

Trafficked adult males, gendered constructions of vulnerability and access to protection

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Abstract

Trafficking in persons has attracted considerable attention after the adoption of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings. International law, as well as international human rights courts and bodies, has created and developed standards able to offer inclusive protection for trafficked persons. Yet, the enforcement of these laws remains reliant on States' political willingness not only to adjust their domestic legal systems to reflect international obligations, but also – and arguably foremost – to implement the available laws in good faith and through a human rights-based approach. The research acknowledges the historical exclusion of men from the narrative of the phenomenon of human trafficking, and the reticence on the part of policy and decision makers to perceive and acknowledge vulnerability beyond gendered assumptions, and across the gender *spectrum*. Addressing gendered, or gendering, constructions of vulnerability in the anti-trafficking field, the research highlights the significance of gender in identification or recognition processes.

Through an evaluation of international and domestic law, as well as policy and practice in Italy and in the United Kingdom, the research unpacks the gendered nature and the politicised application of anti-trafficking law, highlighting how these elements have negatively impacted on the identification and access to protection of trafficked persons who do not conform to the imaginary 'ideal victim'. Although in

both Italy and the United Kingdom there have been significant legislative and policy developments with respect to anti-trafficking action, parallel developments in the field of immigration law highlight a tension with respect to the paradigm of inclusion. Looking beyond the surface of ‘functioning’ protection models, broader questions remain as to what purposes they have served in expanding the accessibility of rights.

Declaration of originality

I, Noemi Magugliani, do hereby declare that the work submitted for examination is my own and that due credit has been given to all sources of information contained herein. With this declaration, I certify that I have not obtained a degree at the National University of Ireland, Galway, or elsewhere, based on this work. I acknowledge that I have read and understood the Code of Practice for dealing with Plagiarism and the University Code of Conduct of the National University of Ireland, Galway and that I am bound by them.

Noemi Magugliani

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Thesis related publications

Noemi Magugliani, 'Protection from human trafficking? Examining (in)vulnerable masculinities in the United Kingdom's Upper Tribunal, immigration and asylum chamber', in Tatiana Cardoso Squeff (ed), *Political Asylum: theoretical discussions and emblematic cases* (Thoth 2021).

Noemi Magugliani, 'Trafficked adult males and their recognition as members of a particular social group in the United Kingdom's Upper Tribunal' (2020) Refugee Law Initiative Blog on Refugee Law and Forced Migration.

List of abbreviations

CA	Competent Authority
CoE	Council of Europe
DEO	<i>Dipartimento Pari Opportunità</i> , or Department of Equal Opportunities
DL	Discretionary Leave
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FROs	First Responders Organisations
GLAA	Gangmasters and Labour Abuse Authority
GRETA	Council of Europe Group of Experts on Action against Trafficking in Human Beings
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
MSA	Modern Slavery Act
NAP	National Action Plan
NCA	National Crime Agency
NRM	National Referral Mechanism
PSG	Particular Social Group
SCA	Single Competent Authority
SIRIT	<i>Sistema Informatizzato di Raccolta Informazioni sulla Tratta</i> , or Computerised system for the collection of information on trafficking in human beings
SOP	Standard Operating Procedures
TC	Territorial Commission
THB	Trafficking in human beings
TUI	<i>Testo Unico sull'Immigrazione</i> , or Consolidated Immigration Act
UKUT	United Kingdom Upper Tribunal
UKVI	United Kingdom Visas and Immigration Department
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees

Introduction

This thesis is the result of a personal, professional and academic process that started in 2013 at the University of Milan, where I became increasingly interested in migration and gender studies. It was the module on History of Sub-Saharan Africa, and Dr. Cristiana Fiamingo's passion for the subject that drew me to the field. Our debates in the classroom revolved around colonialism, borders and structural inequalities. I remember, in particular, the discussion that followed the screening of the movie "Like a Man on Earth", by Andrea Segre and Dagmawi Yimer. At the time, the Central Mediterranean route was more obscure, and less information was available on what happened in Libya to people attempting to reach Europe. It was not long after we saw that movie that more than 350 people drowned trying to reach Italy from Libya as a boat sank off the island of Lampedusa on 3 October 2013. As the number of asylum seekers and *irregular* migrants rose exponentially in 2014 and 2015 across Europe, so did the number of studies and reports on the extreme exploitation to which they were subjected in transit as well as in countries of destination. As the general political climate around migration worsened, the deficiencies of protection systems became evident. In the Italian context, international organisations and NGOs began exposing the nature and the scale of the phenomenon of trafficking of Nigerian women and girls for the purpose of sexual exploitation through the Central Mediterranean route. Shortly after, human trafficking became a key element in the discussions around migration at national and international level. Over several years I was inspired by Professors, fellow

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students and NGOs colleagues, to continue learning and to perform research that would have a tangible impact on the effective access to rights and remedies for refugees and other migrants. It was, and still is, because of that inspiration that I chose to start a PhD – and it was, and still is, because of that inspiration that I choose to work in this field.

Research background

Trafficking in persons has attracted considerable attention in the last three decades, and in particular after the adoption of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children,¹ and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings.² More recently, the phenomenon has become a primary concern for the International Criminal Court. The Prosecutor is currently examining the feasibility of opening an investigation into migrant-related crimes in Libya.³ The United Nations Security Council has adopted Resolutions 2331 (2016) and 2388 (2017) on trafficking in persons in armed conflict, and placed six individuals accused of leading smuggling

¹ ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime’ (adopted 12 December 2000, entered into force 25 December 2003) 2237 UNTS 319.

² ‘Council of Europe’s Convention on Action against Trafficking in Human Beings’ (adopted 16 May 2005, entered into force 1 February 2008) vol CETS No. 197.

³ See Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) (8 May 2019) available at <https://www.icc-cpi.int/Pages/item.aspx?name=180508-otp-statement-libya-UNSC>; Statement of ICC Prosecutor to the UNSC on the Situation in Libya (9 May 2017) available at <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>.

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and trafficking networks in Libya on its Sanctions List.⁴ Nevertheless, efforts to combat the phenomenon have been globally implemented through a narrow, criminal law-based approach, while questions around state responsibility for human trafficking,⁵ as well as long-term protection and support to identified trafficked persons, have been afforded a lower degree of attention. Significantly, the international anti-trafficking structure has also placed a primary focus on efforts to tackle the sexual exploitation of women and girls, highlighting their particular vulnerabilities – yet at the same time excluding men and boys from the narrative.

Trafficking is recognised under international law, as well as in most domestic legal frameworks, to encompass a wide range of forms of exploitation beyond sexual exploitation, and available protection measures are applicable to individuals regardless of their sex and gender. Yet, as noted by Hebert:

[...] the assumed association between human trafficking and the exploitation of females has a long history [and therefore it is] not difficult to see why the dominant narrative of trafficking today remains stubbornly focused on (heterosexual) female sex trafficking.⁶

⁴ The United Nations Security Council included Ahmed al-Dabbashi in the Sanctions List in June 2018. See, United Nations Security Council, ‘Security Council Committee concerning Libya Adds Six Individuals to Its Sanctions List’ (7 June 2018) SC/13371, available at <https://www.un.org/press/en/2018/sc13371.doc.htm>.

⁵ Philippa Webb and Rosana Garciandia, ‘State Responsibility for Modern Slavery: Uncovering and Bridging the Gap’ (2019) 68 *International & Comparative Law Quarterly* 539.

⁶ Laura A Hebert, ‘Always Victimiziers, Never Victims: Engaging Men and Boys in Human Trafficking Scholarship’ (2016) 2 *Journal of Human Trafficking* 281, 282–83.

