

**DISREGARDING ARISTOTLE’S MOTTO “UBI SOCIETAS IBI IUS”:  
THE BIASED GENESIS OF HUMAN TRAFFICKING PROTOCOL  
AND THE CONSEQUENCES ON ITS ENFORCEMENT**Teresa Albano<sup>1</sup>Stefano Volpicelli<sup>2</sup>

**Abstract:** Aristotle’s motto “Ubi societas ibi ius” reminds us not only of the fact that where each society produces its own norms and regulations, but also that there must be a close inter-relation between the social reality of a phenomenon and its normative framework in order for a law to be effectively enforced. The definition of human trafficking contained in the Palermo Protocol was strongly influenced by the complex negotiations featuring different approaches, attitudes and political agendas. This essay will analyze the core contents of the Protocol, from the title to the definition of trafficking, as well as the constitutive elements of the crime, exploring how the legacy deriving from a biased discourse on the trafficking phenomenon did not allow to harvest the

full potential of international law as a guiding tool and a common platform for States’ action. As a consequence, the Protocol’s definition is significantly ambiguous and de facto results in its often difficult and uneven transposition at national level.

**Keywords:** human traffic. human rights. Law.

**Introduction**

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children<sup>3</sup> (also known as trafficking protocol), defines trafficking as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat

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<sup>3</sup> One of the three Protocols (the other two are the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms) adopted by the United Nations in the framework of the Convention against Transnational Organized Crime.

or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

According to this definition, human trafficking is the process through which persons are deceived or coerced to move from their place of residence to another place where they will be exploited.

The phenomenon that we today call human trafficking became visible in the early 1990s and turned into a source of social and political alarm when in Western Europe thousands of girls originating from Eastern European and African countries were involved in the sex and adults'

entertainment industry. In the same years, an increasing level of exploitation of migrant workers particularly in agriculture, manufacturing and construction, was also observed. Since then, human trafficking reached global proportions<sup>4</sup>.

Despite the appeals from prominent Representatives at regional and international level, it is undeniable that the actual number of cases that are successfully prosecuted is lamentably low compared to the estimated scope of the problem. The impression, particularly in the “experts’ circles”, is that something is missing and that there is the need to understand why the “fight” against the “scourge” seems far from reaching significant goals.

At the time of the Protocol’s formulation, human trafficking was mainly “narrated” as a gender-based problem, the result of the prevarication and abusive behaviors of male over female. Therefore the phenomenon was perceived as involving mainly vulnerable and

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<sup>4</sup> Between 2010 and 2012, victims with 152 different citizenships were identified in 124 countries across the globe. Moreover, trafficking flows - imaginary lines that connect the same origin

country and destination country of at least five detected victims – criss-cross the world (UNODC 2014)

marginalized migrant women, especially young and *naïve*.

The current reality demonstrates that human trafficking is much more. It can be considered an indicator, a litmus test of human relationships - civil, politic, economic, cultural and social - in the age of globalization.

Based on these considerations, this article argues that when the law is weakly grounded on the socioeconomic understanding of the phenomenon that it intends to regulate, it can miss significantly – and regrettably – its intended purposes.

This article intends to reframe the trafficking phenomenon through the lenses of the geopolitical, economic and social changes favoring the (re)birth and diffusion of human exploitation on a global scale. This analysis, alternative to the “mainstream” narrative focusing on human rights or gender-based dynamics, aims at the identification of tailored working proposals.

**From “Cold war” to “Brave new world”: a close examination of the social**

**changes brought about by the economic globalization.**

In order to understand how behaviors formerly considered as socially dysfunctional have turned out as (almost) legitimate, it is necessary to go through a close – although inevitably synthetic - examination of the changes that, from the beginning of the ‘90s, have heavily influenced the life of many persons worldwide.

*Before*

The world order shaped in 1945, at the end of the World War II, was based on its division in two opposed blocs lead by two superpowers: the Soviet Union and the United States of America. They were marked by opposite economic and political ideologies - communism on the one side, capitalism on the other. In the East, the communist ideology was framed around the rhetoric of universal equality of individuals, while in the Western democracies the rhetoric of universal civil rights was framed around the individual freedom to pursue “happiness and wealth”. The two ideologies were also profoundly

differentiated by the role that the State should play in promoting rights: the State was the primary actor and guarantor of this equality, in the communist approach, being the one who could ensure the “general wellbeing” of all citizens, while in the liberal approach the State was considered as a disturbing factor of the “free forces of the individual and the market” as the best placed actors in pursuing individual advantages. Two mottos can well explain the two opposite approaches: freedom “in” the State, the first, freedom “from” the State, in the other. Welfare state programs in the western bloc and the policies of full employment and education for the eastern bloc balanced the unavoidable social inequalities and discrepancies present in both systems.

In this scenario, individuals, although suffering in many cases from serious poverty conditions, were still considered as active members of society, fully involved in the process of modernization of their society, keeping up decent and safe level of life.

Decent, because the status of a person was measured through “being”

features: being an active and useful member of the community; being reliable and honest as partner, parent and in the interaction with others. This situation supposedly provided a well degree of self-esteem to those without fair economic and financial resources.

Safe, because in this period individuals in difficult economic conditions were supported by welfare systems, which aimed at maintaining a decent level of life for the fragile and marginalised ones, thereby striving for the reinsertion in the productive segment of society. This approach strengthened significantly social cohesion and the sense of belonging to the society. Moreover, the individual’s perception of being safe was constantly being reconfirmed through military alliances – Warsaw Pact and North Atlantic Treaty Organization - built by the two superpowers, with the aim to protect the countries over which they exercised strategic influence.

