafficking movement in the U.S.: A case study of CAST’ (Wagadu: A Journal of Transnational Women’s and Gender Studies 2008) pp 6-20

<sup>235</sup> Rijken CRJJ and Koster D, ‘A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice’ (Social Science Research Network 2008) p 11

## CONCLUSIONS

A human right-based approach to trafficking has been advocated by the UN General Assembly, the HRC, other special procedures and treaty bodies. As described by the OHCHR in the Recommended Principles and Guidelines on Human Rights and Human Trafficking, such approach is built on four pillars: the primacy of human rights and victim's dignity, the need to address the root causes of THB, the extension of protection and assistance to all victims, the punishment of traffickers and redress of victims. This approach is multidisciplinary hence it requires states to consider all the elements of THB, hence it involves international criminal law, migration law and human rights law. Further, this approach highlights some of the main shortcomings of the anti-trafficking policies analysed. Indeed, it moves beyond the data on traffic inflows, and focuses on the evaluation of the welfare conditions of the victims of sex-trafficking.

As seen in the previous chapters, prostitution and sex-trafficking are deeply connected since most of the women and girls trafficked for the purpose of sexual exploitation are introduced into the prostitution market. Further, the demand for sexual services influences the traffic inflows. Indeed, most of the prostitution policy regimes aim to reduce the demand. The abolitionist Italian model planned to do so by criminalising all the parallel activities to prostitution, namely pimping, pandering and procuring. The Swedish neo-abolitionist model only criminalised the clients in view of reducing the demand. Finally, the Dutch regulationist model criminalised only forced prostitution, and incremented the controls in the sex market in order to ensure that its inaccessibility to trafficked women.

As highlighted by the Dutch National Rapporteur on THB, the efficiency of the different prostitution policy regimes cannot be assessed on the basis of the available data. Indeed, these data are often misleading since countries which invest more in the action against trafficking often result in greater traffic inflows, while countries which do not invest in the fight against THB score better in the rankings. Further, it is almost impossible to rely on data that depict the real entity of the phenomenon, given that most victims refrain from denouncing their perpetrators. The comparison between the different regimes is often grounded on the “visible trafficking”, while the “invisible trafficking” should be also taken into account.<sup>236</sup> Even though it is impossible to determine which model better prevents THB, it is possible to

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<sup>236</sup> Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, *Trafficking in Human Beings. Ninth report of the Dutch National Rapporteur*. (2013) p 87

assess whether any of the analysed prostitution policy regimes follows a human rights-based and victim-centered approach to trafficking. However, the analysis of the case studies of Italy, Sweden and the Netherlands shows that all the countries fail to fully adopt such approach.

At first glance, Italy seems to adopt a human rights-based approach since it provides residence permits to the victims regardless of their collaboration in the proceedings. However, the catholic Salvationism of the rescuing organisations and the discriminatory implementation of the assistance programmes seriously compromise the efficiency of the Italian abolitionist model. Such regime follows a victim-centered approach, but the focus is put only on certain categories of “ideal victims” who are helpless, white, western women. Further, Italy fails to grant protection to minors due to the difficulties encountered during the identification phase.

The lack of attention for the intersectionality of the victims can be depicted also in the Swedish model. Sweden fails to adopt a victim-centered approach since it treats migrant women –especially Nigerians– in a different way from nationals. The adoption of such double standard results in the gap of protection of certain categories of trafficked women, who are considered illegal migrants and are expelled from the Swedish territory. Whereas these women are most probably victims of sex-trafficking. Furthermore, Sweden grants residence permits only to those victims who are willing to cooperate with the investigation authorities even though a human rights-based approach would imply the unconditional grant of such permits.

As for Sweden, also the Dutch model links the release of the residence permit for victims of THB to their cooperation with the investigation authorities. Moreover, the regulationist model fails to prevent sex-trafficking in both the legal and illegal market. The police efforts are directed to the control of the validity of the permits for sex-workers. This result in a lack of resources for the prevention of THB.

On the other hand, the analysed countries pursue the protection of the victims through different tools such as support programmes, educational and professional trainings. However, they often fail to address the multidisciplinary nature of the human rights-based approach to trafficking. They focus solely on the issues arising under criminal law, or those deriving from migration law. They do not consider the complexity of sex-trafficking and its different features. Further, these countries fail to address the needs of the survivors and to listen to their voices. They rather consider them as helpless, fragile victims, not worth of empowerment. Then, they fail to disconnect migration law from criminal law, so that they instrumentalize sex-trafficking in order to tighten the repressive measures under migration law. In conclusion, a revision of the policy regimes is needed in view of committing to the full implementation of a human rights-based and victim-centered approach.

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