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Indeed, domestic anti-trafficking systems are still anchored to a vision of trafficking built around sexual exploitation and charged with a strongly gendered narrative.⁷ Similarly, the overwhelming majority of research and scholarship in international law on human trafficking and protection focusses largely on trafficking for the purpose of sexual exploitation and on particular vulnerabilities of women and children,⁸ while the situation of trafficked adult males has attracted limited analysis or commentary.⁹

This narrow attention to trafficked males not only reflects a lack of attention within international law and practice on sexual and gender-based violence targeting men and boys, but it also reflects the marginalisation of labour exploitation and socio-economic rights concerns within the anti-trafficking discourse. Without discarding or undermining the idea that a gender-based, or gender-sensitive approach to human trafficking is needed, and taking into account the important

⁷ Sarah L Steele and Tyler Shores, 'Real and Unreal Masculinities: The Celebrity Image in Anti-Trafficking Campaigns' (2015) 24 *Journal of Gender Studies* 419.

⁸ Abigail Stepnitz, 'A Lie More Disastrous than the Truth: Asylum and the Identification of Trafficked Women in the UK' (2012) 1 *Anti Trafficking Review* 104; Helen Baillot and others, 'Second-hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context' (2013) 40 *Journal of Law and Society* 509; Helen Baillot and others, 'Reason to Disbelieve: Evaluating the Rape Claims of Women Seeking Asylum in the UK' (2014) 10 *International Journal of Law in Context* 105; Melanie Griffiths, "'Here, Man Is Nothing!': Gender and Policy in an Asylum Context' (2015) 18 *Men and Masculinities* 468.

⁹ Rebecca Surtees, 'Trafficked Men as Unwilling Victims' (2008) 4 *St Antony's International Review* 16; Rebecca Surtees, 'Trafficking of Men: A Trend Less Considered - The Case of Belarus and Ukraine' (IOM Migration Research Series, UN 2008); Samuel Vincent Jones, 'The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking' (2010) 4 *Utah Law Review* 1143; Carol Allais, 'The Profile Less Considered: The Trafficking of Men in South Africa' (2013) 44 *South African Review of Sociology* 40; Hebert (n 6); Avyanthi Azis and Ridwan Wahyudi, 'Imperfect Victims and an Imperfect Protocol: Reflecting on the Trafficking Experiences of Indonesian Migrant Fishermen' (2020) 6 *Journal of Human Trafficking* 156.

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contribution of feminist literature to the anti-trafficking debate,¹⁰ it is nonetheless arguable that the current narrow focus has been detrimental to a deeper understanding of the intersectional power dynamics behind and beyond trafficking in human beings. The consequences of this limitation are that the attainment of protection for ‘victims’,¹¹ who do not fit the dominant stereotype, is extremely challenging.

In recent years, there has been a growing academic and policy interest in the vulnerabilities of men,¹² and on sexual and gender-based violence against men,¹³ as

¹⁰ See, inter alia, Jo Goodey, ‘Sex Trafficking in Women from Central and East European Countries: Promoting a “Victim-Centred” and “Woman-Centred” Approach to Criminal Justice Intervention’ (2004) 76 *Feminist Review* 26; Christien van den Anker, ‘Trafficking and Women’s Rights: Beyond the Sex Industry to “Other Industries”’ (2006) 2 *Journal of Global Ethics* 163; Stepnitz (n 8); Francesca Esposito and others, ‘Voices of Nigerian Women Survivors of Trafficking Held in Italian Centres for Identification and Expulsion’ (2016) 54 *International Migration* 133; Alison Jobe, ‘Telling the Right Story at the Right Time: Women Seeking Asylum with Stories of Trafficking into the Sex Industry’ (2020) 54 *Sociology* 936.

¹¹ While the term ‘victim of trafficking’ is commonly used both in law and in practice, it carries a (often negative) connotation of victimhood that this research seeks to challenge. Therefore, the term ‘victim’ will be placed in single quotation marks throughout this research and used interchangeably with the term ‘trafficked person’.

¹² Giulia Sinatti, ‘Masculinities and Intersectionality in Migration: Transnational Wolof Migrants Negotiating Manhood and Gendered Family Roles’ in *Migration, Gender and Social Justice* (Hexagon Series on Human and Environmental Security and Peace, Springer 2014); Nicola S Pocock and others, ‘Labour Trafficking among Men and Boys in the Greater Mekong Subregion: Exploitation, Violence, Occupational Health Risks and Injuries’ (2016) 11 *PLoS One*; Julie Freccero and others, ‘Sexual Exploitation of Unaccompanied Migrant and Refugee Boys in Greece: Approaches to Prevention’ (2017) 14 *PLOS Medicine* e1002438; Jennifer Cole, ‘Service Providers’ Perspectives on Sex Trafficking of Male Minors: Comparing Background and Trafficking Situations of Male and Female Victims’ (2018) 35 *Child and Adolescent Social Work Journal* 423; Anaïs Broban and others, ‘Assault and Care Characteristics of Victims of Sexual Violence in Eleven Médecins Sans Frontières Programs in Africa. What about Men and Boys?’ (2020) 15 *PLOS ONE* e0237060.

¹³ Sandesh Sivakumaran, ‘Male/Male Rape and the “Taint” of Homosexuality’ (2005) 27 *Human Rights Quarterly* 1274; Chris Dolan, ‘Inclusive Gender: Why Tackling Gender Hierarchies Cannot Be at the Expense of Human Rights and the Humanitarian Imperative’ (2016) 98 *International Review of the Red Cross* 625; Amrita Kapur and Kelli Muddell, ‘When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys in

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well as increased awareness of trafficking for the purpose of labour exploitation and forced criminality, where higher numbers of trafficked men are identified.¹⁴ Looking beyond the focus on protection systems in isolation,¹⁵ on trafficking for the purpose of sexual exploitation and on the particular vulnerabilities of women and children,¹⁶ this research engages with reflections on human trafficking, vulnerability and masculinities. It further complements and critiques research that

Transitional Contexts' (December 2016); Sarah Chynoweth, "'We Kept in in Our Hearts": Sexual Violence against Men and Boys in the Syria Crisis' (2017); All Survivors Project, "'I Don't Know Who Can Help". Men and Boys Facing Sexual Violence in Central African Republic' (2018); Rosemary Grey and others, 'Evidence of Sexual Violence against Men and Boys Rejected in Ongwen' (*Human Rights in International Justice*, 10 April 2018) <<https://hrij.amnesty.nl/evidence-sexual-violence-men-boys-rejected-ongwen/>>; Women's Refugee Commission (WRC), "'More Than One Million Pains": Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy' (March 2019); Philipp Schulz, *Male Survivors of Wartime Sexual Violence* (University of California Press 2020).

¹⁴ Neil Howard, 'Of Coyotes and Caporali: How Anti-Trafficking Discourses of Criminality Depoliticise Mobility and Exploitation' in *Routledge Handbook of Human Trafficking* (Routledge 2018); Ella Cockbain and others, 'Human Trafficking for Labour Exploitation: The Results of a Two-Phase Systematic Review Mapping the European Evidence Base and Synthesising Key Scientific Research Evidence' (2018) 14 J Exp Criminol 319.

¹⁵ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2012); Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017).