The geopolitical balance impacted the movement of persons. In line with the predominant geopolitical division at the time, migrants were moving south–north within the boundaries of the two

opposing blocs. With very few exceptions, migrants from developing countries under Western influence moved to North America, Europe and Oceania. Migrants from countries under a communist regime moved to the Soviet Union and other Warsaw Pact countries. Immigration laws and regulations were not particularly developed and elaborated as the movements took place within areas sharing the same systems of values, and therefore linked by a sense of “brotherhood”.

#### *After*

The above scenario changed abruptly in 1989, when the second-world war order collapsed. In the five years following the disintegration of the Soviet Union, the world engaged in a deep geopolitical and economic rearrangement: countries established as a result of the First or Second World Wars split up, separatist ethnic movements flourished and long-lasting conflicts over resources and power

fuelled the displacement of vulnerable people.

Deprived of an alternative model to the liberal Western approach, the world reoriented its economic policies towards the only system that survived the contest: formally recognized in 1994 with the Marrakech agreement, the World Trade Organization was established.<sup>5</sup> The now “global” capitalism envisages:

- the liberalization of commercial and financial trade, which postulates the dismantling of the barriers to free trade, financial markets and goods’ productive chains;
- the progressive reduction of public welfare mechanisms and,<sup>6</sup> more generally, of the state’s intervention in the economy, since this is considered to be a brake on the free expression of the market and financial forces (Stiglitz, 2002);
- the implementation of structural adjustment programs, which

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<sup>5</sup> The Marrakech Declaration of 15 April 1994 of the Uruguay round agreement is considered the date of birth of globalization.

<sup>6</sup> See the WTO report following up the Resolution

adopted by the Human Rights Council 15/25 “The right to development” at [www.ohchr.org/documents/issues/development](http://www.ohchr.org/documents/issues/development).

requires countries to open up their markets to foreign firms and eliminate State subsidies (Sassen, 1998).

At the beginning, globalization was welcomed with expectations of greater prosperity for all. Yet, soon this new economic order fostered criticism over wealth inequalities (Stiglitz, 2002, ILO 2008; Atkinson and Morelli, 2014) and the skyrocketing of employment redundancy worldwide (Baumann, 2004) that increased economic instability and social dissolution in many areas of the world (Stiglitz 2002:8), particularly in those areas of the Second and Third World, which have benefited from the technical and military assistance of the former superpowers (Moyo, 2009:24).

It is in this complex and dynamic scenario where the inequalities increase between and within countries, where

millions find themselves redundant overnight, that human trafficking takes center stage. Until the mid-1990s, this phenomenon was viewed as a form of human smuggling and a type of illegal migration (Laczko, 2002). In those years a growing number of foreign workers were subject to forced labour,<sup>7</sup> slavery<sup>8</sup> or slavery-like conditions in mines, sweatshops, agricultural fields, and in the sex industry. However, particularly this latter area of exploitation, involving, apparently, mainly women and minors of both sexes, attracted the attention of the international community.

Although difficult to estimate rigorously, billions of dollars were spent since 2000, with the aim to curb especially the sexual exploitation of women and children. Revisions of national laws and regulations, information and awareness-raising campaigns, training of law enforcement, judiciary, caregivers, social

ownership are exercised (*Art. 1, Slavery Convention, 1926 as amended by 1953 Protocol*). Slavery is identified by an element of ownership or control over another's life, coercion and the restriction of movement and by the fact that someone is not free to leave or to change employer (e.g. traditional chattel slavery, bonded labour, serfdom, forced labour and slavery for ritual or religious purposes).

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<sup>7</sup> “The term *forced or compulsory labour* shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” (art.2, paragraph 1, ILO Convention n.29/1930).

<sup>8</sup> The status or condition of a person over whom any or all the powers attaching to the right of

workers, labour inspectors, medical personnel, legal practitioners, programmes for victims' assistance, return and reintegration and other activities like researches, studies, collection of data, country visits, and much more, were carried out with the intention to mobilize efforts to flights against trafficking.

Yet, according to the ILO and the UNODC estimates, the phenomenon has since gained alarming proportions without showing too promising prospects to be contained. On the contrary, the often lamented low number of prosecutions vis-à-vis the estimated number of victims seems to significantly outweigh the efforts put in place to counteract the crime. In spite of these efforts, what seems to be lacking in the case of human trafficking is a common understanding of the phenomenon, a clear distinction between the victim and the perpetrator, a full awareness of the differences with other bordering phenomena – migration, prostitution, forced labour – which, in the daily practice of the law, seems to prevent the joining of efforts for an effective enforcement strategy.

The strong impression is that the true nature of the trafficking phenomenon has been '*lost in translation*' as if something inevitably escaped the definition. "You have to understand" – said one of the State delegates at the negotiations in Vienna – "this is not like torture. It is not even about human rights" (Gallagher, 2010). Indeed, this and other similar sharp remarks remind of the challenge to work out the "wrong" of trafficking.

### **Working out the wrong in the trafficking definition: the process**

It is therefore evident that lawmaking represents the critical process through which the wrong and the good, the desirable and the detrimental are positioned, thus crystallizing interests and power relations. This is the most authentic meaning of the Aristotle's annotation "Ubi societas ibi ius"<sup>9</sup> - and its specular "Ubi ibi societas"<sup>10</sup> - in the words and works of an eminent Italian jurist, Santi Romano. Far from being a sociological interpretation of the "magnificent creation

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<sup>9</sup> Where there is a society there is a law.