¹⁶ Goodey (n 10); Anker (n 10); Stepnitz (n 8); Baillot and others, 'Second-hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context' (n 8); Baillot and others, 'Reason to disbelieve: evaluating the rape claims of women seeking asylum in the UK' (n 8); Letizia Palumbo and Alessandra Sciarba, 'Vulnerability to Forced Labour and Trafficking: The Case of Romanian Women in the Agricultural Sector in Sicily' (2015) 5 Anti-Trafficking Review 89; Melanie Griffiths, "'Here, Man Is Nothing!": Gender and Policy in an Asylum Context' (2015) 18 Men and Masculinities 468; Esposito and others (n 10); Moira Dustin, 'Designating "Vulnerability": The Asylum Claims of Women and Sexual Minorities' (*Security Praxis*, 3 June 2017) <<https://securitypraxis.eu/vulnerability-asylum-claims-women-minorities/>> accessed 27 February 2018; Baillot and others, 'Reason to disbelieve: evaluating the rape claims of women seeking asylum in the UK' (n 8).

depicts men as main perpetrators of the crime of human trafficking, rather than as potentially trafficked persons.¹⁷

Scope and aim of the thesis

The aim of the thesis is to critically evaluate how trafficked adult males are identified, recognised and protected, both within domestic anti-trafficking mechanisms and refugee status determination (RSD) processes. Throughout the thesis, protection is conceived broadly, as to include not only asylum, subsidiary and humanitarian protection, but also obtainment of protection through recognition of the status of ‘victim of trafficking’. The research focuses on two selected States, Italy and the United Kingdom. The main objective is to examine the theoretical underpinnings, together with the practical implications, of the relationship between gender, victimhood and protection. This relationship is examined through an analysis of how the interpretation and application of anti-trafficking and international protection laws, as well as migration control procedures, include (or

¹⁷ Surtees, ‘Trafficking of Men: A Trend Less Considered - The Case of Belarus and Ukraine’ (n 9); Allais (n 9); Rafaela Pascoal, ‘Are Men Victims of THB Considered to Be Vulnerable? The Study Case of Labour Exploitation of Romanian Men in Agriculture’ (Social Inclusion and Equal Opportunities - SIEO, Timisoara, 2016); International Rescue Committee, ‘Vulnerability Assessment of Syrian Refugee Men in Lebanon. Investigating Protection Gaps, Needs and Responses Relevant to Single and Working Syrian Refugee Men in Lebanon’ (2016); Clíodhna Murphy, ‘Tackling Vulnerability to Labour Exploitation through Regulation: The Case of Migrant Fishermen in Ireland’ (2017) 46 *Industrial Law Journal* 417; Gemma Bird, ‘Changing Vulnerabilities on Samos: Why Young Men Are Not Always the Least Vulnerable Refugees’ (*LSE European Politics and Policy*, 12 July 2019) <<https://blogs.lse.ac.uk/europpblog/2019/07/12/changing-vulnerabilities-on-samos-why-young-men-are-not-always-the-least-vulnerable-refugees/>> accessed 27 October 2019.

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exclude) trafficked adult males, who are non-nationals of the State where they find themselves, from protection.

The core research questions addressed in this study are:

- i. What obstacles arise in recognising trafficking related protection claims brought by adult men?
- ii. How do constructions of vulnerability of adult male migrants influence the protection determination process, or the trafficking ‘victim’ identification processes? Is gender a significant factor?
- iii. How does gender intersect with ‘race’ and ethnicity to influence decision making processes and assessments of credibility?
- iv. How do migration control policies in both jurisdictions influence decision-making on ‘victim’ identification and access to protection?

By addressing gendered, or gendering, misperceptions linked to trafficking in human beings, the research aims to, “bring assumptions and things taken for granted again into question, to shake habits, ways of acting and thinking, to dispel the familiarity of the accepted.”¹⁸ The research provides an in-depth analysis of conceptual and practical difficulties that arise for trafficked adult males in securing formal identification and access to protection. It also highlights the significance of gender in identification or recognition processes. In the anti-trafficking field, such significance has been mainly, if not exclusively, understood from the perspective of women and girls. The research draws on this understanding and expands it, looking at problematic constructions of masculinity and adding to existing literature

¹⁸ Colin Gordon, ‘Introduction’ in James D Faubion (ed), *Michel Foucault: Power. Essential works of Foucault, 1954–1984* (The New Press 2000) xxxiv.

on human trafficking for purposes other than sexual exploitation. It further contributes to scholarship on case law on trafficking, beyond the limited focus to date on case law of the European Court of Human Rights and on national case law on sexual exploitation of women and children. In parallel, the research critically explores the field of international migration law and the concept of, “migration as decolonisation,”¹⁹ examining questions of state responsibility as well as the tensions within protection mechanisms, perceived both as inclusive protection-based and exclusive border-control systems.

Methodology and structure

In light of the scope and aim of this research, a socio-legal methodology was considered the most appropriate framework to address the research questions.²⁰ Four steps were followed as part of this methodology: a socio-legal analysis of primary sources, a literature review of secondary sources, a jurisprudential review of leading case-law pertinent to the research questions, and an analysis of the central case-studies underpinned by empirical evidence collected via qualitative, semi-structured and confidential interviews with a purposeful sample of expert respondents in Italy and in the United Kingdom, as well as qualitative questionnaires. All interviews were held in line with ethical procedures established by National University of Ireland, Galway’s Research Ethics Committee.

¹⁹ E Tendayi Achiume, ‘Migration as Decolonization’ (2019) 71 *Stanford Law Review* 66.

²⁰ Christopher McCrudden, ‘Legal Research and the Social Sciences’ (2006) *Oxford Legal Studies Research Paper No. 33/2006 Law Quarterly Review*.

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The research includes both desk-based and empirical research. A socio-legal methodology is deployed to analyse asylum-status determination decisions, and decisions on subsidiary or humanitarian protection, relating to trafficked adult males in the Italian Territorial Commissions and Tribunals and in the UK Border Agency and Immigration Tribunals. The legal analysis is both ‘expository’ and ‘evaluative’. It includes engagement with policy reports, non-binding guidelines, and other practice documents on the protection of trafficked persons. This socio-legal methodology analyses law in its social and political, and historical context.²¹ The procedures, policies and practice on identification of trafficked adult males are also examined, to analyse how these shape and influence decision-making processes. The theoretical framework draws upon Carens and Achiume's critical approach to international migration law,²² as well as on Chuang and Thomas' examination of international law on trafficking.²³ This includes a focus on the concepts of substantive fragmentation, exploitation creep, and presumptive exclusion. The research also addresses critical analysis of progressive but exclusive expansion of human rights norms.²⁴ In addition, the research draws on feminist

²¹ David Ibbetson, ‘Historical Research in Law’, in Mark Tushnet and Peter Cane (eds) *Oxford Handbook of Legal Studies* (OUP 2003) 863, 864.

²² Joseph H Carens, ‘Aliens and Citizens: The Case for Open Borders’ (1987) 49 *The Review of Politics* 251; E Tendayi Achiume, ‘The Fatal Flaw in International Law for Migration’ (2017) 56 *Columbia Journal of Transnational Law* 257; E Tendayi Achiume, ‘Reimagining International Law for Global Migration: Migration as Decolonization?’ (2017) 111 *AJIL Unbound* 142.

²³ Janie Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) 108 *The American Journal of International Law* 609; Chantal Thomas, ‘New York State Farmworkers as a Study of Globalization, Irregular Labor Migration, and International Law’ (Bellagio Workshop, 2016).

²⁴ Marie-Bénédicte Dembour, ‘Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg’ (2003) 21 *Netherlands Quarterly of Human Rights* 63; Seyla Benhabib and Judith Resnik, *Migrations and Mobilities: Citizenship, Borders, and Gender* (New York University Press 2009); Gillian Wylie, *The International Politics of Human Trafficking* (Palgrave Macmillan 2016).

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approaches to international law,²⁵ scholarship on law and masculinities,²⁶ vulnerability and victimhood.²⁷ The relevance of gender to assessments of credibility and vulnerability, is also explored, drawing on socio-legal studies.²⁸

Through a jurisprudential review and a dissection²⁹ of leading case-law and of anti-trafficking policies, as well as on primary data on identification of trafficked persons, the research evaluates the way in which Italy and the United Kingdom have responded to the growing number of potentially trafficked adult males and their access to protection in practice. The choice of jurisdictions is rooted in the countries' historical relationship with anti-trafficking law and instruments, as well as in the innovative character of their policies. In the 1990s, Italy was a pioneer in European anti-trafficking legislation. Article 18 of the *Testo Unico*

²⁵ Sivakumaran (n 13); Christine Chinkin and Mary Kaldor, 'Gender and New Wars' (2013) 67 *Journal of International Affairs* 167.

²⁶ Richard Collier, 'Researching Men, Masculinities and Law: On Sources, Methods and the "Man Question"' (2015) 15 *Legal Information Management* 19.

²⁷ Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1; Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056; Alyson Cole, 'All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique' (2016) 17 *Critical Horizons* 260; Sharron A FitzGerald, 'Vulnerable Geographies: Human Trafficking, Immigration and Border Control in the UK and Beyond' (2016) 23 *Gender, Place & Culture* 181.

²⁸ Helen Baillot and others, "'Hearing the Right Gaps": Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process' (2012) 21 *Social & Legal Studies* 269; Baillot and others, 'Reason to disbelieve: evaluating the rape claims of women seeking asylum in the UK' (n 8).

²⁹ I drew on Dembour's dissecting method of analysis for legal judgments, which means to "approach every decision as a piece of anthropological mini-fieldwork: a conversation between different voices (some of them submerged), framed in a fairly formal way". See Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 66–74.

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sull'Immigrazione (TUI),³⁰ or Consolidated Law on Immigration, introduced a special permit for trafficked persons, which can be issued regardless of whether or not trafficked persons cooperate in judicial proceedings. In 2015, the United Kingdom has adopted the *Modern Slavery Act*.³¹ It provides for the inclusion of human trafficking under the broader umbrella category of *modern slavery*, contributing to a shift in the narrative through which human trafficking is discussed and to a stronger focus on labour exploitation. Although in both jurisdictions there are increasing numbers of men who could fall into the category of trafficked persons, there are discrepancies in terms of the number of recognised 'victims' who are adult males (compared to minors and adult women). The research explores these differences and evaluates the determinants of the discrepancy. Furthermore, by including socio-legal research methods, this work examines gaps arising between international and regional human rights standards on trafficking and protection, and the role played by international human rights law, as well as the United Nations High Commissioner for Refugees (UNHCR) guidelines on gender and trafficking, to assess how and whether such norms shape the protection processes at domestic level.

Alongside the desk-based legal analysis, I conducted first-hand, semi-structured interviews with professionals working in the field of asylum, international protection and anti-trafficking law, in order to acquire information that was otherwise unavailable through secondary data. I engaged with lawyers, social

³⁰ *Testo Unico sull'Immigrazione of 1998* (Italy 1998).

³¹ *Modern Slavery Act of 2015* (UK 2015).

workers, legal consultants and policy makers, sampled through the use of the ‘purposeful or purposive sampling’ technique as well as snowballing methods.³² The former, is a technique widely used in qualitative research for the identification and selection of information-rich cases, for the most effective use of limited resources. It involves the identification and selection of individuals (or groups of individuals) that are particularly knowledgeable about or experienced with a phenomenon of interest,³³ who are available and willing to participate, and who possess the ability to communicate experiences and opinions in an articulate, expressive, and reflective manner.³⁴ The purposeful sampling technique was logistically sustained by the snowballing method, defined most frequently as:

[...] a sampling method in which one interviewee gives the researcher the name of at least one more potential interviewee [and] that interviewee, in turn, provides the name of at least one more potential interviewee, and so on, with the sample growing like a rolling snowball if more than one referral per interviewee is provided.³⁵

I first proceeded to identify key gatekeepers and to make contact with potential interviewees seeking their consent to be interviewed. At a later stage, I set up interviews and carried out both the transcription and analysis of the same

³² Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (Fourth edition, SAGE 2015).

³³ John W Creswell and Vicki L Plano Clark, *Designing and Conducting Mixed Methods Research* (Third edition, SAGE 2017).

³⁴ Lawrence A Palinkas and others, ‘Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research’ (2015) 42 *Administration and policy in mental health* 533, 534.

³⁵ Julian Kirchherr and Katrina Charles, ‘Enhancing the Sample Diversity of Snowball Samples: Recommendations from a Research Project on Anti-Dam Movements in Southeast Asia’ (2018) 13 *PLoS ONE* 17, 1.

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independently. All participants understood that there would be no material gain from participating in the research project and that consent might have been withdrawn at any time. Participation in the interviews was anonymous, voluntary and individual. In total, 8 professionals were interviewed. A further 10 professionals completed a preliminary questionnaire but were not interviewed.

The inclusion criteria were set around three components, namely age, relevance and professional experience. Only participants who were older than 18 and who were directly or indirectly involved in the development of anti-trafficking legislation and policy, on the one hand, and in the practical implementation of the current law, on the other hand, were interviewed. Concerning professional experience, participants were selected considering their role in their organisation and the significance of their involvement in anti-trafficking actions, with a view to keep a balance between subjects involved in the legal, political, and social sectors. The interviews took place in Italy (Rome) and were scheduled to take place in the United Kingdom. Due to the spread of the Covid-19 pandemic, the interviews that had been scheduled for 2020 were held on online platforms such as Zoom, Microsoft Teams and Skype. The initial choice of locations was based on three factors, namely the presence of governmental and non-governmental organisations working on trafficking in human beings; a preliminary analysis of reported cases of human trafficking; and the presence of either Territorial Commissions or Competent Authorities and Tribunals. I was and remain fully aware of the limitations of the field component of the study, which was mainly constrained by time and accessibility to interviewees in a first phase and was further constrained by the spread of Covid-19 in a later phase.

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I adopted semi-structured interviews in order to prompt participants with initial general, open-ended questions on their views on the international protection and anti-trafficking systems. The interviews were mainly participant-driven, although I often redirected the discussion on issues of concern to the research project. Interviews completed in Italy – or with Italian counterparts – were conducted in Italian and both the translation and transcription were performed without the assistance of a professional interpreter and translator. Upon completion of the preliminary analysis, themes were further refined into categories and analysed in the light of existing literature and the broader theoretical framework. The analytical layer derived from data collected through semi-structured interview was used against existing secondary research and literature analysis and, although it confirmed part of the initial hypothesis, it also highlighted a number of inconsistencies. The formulation of these inconsistencies is believed to be able to better inform key stakeholders and relevant actors in the redaction of new policy proposals.