<sup>10</sup> Where there is a law there is a society

of the law” (Romano, 1909: 8,11,16), the original reflection of Santi Romano identifies in “the social structure, the social forces and in social contrasts” (Romano, 1918) the main determinants of lawmaking. The elaboration of a law – in this case the human trafficking definition in the Palermo Protocol – represents, therefore, the end of a process in which different social groups, not only State actors or parties but also civil society organizations and other influential socio-economic entities – are confronted with the objective to identify what is more respondent to the needs and demands of those social bodies that exercise their influence in the elaboration of the law. Although the lawmaking process is more complicated at international level - where the familiar tripartite division of formal governmental institutions, executive, legislative and judicial, does not exist – yet an established scholar literature (Boyle and Chinkin, 2007) shows that international law is made in different fora by a plethora of different actors, such as international organizations and judges, as well as other influential entities, including non-governmental organizations and even

individuals, in addition to the traditional role of States (Reisman, 1981).

On the other hand, once the law is “created” another process of lawmaking starts, the process of enforcement, which, for international law instruments, requires the necessary transposition of international conventional norms into national provisions, in line with national frameworks and modeled by local “legal cultures” (Nelken, 2014). This is when abstract and general concepts - the “law in the books” - are interpreted to capture real life facts - the “law in action”.

Digging into the process of lawmaking that at the time of the “Vienna process” brought to the definition of trafficking can be, therefore, helpful in understanding better which knowledge, concepts, and values were considered important – and which not - in the elaboration of the definition. And, moreover, which social groups and, sometimes, conflicting interests shaped the final version of the Protocol’s definition. In doing so, the *Travaux Préparatoires* indeed represent a useful source of knowledge. Further critical information on the Protocol negotiations



come from those who were directly involved in that process. In their insightful description of the atmosphere, the power dynamics and the lobbies that were confronted during the elaboration of the Trafficking Protocol, Melissa Ditmore and Marjan Wijers (2003) offer a particularly useful source of reflection.

The negotiating table in Vienna saw the participation of many actors: besides governments' delegates, international organizations, UN agencies, individual experts and, particularly, Non-Governmental Organizations (NGOs) took part at the meetings of the UN Crime Commission, providing advice, information, analysis meant to support the elaboration of the definition. In particular, two blocs of NGOs were particularly active in the negotiations talks. The first bloc, the Human Rights Caucus, was composed by human rights, anti-trafficking and sex workers' rights organisations and activists, with a leading role for the International Human Rights

Law Group (IHLRG) and the Global Alliance Against Trafficking in Women (GAATW)<sup>11</sup>, while the other, the Coalition, led originally by the American based Coalition Against Trafficking in Persons (CATW), included the European Women's Lobby (EWL) and the International Abolitionist Federation (IAF)<sup>12</sup>. The first bloc focused on human rights and migrant labour, supporting the shaping of the definition of trafficking around the coercive forms related to the conditions of recruitment and/or the conditions of work, regardless the nature of the work or services and regardless the sex of the trafficked workers. The immediate consequence of such an approach was to include sex work in the trafficking definition as well as women and men as potential and *de facto* trafficked persons. On the other hand, the second bloc focused on prostitution, considered inherently as a form of slavery and, in itself, a violation of human rights. The CATW-led coalition proposed a

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<sup>11</sup> For greater insight on the position of the Caucus group, see also the *Human Rights Standards for the Treatment of Trafficked Persons*, drafted by the Foundation Against Trafficking in Women (STV), the International Human Rights Law Group and the Global Alliance Against Traffic in Women (1999).

The standards are available in several languages on the GAATW website: [www.thai.net/gaatw](http://www.thai.net/gaatw).

<sup>12</sup> Abolition here stands for abolition of prostitution. Documents explaining the position of group can be found at the CATW website [www.catwinternational.org](http://www.catwinternational.org)

gendered approach to the definition, speaking about “Trafficking in Women and Children”, leaving men out of the equation, putting forward a vision of human trafficking as a situation in which women were entrapped as innocent victims of men’s ruthless sexual appetites.

This latter view saw all sex work as trafficking, no matter the conditions of the work and the individual’s agency. This position has as its root the idea that a woman’s consent to travel and to engage in sex work is meaningless. Any distinction between ‘forced’ and ‘free’ prostitution is considered to be a false one, as prostitution is by definition ‘forced’.<sup>13</sup> The former view, on the contrary, held that conditions of forced labour in all industries, including sex industry, had to be addressed, and particularly with regard to migrant labour which had become the object of increasing repressive measures from governments since the fall of the Berlin Wall and the advent of globalization (Saquella and Volpicelli, 2010).

The same assembly of

discussants was gendered: State delegates at the UNODC Crime Commission were primarily men, more often with a law enforcement background with little if no knowledge about human rights, while the lobbyists, from both sides, were primarily women, who soon revealed their different approaches towards the trafficking phenomenon. It became soon evident that the negotiations turned into a dispute between two opposing views regarding prostitution. Indeed the elaboration of the trafficking definition suffered from the confrontation between regulatory and abolitionist approaches to prostitution and of the sometimes irreconcilable interests of the feminist faction and the pro-sex workers’ faction. And this ideological dispute gave States the opportunity to further dilute the contents of the Protocol, particularly those provisions related to assistance and protection of trafficked persons, in line with a diffused and growingly defensive approach of the countries of the global north and the global west against migrants. Although freedom

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<sup>13</sup> ‘Forced’ in this interpretation does not address coercive working conditions but only the way a woman came to be a prostitute: as a result of her own decision or forced by others, thus reinforcing

the distinction between ‘innocent’ women who are deserving of protection and ‘guilty’ ones who can be abused with impunity because it is their own fault. M. Ditmore, M. Wijers, Cit.

of movement had been one of the totems of the Cold War, the actual fall of the physical and ideological barriers to people's movements had given rise to a progressive repulse attitude against free circulation of people, particularly if coming from poor and under-developed areas, and the recognition and protection of migrant workers' rights. Indeed, both feminist blocs were ill-equipped in countering the growing opposition of States against migration and against the fair treatment of foreigners.