Outline of the study

In addition to this introduction, this study is composed of five substantive chapters, and a concluding chapter. Chapter I, ‘The historical exclusion of men from the human trafficking discourse and the construction of an ‘ideal victim’ in international law’, provides an overview of feminist critique to international law as gendered and biased in favour of men, and the historical context in which the anti-trafficking structure emerged, arguing that it represents at the same time both a

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reversed exception and a coherent *continuum* of gendering legal processes. I trace the roots of the exclusion of men from the anti-trafficking discourse at the beginning of the XX century, analysing the movement that led to the adoption of international legal instruments concerned with the abolition of the so-called “White Slave Traffic” and the debates on exploitation within the United Nations and other international institutions, including the International Labour Organisation. Finally, Chapter I contextualises the development of soft law initiatives and the tensions between a criminal law approach and a human rights approach to anti-trafficking actions, critically evaluating the adoption in 2000 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

Chapter II is titled ‘Anti-trafficking and protection mechanisms: The European regional framework and the applicable law in Italy and in the United Kingdom’. This chapter presents an analysis of applicable international, European and domestic law on trafficking in human beings, examining the forms of protection available to trafficked persons. It further lays down the interconnections between the anti-trafficking structures and the asylum systems in light of the 2006 UNHCR Guidelines on the application of the Refugee Convention to people who have been trafficked. It provides an analysis of the European legal framework, with reference to both the Council of Europe and the European Union applicable legislation, and of the domestic legal framework in Italy and in the United Kingdom. It demonstrates the engagement of international organisations with the protection of trafficked persons, and the mechanisms through which sovereign states have given effect to international legal obligations and transposed EU law into their domestic

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legal systems. The adoption of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, and the development of the European Court of Human Rights' (ECtHR) jurisprudence on human trafficking, have further developed the positive obligations on Member States to identify and protect trafficked persons. Both the Convention and the ECtHR jurisprudence have also highlighted the tensions between criminal justice and security centred responses to human trafficking, and human rights law approaches.

If the analysis in Chapter II highlights that domestic mechanisms to access international or other types of protection are not, by law, gendered nor exclusionary, Chapter III, 'Gendered protection? Conceptual and procedural obstacles for trafficked adult males in accessing protection mechanisms', explores how access to protection is conditional on the correct and timely identification of trafficked persons, which in practice suffers from structural gender and racial biases. Chapter III also problematises the interconnections between human trafficking and asylum. An analysis of case-law highlights that trafficked persons in the asylum system tend to rely on their identification as members of a Particular Social Group (PSG) to be recognised as refugees. It is argued that the recognition of individuals as members of a PSG is negatively affected by gendered and colonial stereotypes on agency, vulnerability and victimhood, as well as by the lack of recognition of violations of socio-economic rights as grounds on which to seek asylum.

Chapter IV, 'The gendered nature of trafficking in human beings: A model of inclusion or a tool of exclusion?', examines the nature of anti-trafficking action and its role (in practice) as a mechanism of border control, and of exclusion – flexible

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and selective – of ‘unwanted’ individuals from the protection of the State. It engages with reflections around risk factors and root causes of trafficking, shifting the focus to the actions of the State, rather than to the actions of individuals. It argues that a State’s immigration policies and laws produce, or enhance, vulnerability to exploitation in a way that, together with the global unequal economic order, heavily contributes to the so-called root causes of trafficking. This explains why anti-trafficking actions have been unsuccessful, if not detrimental, to the protection of trafficked individuals. It also explains how, for a meaningful change to happen, States would need to shift their attention to their own behaviour, in particular with respect to immigration laws and policies and to their role in maintaining the structural inequalities between countries. Chapter IV also argues that the current laws and policies on human trafficking are particularly punitive towards adult men, whose masculinity is perceived to be challenging the masculinity of the State as an entity, and whose vulnerability and victimhood are rarely acknowledged. Although the legal concept of vulnerability, and vulnerability assessments, have been presented as a tool of inclusion, I argue that it has been used as a tool of exclusion, aimed at restricting access to protection to those individuals deemed to be ‘protectable’.

Chapter V, ‘Rethinking vulnerability as a tool of inclusion: Moving away from a gender-biased understanding of the concept’, explores the history of the concept of vulnerability in law, its interactions with gender and victimhood, and the selective, albeit extensive use of the concept by States and stakeholders in international protection system, including in relation to trafficked persons. Despite having a relatively long history in the fields of sociology and psychology,

vulnerability as a legal concept has been deployed and heavily relied upon in the European context only in more recent times. Chapter V provides a reconceptualization of the notion of vulnerability that, alongside – and arguably as a product of – a particular, restrictive understanding of gender, has increasingly been relied upon in determining whether an individual will have access to systems of protection.

Original contribution and limits of the study

The study is the first to present an in-depth analysis of case-law and protection determination decisions on trafficked males. It explores the gender dimension of credibility assessments and constructions of vulnerability beyond women and girls, through the analysis of case-law, asylum determination, subsidiary and humanitarian protection decisions, as well as data on the identification of trafficked persons.

A limitation in conducting the study was the limited access to particular categories of interviewees, including judges and state authorities (e.g., police officers, asylum decision-makers). Another significant limitation was the lack of access to official documentation, particularly asylum decisions in both jurisdictions, and court records in Italy. In order to overcome this obstacle, I have engaged with lawyers and accessed, in a confidential manner, case files and court records. Care has been exercised in order to corroborate, wherever possible, the status and outcome of asylum claims, investigations and court cases that were

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referred to in the course of qualitative interviews, or that were reported by legal practitioners. The purpose and value of reviewing these cases is not to prove specific facts in court, but rather to explore the nuances and interactions between gender and vulnerability in the human trafficking context with illustrative examples. In the context of sexual exploitation, men are less visible as ‘victims’ and the assessments of credibility and vulnerability remain profoundly gendered.³⁶ In the context of labour exploitation, a category to which most trafficked adult males pertain, they face the additional hurdle of securing recognition of a socioeconomic related rights violation, as well as limited acceptance of men as vulnerable.³⁷ In the context of trafficking for the purpose of forced criminality, one of the lesser-known types of trafficking, “the lack of awareness of this reality [acts] as the precondition for the subsequent failure to identify the victims.”³⁸

While international law, as well as international human rights courts and bodies, have developed standards able to offer inclusive protection for trafficked persons, the enforcement of these laws remains reliant on States’ political willingness to adjust their domestic legal systems to reflect international obligations. In inquiring the degree to which Italy and the United Kingdom have done so, this research unpacks the concept of State-sponsored vulnerability, that is to say the result of the lack of engagement of the State, or the engagement in a non-human rights-based manner, with situations conducive to exploitation. This is

³⁶ Dolan (n 13); Freccero and others (n 12).

³⁷ *Chowdury and Others v Greece* No. 21884/15 (European Court of Human Rights 30 March 2017).

³⁸ Carolina Villacampa and Núria Torres, ‘Human Trafficking for Criminal Exploitation: The Failure to Identify Victims’ (2017) 23 *European Journal on Criminal Policy and Research* 393.

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particularly evident when States adopt restrictive immigration laws and policies that prevent people from migrating regularly, but it is also reflected in instances where States *de facto* tolerate exploitative situations in their economic and social systems.

The originality of the research is ensured not just by addressing an evident and significant gap in literature, but also by the analysis of case-law and by the empirical data upon which the gendered constructions of vulnerability are discussed. This research has the potential to inform the work of UNHCR, the Council of Europe's Group of Experts on Action against Trafficking in Human Beings, as well as other regional and UN bodies. It highlights the significance of vulnerability assessment beyond current, gendered constructions of vulnerability, and it will contribute to ongoing work on revising the 2006 UNHCR Guidelines on International Protection, shining a light on interconnections between trafficking and protection mechanisms, particularly that of asylum, as well as to a wider debate on 'inclusive gender', or gender beyond women, in international law. It will further contribute to discussions around state responsibility, through the conceptualisation of 'State-sponsored vulnerability' – understood as the combination, or set, of elements through which States create or maintain structures and frameworks that tolerate or increase the risk of human trafficking – in the context of human trafficking and exploitation.