### **Working out the wrong of the trafficking definition: the result**

Reading the article 3 definition of human trafficking and the Palermo Protocol through the lenses of these diverse forces which shaped its contents, allows for a deeper understanding and a greater awareness of the background that generated the main features of this international instrument. The same title of the document - Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children - by underlining two, supposedly principal

targets of traffickers – *women and children* - reflects the object of the negotiations: does trafficking involve also men or does it pertain exclusively to the realm of “women's issues”?

The definition below shows further traces of the impact of those different narratives of the trafficking phenomenon:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

In particular the following aspects are worth being observed:

- The *actus reus*, the substance of the crime. A careful reading of the text leads to the conclusion that the unlawful activities to be prosecuted are the unconsensual recruitment, transportation, transfer, harbouring or receipt of persons.

Indeed these activities, which are licit *per se*, become wrongful when carried out against the free will of the individual: “nobody would want to argue that any recruitment *per se* for e.g. domestic or agricultural labour, is trafficking, irrespective of the means used. Indeed the issue of consent is more a matter of evidence and not of definition. Once the existence of forced labour, slavery or servitude is established, ‘consent’ actually is irrelevant”<sup>14</sup>. However, the wording of the definition does not put forced labour, slavery or servitude at the centre of the inquisition. Forced labour, slavery or servitude – the exploitation of the individual - are not the *actus reus*, the “wrong” of the trafficking phenomenon elicited in the definition. The exploitation of the individual remains more at the “horizon” of a number of other activities.

The main focus of the definition is, in fact, centred on unconsensual

preparatory actions which are accomplished with the intention to exploit the person. These unlawful activities are those generally related to the migratory movement of the individual from one place to another<sup>15</sup> (recruitment, transfer, transportation, receipt, harbouring), and particularly to cross-border movement.<sup>16</sup>

In this case, the interest of the abolitionist support group, aiming at defining trafficking by the inherently unlawful nature of the work involved - prostitution – and the interest of States, aiming at opposing migration, converged in shaping the substance of the criminal behaviour around “unconsensual” migratory movement”. Indeed, this is not a new practice. Already in 1912 Greece fought ‘white slavery’ by passing legislation forbidding women under 21 to travel abroad without a special permit (Doezema, 2002).

phenomena, such as forced labour and slavery, increasing the entropy of differing interpretations to the same definition of trafficking with evident detrimental effects on this latter one, according to the wording of the Protocol.

<sup>16</sup> It is important to remind that at an initial stage of the negotiations, trafficking was considered only as a transnational phenomenon. On a later stage of the negotiations, internal trafficking was also included in the definition. See also A. Gallagher, *ibidem*.

<sup>14</sup> M. Ditmore, M. Wijers, *ibidem*

<sup>15</sup> We differ in the interpretation of the definition of trafficking from the approach pursued by some countries for which the movement is not an essential element of trafficking. Not only does this approach negate systemic interpretation in the light of the fact that the Protocol supplements the Convention on Transnational Organized Crime, but also contradicts the interpretation that would allow to distinguish trafficking from other neighboring

(a) “Trafficking in persons shall mean [...] for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

- The purpose of trafficking. A highly emotional discussion arose with reference to the purpose of trafficking and in particular with regard to the inclusion of “the exploitation of the prostitution of others” and “sexual exploitation” among the purposes of the criminal activities – the unconsensual movement - defined as trafficking. These terms are indeed not only imprecise but also undefined and would recall the words of the 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* which, although not entered into force, included in its definition both voluntary and involuntary prostitution. Such inclusion would undermine the consensus of adult

individuals engaged voluntarily in providing sexual services. The proposal to concentrate on forced and/or bonded labour and servitude, which includes also forced provision of sexual services, supported by the High Commissioner for Human Rights, the Special Rapporteur on Violence Against Women, the International Labour Organisation, as well as countries with regulatory and decriminalising policies on prostitution, like The Netherlands and Germany, was rejected (Ditmore and Wijers, cit.). A compromise was finally reached with the inclusion in the definition of the two mentioned terms while adding an interpretative note as follows:

With a UN interpretative note, reading: ‘The *Travaux Préparatoires* should indicate that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms ‘exploitation of the prostitution of others’ or ‘other forms of sexual exploitation’ are not defined in the Protocol, which is therefore without prejudice to how States

Parties address prostitution in their respective domestic laws’ .

- The issue of consent. The definition of the purpose of trafficking – exploitation as the ultimate intention of unconsensual movement – is then completed by the subparagraph (b) where the issue of consent is evoked again, for the second time in the article.

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

It is clarified that the individual’s consent is irrelevant where the mentioned means, used to move the potential trafficked person – still “potential” at that moment, at least until the exploitation takes place - are also used to exploit the person, once the crime is finally consumed, and the trafficked person can be identified as a *de facto* victim, as a

person suffering exploitative practices. Subparagraph (b) underlines that exploitation must be imposed through the same coercive means. As a consequence, according to the wording of the definition, the lack of the individual’s consent must be proved in two different stages of the trafficking process: when the transfer of the *potential* victim takes place, during the migration movement presumably in view of the exploitation, and when the exploitation is exercised over the *de facto* victim.<sup>17</sup>

### **Working out the wrong of the trafficking definition: the consequences**

The above wording of the definition and the related aspects bear significant consequences in effectively achieving the openly stated objectives of the Protocol: to prevent and combat trafficking, by prosecuting the traffickers; to protect and assist the victims, after their identification; and to promote cooperation among States Parties, by supporting partnership among relevant

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<sup>17</sup> Although in real life cases the exploitation often already starts during the transfer of the victim from the origin place to the destination place.

and appropriate stakeholders. The often heard 4Ps-approach: Prosecution, Prevention, Protection and Partnership.

Being a criminal justice instrument supplementing the UN Convention on Transnational Organized Crime, the primary objective of the Protocol is to prosecute trafficking as a form of organised crime. It is therefore natural to wonder which the object of the prosecution is, which the criminal behaviour to be tackled is. Although scholar literature identifies the individual's exploitation as the distinguishing feature between human trafficking and migrant smuggling (Gallagher, 2009), according to a rigorous reading of the wording of the definition it is difficult to say "exploitation" as a straight-forward answer. Law enforcement and judicial officials might have some doubts, too, in supporting such view without hesitation. This nebulous definition, caught in between contrasting views and interests, leaves too much room to diverging interpretations. Indeed, the unlawful activities described in the definition are those comprising a "non-consensual movement" for which victims

bear a heavy burden of the proof. It is their responsibility, in fact, to prove that the recruitment and the journey took place as a consequence of deception or force. But it is also the victims' responsibility to prove that the conditions of work – the ultimate purpose of the non-consensual movement - were exploitative against their will, as if the individual's consent to be subjected to forced labour could legitimise – and possibly "legalise" - such an abuse of a person over another person (Yun, 2004). It is evident how the enthusiastic willingness of a presumed victim to embark in an irregular – but also regular – migration journey with the perspective to "work hard" to achieve his/her objectives of education, improvement of life conditions, curiosity and empowerment can be easily used to drop a case of trafficking for any form of exploitation. The victim can be easily confused with the perpetrator or perceived at a minimum as an accomplice. In conclusion, the 'victim' went to look for troubles and eventually s/he found them. The same abolitionist narrative used to distinguish between innocent women, who stay safely at home, and the 'guilty' ones who dare to adventure outside and can be

abused with impunity because it is their own fault, is dangerously echoed in the trafficking definition and risks to be applied to prosecute migrant workers as accomplices to acts of voluntary migration and consensual exploitative work.

Indeed, the same UNODC, the UN agency that is the guardian of the UNTOC, in its “Issue Paper” on “The Role of Consent” - aimed at providing interpretative guidance to the trafficking definition - admits that “Consent remains a troubled, complex and unresolved aspect of international law and policy around trafficking. The relevant clause in the Trafficking in Persons Protocol ... has not eliminated conceptual confusion, diverse interpretations and practical hurdles” (UNODC, 2014:7).

As far as the Protocol second objective is concerned – Prevention - four out of the five articles devoted to the issue, from 9 to 13, make reference to measures dealing with immigration control. Indeed this is in line with the trafficking definition as outlined before, focused on non-consensual movement of persons. During the Vienna process the UN Special Rapporteur on Human Rights proposed to

include a provision advocating that actions aimed at preventing trafficking should not have discriminatory effects or infringe upon the right of individuals to leave their country or legally migrate to another. But the proposal was rejected although a reminiscence can be found both in article 11, where it is stated that border measures to prevent trafficking should be ‘without prejudice to international commitments in relation to the free movement of people’, and in the ‘saving clause’, article 14, which recalls the principle of non-refoulement of the 1951 Geneva Convention and the 1967 Protocol on the Status of Refugees. Other prevention aspects different from immigration and border control are included in article 9. After mentioning information campaigns and research among prevention measures, the article makes reference to the factors that make persons vulnerable to trafficking, poverty, underdevelopment and gender inequality, to be addressed through social and economic initiatives. Although only indicative, this list of vulnerability factors reflects, however, a simplistic view of the trafficking phenomenon and a possible



(un)intentional overlook of the detrimental impact of restrictive State migration policies on trafficking. Since the late Nineties a wide scholar literature has, in fact, analysed the perverse effects of States' prohibitionist approaches to people's movement that, by closing legal avenues of migration, leave would-be migrants no other options than to use the services of traffickers and smugglers (Kwong 1997, Meillón 2001, De Haas 2004, Saquella, Volpicelli, 2010). Finally article 9 refers to "legislative or other measures, such as educational, social or cultural measures [...] to discourage the demand that fosters all forms of exploitation of persons, especially of women and children, that leads to trafficking"<sup>18</sup>. This ambiguous 'demand language' essentially aims at defining all sex work as trafficking and allows States to prosecute prostitutes' clients as traffickers (Ditmore and Wijers). Indeed, States and abolitionist groups took advantage from the Vienna process to plant anti-migrants' and anti-sex workers' seeds in the Protocol at the expenses of the

recognition and protection of the human rights of migrant workers.

And in fact, the parts of the Palermo Protocol devoted to assistance and protection of trafficked persons, what should have been the backbone of this often-referred-to as an international human rights' instrument, are particularly disappointing. Whereas the Protocol contains strong law enforcement provisions, its few protection and assistance measures are all discretionary for States Parties. Although many governments recognized the value of victims as witnesses, deserving protection during the trial, they nevertheless wished to preserve their prerogative to deport them after the trial or even to prosecute them for the unlawful acts committed as a consequence of being trafficked. Meaningfully, while the Smuggling Protocol contains a clear clause for the non-criminal liability of migrants for the fact of being smuggled (art. 5), a similar provision has not been included in the Trafficking Protocol. It therefore becomes increasingly difficult for law enforcement

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<sup>18</sup> Art. 9.5 Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children

and judicial officials to draw a clear dividing line between perpetrators and victims.