Chapter I – The historical exclusion of men from the human trafficking discourse and the construction of an ‘ideal victim’ in international law

This Chapter provides an overview of feminist critique to international law as gendered and biased in favour of men, and the historical context in which the anti-trafficking structure emerged, arguing that it represents at the same time both a reversed exception and a coherent *continuum* of gendering legal processes. The Chapter traces the roots of the exclusion of non-sexual forms of exploitation and of the trafficked male from the anti-trafficking discourse at the beginning of the XX century. It analyses the movement that led to the adoption of international legal instruments concerned with the abolition of the so-called “White Slave Traffic” and the debates on exploitation within the United Nations and other international institutions, among which the International Labour Organisation (ILO). It also contextualises the development of soft law initiatives and the tensions between a criminal law approach and a human rights approach to anti-trafficking actions, critically evaluating the adoption in 2000 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

1.1 International law and gender: Anti-trafficking law both as exception and coherent *continuum* of male-dominated process of law-gendering

Gender undeniably interacts with law, both in its creation and, even more significantly, in its implementation. Throughout the drafting process, the choices with respect to language contribute to defining the limits of the law and the eligibility (or exclusion) of persons from its scope. When language is understood as constitutive, it creates the boundaries within which subjects exist, and the regimes of rights they will be able to access. Those who remain outside of such linguistic boundaries will not be legible to the law – and will therefore be excluded from its application. While some laws are explicitly gendered – meaning that they deliberately target certain categories of people, particular sexes or genders (usually women) – others become gendered through their interpretation or application. Indeed, as Ewald argues, one needs to be aware and mindful of the distinction between the norm itself and “the apparatus, institution, or technique of power that brings it into action and functions according to its principles.”¹

Feminist scholars have long critiqued and contested the gendered nature of international law, and its consequent transposition and application in the domestic legal sphere of many countries. Some scholars, including Charlesworth and Chinkin,² have argued that the legislation, the law-making process and the language

¹ François Ewald, ‘Norms, Discipline, and the Law’ (1990) 30 *Representations* 138, 153.

² Hilary Charlesworth and others, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000).

have been influenced by male domination, and that gender biases have affected the development of norms in international law institutions.³ As Charlesworth writes:

[An] obvious sign of power differentials between women and men is the absence of women in international legal institutions. Beneath this is the vocabulary of international law, which generally makes women invisible. Digging further down, many apparently neutral principles and rules of international law can be seen as operating differently with respect to women and men. Another, deeper, layer of the excavation reveals the gendered and sexed nature of the basic concepts of international law; for example, “states,” “security,” “order” and “conflict.”⁴

Feminist methods not only contributed, and still contribute, to question the possibility of objectivity in a system that effectively excludes women's voices, but they also raise questions around the construction of ‘neutral and impartial standards’, which are seen as synonyms for male perspectives. Feminist analysis of international law offers a challenge to the idea that international law simply sets a neutral structure, by asserting that it has a fundamental, even if sometimes subtly manifested, bias in favour of men,⁵ and it has proposed a critique of all spheres of

³ See inter alia Katherine Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory: Readings In Law And Gender* (Avalon Publishing 1991); Ngaire Naffine and Rosemary J Owens, *Sexing the Subject of Law* (LBC Information Services 1997); Aaron Xavier Fellmeth, ‘Feminism and International Law: Theory, Methodology, and Substantive Reform’ (2000) 22 *Human Rights Quarterly* 658; Lauren Bock Mullins, ‘CEDAW: The Challenges of Enshrining Women’s Equality in International Law’ (2018) 20 *Public Integrity* 257; Misbah Sabohi and others, ‘Feminist Perspective of International Law and Its Effect on International Courts and Tribunals’ (2019) 22 *Journal of Legal, Ethical and Regulatory Issues*.

⁴ Hilary Charlesworth, ‘Feminist Methods in International Law’ (1999) 93 *The American Journal of International Law* 379, 381.

⁵ Hilary Charlesworth, ‘Feminists Critiques of International Law and Their Critics’ (1995) 13 *Third World Legal Studies* 17, 2.

international law, including of international refugee law.⁶ Early criticism of international refugee law highlighted how:

[...] by portraying as universal that which is in fact a male paradigm, ... women refugees face rejection of their claims because their experiences of persecution go unrecognized.⁷

Doreen Indra spells out her critique referencing to the “systematic neglect of gender as a critical consideration in every facet of the refugee situation.”⁸ She critiques how “mass media materials soliciting sympathy for refugees usually tend to identify notable refugees with men.”⁹ Honkala further argues that the (almost) systematic categorisation of women’s gender-based persecution claims under the membership of a particular social group ground, instead of, *inter alia*, the political opinion ground, demonstrates an underlying gendered politics.¹⁰ In the context of armed conflict, the focus of the legal protection of the human rights of women is almost exclusively on sexual violence:

⁶ See *inter alia* Doreen Indra, ‘Gender: A Key Dimension of the Refugee Experience’ (1987) 6 *Refuge: Canada’s Journal on Refugees* 3; Jacqueline Greatbatch, ‘The Gender Difference: Feminist Critiques of Refugee Discourse’ (1989) 1 *International Journal of Refugee Law* 518; Deborah E Anker, ‘Refugee Law, Gender, and the Human Rights Paradigm’ (2002) 15 *Harvard Human Rights Journal* 133; Jane Freedman, ‘Taking Gender Seriously in Asylum and Refugee Policies’ in Kavita R Khory (ed), *Global Migration: Challenges in the Twenty-First Century* (Palgrave Macmillan US 2012); Efrat Arbel and others, *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014); Megan Denise Smith, ‘Rethinking Gender in the International Refugee Regime’ (2016) 53 *Forced Migration Review* 65.

⁷ Greatbatch (n 6) 518.

⁸ Indra (n 6) 3.

⁹ *ibid.*

¹⁰ Nora Honkala, “‘She, of Course, Holds No Political Opinions’”: Gendered Political Opinion Ground in Women’s Forced Marriage Asylum Claims’ (2017) 26 *Social & Legal Studies* 166.

[An] emphasis [that] obscures many other human rights issues in times of armed conflict, particularly the protection of economic, social and cultural rights of women.¹¹

Similarly, reflections on gender and chattel slavery often highlight women's vulnerability to sexual violence and their dual exploitation.¹² Studies of slavery and gender developed somewhat independently from each other until the 1990s, when scholars began to rectify the historical de-gendering of slavery and "slaves and women came to be depicted respectively as not passive but active participants in history making and agents of social changes."¹³

Yet, as Charlesworth argues, it still appears that:

[...] when women enter into focus at all in international law, they are viewed in a very limited way, often as victims, particularly as mothers, or potential mothers, in need of protection.¹⁴

The focus on women's bodies and questions of morality and honour is also evident in early anti-trafficking legislation and has been inherited by the contemporary anti-trafficking system. Underlying assumptions of the woman's body as a commodity and perceptions of the necessity to control women's sexuality, labour and migration can be understood as a result of the operationalisation of male-dominated structures

¹¹ Charlesworth (n 4) 388.

¹² Beth Herzfeld, 'Slavery and Gender: Women's Double Exploitation' (2002) 10 *Gender and Development* 50; Kirsten E Wood, 'Gender and Slavery' in Mark M Smith and Robert L Paquette (eds), *The Oxford Handbook of Slavery in the Americas* (Oxford University Press 2010).

¹³ Mieko Nishida, 'Slavery and Gender', *Atlantic History* (Oxford Bibliographies 2015).

¹⁴ Charlesworth (n 4) 381.

of thought and of law. In this sense, anti-trafficking legislation represents a *continuum* in the processes of gendering of the law that are criticised by feminist scholars. At the same time, it also represents – initially in law and currently in its practical implementation – an exclusion mechanism with respect to men and boys. The male ‘victim’, as well as reflections on males as gendered subjects, has been silenced throughout the creation of the anti-trafficking structures, and current protection mechanisms continue to be (negatively) affected by an identification bias. ‘Searching for silences’¹⁵ in the anti-trafficking sphere also includes ‘asking the man question’,¹⁶ in the attempt to contribute to the dismantlement of the stereotypes of the trafficked person that were created through the anti-trafficking structure. It also aims at remedying the troubling consequences of the imaginary created by the ‘ideal victim’ for the identification and recognition of ‘real victims’,¹⁷ regardless of their age, sex and gender. At the same time, inquiring the gendered nature of anti-trafficking law is a tool to move away from the gendered assumptions about women, too. Challenging this narrative not only allows to understand and acknowledge vulnerability and victimhood as they interact with masculinities, but it also allows to reclaim the agency and resilience of female subjects, who are too often essentialised in anti-trafficking discourses.

¹⁵ *ibid.*

¹⁶ Nancy Dowd, ‘Asking the Man Question: Masculinities Analysis and Feminist Theory’ (2010) 33 *Harvard Journal of Law & Gender* 415.

¹⁷ Nils Christie, ‘The Ideal Victim’ in *From Crime Policy to Victim Policy* (Palgrave Macmillan, London 1986).

1.2 The roots of exclusion: The formation of anti-trafficking norms in the international system

The modern legal history of trafficking in human beings is usually associated with the process that led to the adoption of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol or 2000 United Nations Protocol),¹⁸ signed in Palermo in 2000 alongside the Protocol against the Smuggling of Migrants by Land, Sea and Air,¹⁹ and a third Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. The Protocol, attached to the United Nations Convention against Transnational Organised Crime, laid down a legal definition of trafficking. Under Article 3(a), trafficking in persons shall mean:

The recruitment, transportation, transfer, harbouring, or receipt of persons, by means of 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 payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at the minimum, the exploitation of the prostitution

¹⁸ ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime’ (adopted 12 December 2000, entered into force 25 December 2003) 2237 UNTS 319.

¹⁹ ‘Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime’ (adopted 12 December 2000, entered into force 28 January 2004) 2241 UNTS.

of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs.²⁰

Although the Palermo Protocol has surely represented a milestone in the definition of the international anti-trafficking structure, the concept of human trafficking, albeit initially lacking a legal definition and limited in its scope, already had a solid, yet controversial, legal, political, and social history. It has been argued that, looking at the development of the anti-trafficking norm, the roots and the conceptual understanding of *modern* trafficking can be traced back to the phenomenon of slavery. Indeed, the 1904 International Agreement for the Suppression of the White Slave Traffic²¹ and the 1910 International Convention for the Suppression of the “White Slave Traffic,”²² the first international instruments dealing with trafficking, both referred to the concept of slavery. More precisely, they referred to the traffic of white females for *immoral* purposes. Although it has been claimed that trafficking and slavery share some characteristics,²³ the question whether trafficking can be considered a form of slavery is far from being settled, and it has attracted renewed importance in light of the adoption by several States, including

²⁰ ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’ (n 18) Article 3(a).

²¹ ‘1904 International Agreement for the Suppression of the White Slave Traffic’ (adopted 18 May 1904, entered into force 18 July 1905) vol 1 LNTS 83.

²² ‘1910 International Convention for the Suppression of the “White Slave Traffic”’ (adopted 4 May 1910, entered into force 5 July 1920).

²³ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers 2006) 13. See also Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2012) 177–91.

the United Kingdom,²⁴ of legislation aimed at targeting human trafficking as a form of ‘modern slavery’. It is true that:

[All] practices involve the organized movement of individuals, generally across national borders, for exploitative purposes [and] neither system can be sustained without massive and systematic violations of human rights.²⁵

Yet, despite the substantive, discernible link in principle between human trafficking, slavery, and the slave trade, the appeal of equating human trafficking and slavery, although self-evident from a rhetorical perspective, shall be balanced with legal – as well as historical and social – precaution. The development of international law with respect to slavery highlights how the 1926 Convention to Suppress the Slave Trade and Slavery was not intended, despite an ambiguous wording, to expand the definition of slavery to such institutions and practices which would not involve the exercise of “any or all of the powers attached to ownership.”²⁶ Indeed, the work of Jain Allan in the analysis of the *travaux préparatoires* of the Convention has highlighted how the concept of slavery was meant to be interpreted in a restrictive manner.²⁷ In its first, landmark judgment on a trafficking case,

²⁴ *Modern Slavery Act of 2015* (UK 2015).

²⁵ Gallagher (n 23) 177.

²⁶ ‘Convention to Suppress the Slave Trade and Slavery’ (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 Article 1(1).

²⁷ Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff Publishers 2008). This interpretation is in line with the judgment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Kunarac* case. See *Prosecutor v Kunarac, Kovac and Vukovic* Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (22 February 2001); *Prosecutor v Kunarac, Kovac and Vukovic* Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (6 December 2002).

Rantsev v Cyprus and Russia,²⁸ the ECtHR elaborated on the concept of right of ownership, but it refrained from equating slavery and human trafficking. The Court recognised that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, fell within the scope of Article 4 of the Convention,²⁹ which provides that “[n]o one shall be held in slavery or servitude [and n]o one shall be required to perform forced or compulsory labour.”³⁰ It further held that:

[Even if] the absence of an express reference to trafficking in the Convention is unsurprising [as] the Convention was inspired by the Universal Declaration of Human Rights, ... which itself made no express mention of trafficking[,] in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention’s special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions.³¹

Expanding on its previous interpretation of slavery as requiring the exercise of a genuine right of ownership, thus the reduction of an individual to the status of an ‘object’,³² the Court affirmed that “trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership.”³³ Nonetheless, the Court considered that it was, “unnecessary to identify whether the treatment about which the applicant complains constitutes

²⁸ *Rantsev v Cyprus and Russia* No. 25965/04 (European Court of Human Rights 7 January 2010).

²⁹ *ibid* para 282.

³⁰ ‘European Convention for the Protection of Human Rights and Fundamental Freedoms’ (adopted 4 November 1950, entered into force 3 September 1953) vol ETS 5 Article 4.

³¹ *Rantsev v Cyprus and Russia* (n 28) paras 277–278.

³² *Siliadin v France* No. 73316/01, para 122 (European Court of Human Rights 26 October 2005).

³³ *Rantsev v Cyprus and Russia* (n 28) para 281.

‘slavery’, ‘servitude’ or ‘forced and compulsory labour’,”³⁴ therefore avoiding to resolve the question whether human trafficking shall be equated with slavery.

Looking at other legal instruments, it could be argued that human trafficking is not slavery, but that it could *become* slavery. As O’Connell Davidson argues:

[...] while in political rethoric trafficking is said to *be* modern slavery, in international law, slavery is just one of a number of possible outcomes of what is termed trafficking.³⁵

Considering the very definition of human trafficking, as agreed upon in the framework of the 2000 United Nations Protocol, slavery is in fact listed as “one of several end purposes for which a person may be trafficked.”³⁶ Therefore, legally speaking and in contrast with the current political rethoric, slavery qualifies as a *result* of trafficking, not as trafficking *per se*. Also, the International Criminal Court Statute defines enslavement as:

[...] the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power *in the course of trafficking in persons*, in particular women and children.³⁷

³⁴ *ibid* para 282.