It is therefore coherent with the narrative of trafficking stemming from the Protocol's definition that Partnerships in the field of human trafficking are built primarily with immigration authorities and criminal justice actors, leaving labour institutions too often out of the equation. The gendered vision of the trafficking definition is then reflected in the area of assistance and protection of trafficked persons, left to the almost absolute monopoly of NGOs, which internally register an outstanding prevailing presence of female social workers. None or very little supervision is exercised by the man-State, as if victims of trafficking were the children of a family with well-defined roles and well-delimited fields of action.

No wonder if one of the main characters of the Protocol negotiations, Anne Gallagher, admits that “although we did not walk away from the “Vienna Process” empty-handed, the end result confirmed the harsh truth that these negotiations had never really been about human rights. Any victories on our side

were both hard won and incomplete” (Gallagher, 2009, cit). Indeed, the human rights of migrant workers were sacrificed on the altar of the defense of women's “purity” from prostitution, on the one side, and the defense of national citizens' “purity” from migrants' intrusion in the destination countries, on the other.

### **Working out the wrong of the trafficking definition: the impact**

Which is the impact of this lawmaking process that, as a result of the distortive influence of the interests of the main groups around the negotiating table, has produced a trafficking definition that essentially fails to capture the reality of the phenomenon? A main immediate impact is visible at the level of the enforcement of the provisions deriving from the Protocol. Despite 95% of the countries in the world have introduced anti-trafficking provisions in their national normative frameworks - often in line with model laws as promoted by UN agencies - the concrete results in convicting the perpetrators and in protecting the victims are still disappointing, according to the reports of

the main international players in this sector: the ILO, the UNODC, the EU, the US Department of State with its annual TIP report.

And these disappointing results represent the source of concerns and preoccupations, expressed at national, regional and international level. Appeals to the States' responsibilities have been usually followed by the elaboration of new guiding principles, Action Plans, sets of recommendations, regional conventions and legislation, Standing Operational Procedures, frameworks for action, interpretative statements, up to the most recent ILO Protocol on Trafficking. A sort of anxiety – maybe the bad conscience? - in the international community seems to push the proliferation of normative and non-normative provisions, in an ever-ending process of lawmaking as if the lost opportunity at the Vienna Process should be somehow repaired, adjusted, amended.

In principle, the effort to promote an effective interpretation of the Trafficking Protocol definition and provisions is necessary and commendable. Necessary because there is always an interpretative hiatus between “the law in

the books” and the “law in action”; commendable because of the complexity of the trafficking phenomenon and of the myriad of political implications when norming it, as the negotiating process at the UN Crime Commission in Vienna showed. However, what it is striking in the case of human trafficking is the quantity and variety of this literature, sometimes beyond a reasonable usefulness of it, giving the rise to an “anti-trafficking community” which represents in itself a social group, an industry. It is therefore legitimate to wonder to what extent the “customers” of this industry, the trafficked persons, the would-be migrants, the people on the move who could become vulnerable to trafficking and exploitation during their journey, benefit from this proliferation of literature. Indeed, although the elaboration of the trafficking definition had the potential to be used to protect migrant workers from abusive work conditions, the current formulation and its enforcement from the many government actions seem to indicate that the repressive potential of the Protocol is prevailing, despite the attempts to adjust what was initially

conceived through biased lenses (Doezema, cit).

It is meaningful that the government systems that currently prove to be the most successful in prosecuting trafficking and protecting the victims are those whose transposition processes have moved away from the Protocol definition. In particular, the Belgian legislation can be considered as paradigmatic of an effective national lawmaking process inspired by the Trafficking Protocol but not fully adherent to it. Indeed, the Belgian legislator, already in 2005 at the time of the Palermo Protocol transposition and additionally in 2013, in order to centre its definition of trafficking on exploitation rather than on the means conducive to it – i.e. the unconsensual movement of the potential victim - decided to consider the coercive means of the Protocol definition as aggravating circumstances rather than constitutive elements of the crime. And in doing so, the definition of trafficking was built around the concept of “working conditions contrary to human dignity”,

which include also sex work. In other words, those persons who are identified by law enforcement officials as being kept in working conditions contrary to human dignity – to be proved through a number of factual evidences, both subjective and objective – are recognized and protected as trafficked persons. If these victims have been, in addition, moved through coercive means in order to be subjugated in inhuman working situations, this aggravates the position of the perpetrator and the penal consequences in case of conviction.<sup>19</sup>

### **Reframing human trafficking**

In the former paragraphs, the process through which a global phenomenon with significant implications on the lives of individuals has been reduced to a gendered issue - or a problematic gender relationship – has had the counterproductive effect of increasing the dissemination of the already diffused asymmetry in inter-personal relations.

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<sup>19</sup> cl. huberts and j.-f. minet, la loi du 29 avril 2013 visant à modifier l'article 433*quinquies* du code pénal en vue de clarifier et d'étendre la définition

de la traite des êtres humains : analyse et mise en perspective, revue de droit pénal et criminologie, janvier 2014

If we wish to reframe human trafficking in the current geo-political and socio-economic changes brought about by globalization, it is necessary to go back to the 1990s, and try to figure out why in a historical moment welcomed as the decisive landing place in the history of the human evolution (Fukuyama, 1992), some old exploitative human dynamics expected to have been defeated have reappeared.

At the end of the cold war, as a consequence of the revolution in means of transportation and media of communication, the world suddenly shrank, allowing a large part of the world population to get in contact with formerly unknown realities and thus fostering the human contamination.

This process has facilitated the diffusion of a globalized modern lifestyle (Bauman 2004) and reshuffled the *finite provinces of meaning* (Berger and Luckmann, 1966) offering new landscapes of interpretation to the concept of centre and periphery, of developed and developing ways of living.

Modernity has reached every corner of the world, facilitating the transition of human beings from producers

to consumers (*id*). This transition has turned out in a true revolution of values.

In order to “be” a person needs to “have”. But often the objects aren’t at hand; for many they are out of their economic possibility, for others they are somewhere else. As a consequence, the formers need to rely on informal deregulated economic channels providing goods at the cheapest price possible; the latters, need to move and travel further distances. This is the reason why in the global village, “mobility assumes the highest level among the values which confer a status, and freedom of movement [...] becomes rapidly the main factor of social stratification of our time” (Baumann 1998). In this respect mobility assumes another meaning: a value measuring the individual’s self-esteem and the capacity to determine the individual’s “success” in a community.

At the same time, at other latitudes, moving is essential. The international crises have been producing a large number of displaced persons, refugee and asylum seekers, which move to defend their right to survive. Unfortunately, for the already mentioned paradox of

globalization, mobility doesn't come easily.

The short circuit between requirements and restrictions to move has generated a parallel market of intermediaries that facilitates migration thus fostering a fertile ground for human trafficking to flourish.

Persons looking for the means to have, and therefore to be, or looking for a safe place to live, become progressively more vulnerable to those that offer a help to move and those that can provide the means "to have" the goods that make them "be".

A vicious narration is therefore generated: people formerly living a safe life are nowadays in constant fear of losing their belongings and consequent status. They are progressively more confronted with an "army" of people coming from the periphery of the world's societies, ready to sacrifice everything in order to access the same belongings – and consequent status - in a world that has become too small for everyone.

Despite Fukuyama's premonition of globalization as landing point of human civilization, the way globalization has

been managed so far, results in the Hobbes' human "natural state": *homo homini lupus* (a man is a wolf to another man). Freud's words in early Nineties sound tremendously up-to-date:

"Men are not gentle creatures, who want to be loved, who at the most can defend themselves if they are attacked; they are, on the contrary, creatures among whose instinctual endowments is to be reckoned a powerful share of aggressiveness. As a result, their neighbour is for them not only a potential helper or sexual object, but also someone who tempts them to satisfy their aggressiveness on him, to exploit his capacity for work without compensation, to use him sexually without his consent, to seize his possessions, to humiliate him, to cause him pain, to torture and to kill him" (Freud, 1930).

In the course of history individuals have always oscillated between two opposite behaviours - to act fairly and generously towards the others or to endorse exploitation as a means to survive.

Today, the process of globalization tend to the creation of a

world society where, for the first time, behaviours that were formerly considered as unethical are progressively more contradicted by mainstream behaviours which are inspired by those same unethical principles.

Such “Ethics of globalization” seem to be dangerously influenced by the following constitutive elements:

1. The change in the perception of the others: in a worldwide competition, if the “others” are no longer perceived as fellows, they represent the opposite, a possible obstacle on the way to victory (emancipation).
2. The value of human beings: persons are progressively more valued according to what they have rather than on their inner value as humans or their merit because of their actions. Such “new” order echoes the Middle Ages aristocratic order of society. The extreme result of this process is that those who have not enough – the poor or supposedly so - are not even considered as human beings and, therefore, merit being

exploited. In a world where, rhetorically, everyone can achieve its own desires thanks to the renewed freedom (from communism), the individual’s poverty is, in fact, the expression of a fault, the individual’s inability to “take advantage” from the “natural forces of the market”. Those who are poor are such because of their own fault. The lack of aggressiveness against the competitor is considered an unacceptable weakness, the expression of the individual’s inability, incapability, insecurity. This is what Pope Francis call “practical relativism, which drives one person to take advantage of the another, that pushes to treat others as mere objects, imposing forced labour on them or enslaving them” as a “natural” way to make them pay their debts. (Pope Francis 2015, 123). This is the use-and-throw-away logic intrinsically connected to the generation of waste, of both objects and humans.

3. The subscription of the “have nots” to the logic of exploitation: this is a discriminating element between slavery and new forms of exploitation. Today the exploited are conscious about their situation, but rarely complain, because they “surrender to the verdict of their inferiority” (Baumann 2004; 53), aware that in order to achieve their own goals they have to be resilient. Exploitation is the cost imposed to them to become “global citizen”.

All the above considered, the ethics of globalization include elements that could be named “of the abuse”. Postulating that the globalized society is permeated by an ethics of abuse is maybe hazardous, or perhaps a provocation. But the exploitation of a person often belonging to the same family or community, and thus being a part of the same emotional environment, or of a person in evident situation of vulnerability requires a strong justification, an overall “ethics” in support of such behaviour.

In this scenario, human trafficking leaves the narrow hallway of

the gender-based exploitation, or of the deviated relationships of outsiders that are marginalized, belonging to the culture of delinquency.

The consolatory separation between victim and perpetrator, or between origin and destination countries a-critically considered as poor/traditional and rich/modern places, disappear. All the individuals are moving into a context where exploitation and abuse are part of the landscape. Today everyone is involved, wittingly as the traffickers or unwittingly as the consumer, searching the self absolution for buying goods produced through exploited labour force – including child labour – through statements like “at least it contributes to development” or “better than being unemployed”.

Considering the above, the anti-trafficking narrative is much more than the biographies of the victims, the process that brought them in the trafficking ring, the consent given to the traffickers, the differences among different degrees and seriousness of exploitation.

Human trafficking expresses other dimensions: at individual level, it is a strong indicator of the state of the art in



human relationships and human rights; at political level, it measures the capacity of decision-makers – local, international or intergovernmental – vis-à-vis the adoption of brave and robust policies to positively influence<sup>20</sup> the process of globalization towards a greater facilitation and interaction of cultural models, re-orienting values towards solidarity, tolerance, and care.

### Conclusions

Lawmaking is never a neutral process. This is true at national level, it is even more evident at international level. Despite the bona fide efforts to adjust the trafficking definition elaborated in the Palermo Protocol, the “anti-trafficking community” should stand up and honestly admit that the definition, if transposed as it is, is the exemplary model of what some scholar literature calls “lex imperfecta” or

“lex simulata”<sup>21</sup>. Thurman Arnold<sup>22</sup> thought that the creation of intentionally unenforceable law was an efficient and economic way of mediating between distinct classes and groups, which had irreconcilably incompatible demands. Others think that it is a way to salving the conscience of a public that intends to do things it still believes improper.<sup>23</sup> The impression is that the overall goal of the international community when elaborating the Palermo Protocol was to keep migration and the work associated with it at such a level of non-regulation to allow abusive practices of migrants to unfold by preserving an area of substantial impunity. Indeed if we keep a positivist bend and transpose the Trafficking Protocol definition as it is, ‘presuming to be the authentic expression of the parties’, we end up by achieving objectives that substantially contradict the apparent façade and supporting rhetoric of the

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<sup>20</sup> Relating to cultural influences, there are studies that document an international transmission of norms, e.g., with regard to inequality (Atkinson, 1997), corruption (Sandholtz and Gray, 2003), and the use of child labor (Congdon Fors, 2012). Other studies find that television affects values and behavior (e.g., Gentzkow and Shapiro, 2004; DellaVigna and Kaplan, 2007; Jensen and Oster, 2009).

<sup>21</sup> In particular see the works of “The New Haven School of International Law”.

<sup>22</sup> An iconoclast attorney in Washington DC, was a professor at [Yale Law School](#), where he took part in the [legal realism](#) movement, and published two books: *The Symbols of Government* (1935) and *The Folklore of Capitalism* (1937).

<sup>23</sup> W. Michael Reisman, *International Lawmaking: A Process of Communication*, (1981). Faculty Scholarship Series. Paper 713.

whole architecture of this document. This is actually well-known to the hundreds of law enforcement officials and judicial forces who carry out investigations, applying other norms rather than the criminal code provisions related to human trafficking if willing to achieve substantial results; this is well-known to the hundreds of victims who do not come forward and prefer to suffer exploitation as an inevitable price to pay to become citizens of the global village.

It is legitimate, and commendable, to try to work out what the possible lessons learned and consequences of a long-lasting misunderstanding of the discourse about trafficking could be, along with the proposal of new lines of work for the future.

However, once again, the issue regarding the correct understanding and framing of a social phenomenon is crucial for the implementation of policies that wish to be sound, effective, and hold-shared. Human trafficking is the first globalized social pathology that has highlighted the gaps in the capacities of the

international community in using prismatic lenses for interpreting the macro (the great geopolitical and economic changes) and micro (the impact on the persons).

A more careful evaluation of all the elements available at the time, which displayed the pathological drift linked to the mobility<sup>24</sup> of persons, could have avoided the mismatching of the symptoms with the cause. A more careful legal formulation could have been drafted to avoid the mistakes that brought to the stigmatization and discrimination of many persons.

This latter consequence is perhaps the heaviest to bear. Activities of rescue and protection would have highly benefitted from a better formulation of the norm. Having directed the legal provisions on a female target, primarily, supported by the (wrong) consideration that vulnerability is an indisputable assumption, an inner and intrinsic feature of the female target of trafficking, has damaged those who, having full right, could have enjoyed protection and

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<sup>24</sup> Intended as “the movement of an individual or group, from one class or social status, to another”.

assistance.<sup>25</sup> Conversely, such approach has excluded other beneficiaries because “the services are structured in a standardized way and are not sufficiently flexible in order to meet the needs of different categories of persons, with different capacities of reaction. Many practitioners reveal to be aware that services do not respond to the effective needs of the victims”<sup>26</sup>. As a consequence, many victims could not be assisted and had to cope with the social stigma once back home, after forced deportation as irregular migrants.<sup>27</sup>

It is clear now that human trafficking calls for the promotion of effective policies to contrast all forms of exploitation throughout its continuum. Focusing the attention more on the forms of exploitation rather than on the process that turned a person into a victim would help law enforcement forces to overcome all the confused elements included in the

trafficking definition, such as consent, level of awareness of the victims and the distinction between forced labour and trafficking. Exploitation should be strongly condemned and prosecuted notwithstanding the victim is a national citizen, a legal migrant, a victim of trafficking, or a clandestine worker.

The above action, introduced at global level, would give back a human feature to globalization, restoring the original expectations of prosperity for all. Most of all, it would contribute in overturning the current elements that are shaping the ethics of abuse.

As any other human issue, globalization (would) just need to be fairly managed.

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<sup>27</sup> Going home empty-handed turns in “social death” in many communities (Kihato 2013, IOM 2012).

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<sup>25</sup> In fact few provisions are available to the victims that don't match with the profile of the “typical” victim of trafficking: woman, prostitute - or more properly, exploited in the sex market -, preferably young, foreigner and naïve. For a worldwide overview of the services available for victims of trafficking see the annual US TIP report at [www.state.gov/j/tip/rls/tiprpt](http://www.state.gov/j/tip/rls/tiprpt)

<sup>26</sup> From the conclusion of the Report of the Research *Evaluation of the Effectiveness of*

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