³⁵ Julia O’Connell Davidson, *Modern Slavery - The Margins of Freedom* (Palgrave Macmillan 2015) 4.

³⁶ Gallagher (n 23) 189.

³⁷ ‘Rome Statute of the International Criminal Court’ (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 Article 7.2 (emphasis added).

It is indeed difficult to claim that all instances of trafficking are included in the restrictive definition of slavery, and therefore in the customary and *jus cogens* norm prohibiting the same.

The concept of trafficking as slavery remains controversial and subject to different interpretations, yet the connections between human trafficking and slavery have been established in law at the early stages of the construction of anti-trafficking norms. The first instruments dealing with the substance of human trafficking, the 1904 International Agreement for the Suppression of the White Slave Traffic and the 1910 International Convention for the Suppression of the “White Slave Traffic”, adopted the language of slavery.³⁸ In doing so, however, both instruments initiated a process of de- and re-racialisation and gendering of the phenomenon, in a way that had been, until then, unexplored.³⁹ The 1904 Agreement and the 1910 Convention referred explicitly to the procurement of (white) *women and girls* rather than of persons, and for *immoral purposes* rather than for exploitation. The initial dimension of human trafficking was indeed charged with a racial dimension, and shaped as to include just one (biological) sex and one type of

³⁸ ‘1904 International Agreement for the Suppression of the White Slave Traffic’ (n 21); ‘1910 International Convention for the Suppression of the “White Slave Traffic”’ (n 22).

³⁹ For an in-depth discussion of the link between the abolitionist movement and the ‘White Slave Traffic’, as well as the moralising impulse of Victorian feminism, see, inter alia, Mary Ann Irwin, “‘White Slavery’ As Metaphor: Anatomy of a Moral Panic’ (1996) 5 *Ex Post Facto: The History Journal*; Cecily Devereux, “‘The Maiden Tribute’ and the Rise of the White Slave in the Nineteenth Century: The Making of an Imperial Construct’ (2000) 26 *Victorian Review* 1; Harald Fischer-Tiné, “‘White Women Degrading Themselves to the Lowest Depths’: European Networks of Prostitution and Colonial Anxieties in British India and Ceylon ca. 1880-1914’ (2003) 40 *The Indian Economic & Social History Review* 163; Brian Donovan, *White Slave Crusades: Race, Gender, and Anti-Vice Activism, 1887-1917* (University of Illinois Press 2006); Paul Knepper, ‘White Slave Trade’ in Paul Knepper (ed), *The Invention of International Crime: A Global Issue in the Making, 1881-1914* (Palgrave Macmillan UK 2010).

exploitative purpose. This focus on white women and girls and on sexual exploitation surely needs to be considered within the historical framework in which anti-trafficking norms emerged, where the international community was “particularly agitated by reports of the time that white women and girls were being trafficked into prostitution in Europe and the colonies.”⁴⁰ Through the 1904 Agreement, Governments agreed to:

[...] establish or designate an authority ... directed to centralize all information concerning the procurement of women or girls with a view to their debauchery in a foreign country [and] to exercise a supervision for the purpose of seeking, particularly in the stations, harbors of embarkation and on the journey, the conductors of women or girls intended for debauchery.⁴¹

Emphasis was placed on the identification of:

[...] women and girls of foreign nationality who surrender themselves to prostitution, with a view to establish their identity and their civil status and to ascertain who has induced them to leave their country [as well as on the return] of those women or girls who ask their return or who may be claimed by persons having authority over them.⁴²

A few years later, in 1910, the International Convention for the Suppression of the “White Slave Traffic” was signed in Paris. Much more focused on criminalisation and prosecution, the Convention provided that:

⁴⁰ Gillian Wylie, *The International Politics of Human Trafficking* (Palgrave Macmillan 2016) 46.

⁴¹ ‘1904 International Agreement for the Suppression of the White Slave Traffic’ (n 21) Articles 1 and 2.

⁴² *ibid* Article 3.

Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, *a woman or girl under age*, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.⁴³

In 1921, just one year after the entry into force of the 1910 Convention, States signed the International Convention for the Suppression of Traffic in Women and Children, agreeing to take all measures to “discover and prosecute persons who are engaged in the traffic in children of *both sexes* and who commit offences within the meaning of Article 1 of the [1910] Convention.”⁴⁴ The inclusion of a reference to both sexes, although limited to children, was not taken up in the 1933 International Convention for the Suppression of The Traffic in Women of Full Age, which was concerned with the punishment of whoever, “has procured, enticed or led away even with her consent, a woman or girl of full age for immoral purposes to be carried out in another country,”⁴⁵ regardless of the sex of the perpetrator.⁴⁶

Despite the limited shift in narrative in the 1921 Convention, subsequent instruments within the League of Nations and its successor, the United Nations, still referred to the coerced movement of women and girls for the purposes of prostitution.⁴⁷ The seeds of a gender-neutral understanding of trafficking can be

⁴³ ‘1910 International Convention for the Suppression of the “White Slave Traffic”’ (n 22) Article 1 (emphasis added).

⁴⁴ ‘1921 International Convention for the Suppression of the Traffic in Women and Children’ (adopted 30 September 1921, entered into force 15 June 1922) 9 LNTS 415 Article 2 (emphasis added).

⁴⁵ ‘1933 International Convention for the Suppression of the Traffic in Women of Full Age’ (adopted 11 October 1933, entered into force 24 August 1934) Article 1.

⁴⁶ *ibid* Article 3.

⁴⁷ Obokata (n 23) 17.

first found in the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.⁴⁸ While still concerned with prostitution and “the accompanying evil of the traffic in persons for the purpose of prostitution,”⁴⁹ which was deemed, “incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community,”⁵⁰ the Convention abandons the earlier, gendered language. In doing so, it calls upon State Parties to:

[...] punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, *another person*, even with the consent of that person; (2) Exploits the prostitution of *another person*, even with the consent of that person.⁵¹

Where previous instruments were not concerned with protection measures, with the partial exception of the 1904 Convention, the 1949 Convention also provides that:

The Parties to the present Convention agree to take or to encourage, through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offences referred to in the present Convention.⁵²

Even if the 1949 Convention provided for a gender-neutral formulation of trafficking in human beings, it did not address forms of exploitation outside of

⁴⁸ ‘1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others’ (drafted 2 December 1949, entered into force 25 July 1951).

⁴⁹ *ibid* Preamble.

⁵⁰ *ibid*.

⁵¹ *ibid* Article 1 (emphasis added).

⁵² *ibid* Article 16.

sexual exploitation and prostitution. Between 1949 and 1993, the United Nations General Assembly did not engage in meaningful discussions on the topic of trafficking in human beings. Considering the limited scope of the type of phenomenon captured in the early anti-trafficking conventions, this is unsurprising.

1.3 The construction and the inclusion of non-sexual forms of exploitation in the anti-trafficking norm

While the United Nations General Assembly remained almost entirely silent for decades on the issue of trafficking in persons after 1949, it was the Economic and Social Council (ECOSOC) that in 1972 addressed the topic through Resolution 1706 (LIII), in which:

[It noted] with alarm and indignation reports of incidents involving the illegal transportation, organized or undertaken by criminal elements, to some European countries and the exploitation of workers from some African countries in conditions akin to slavery and forced labour, which constitute an extreme outrage to the human person.⁵³

The ECOSOC appealed to Governments to take all necessary action to apprehend and bring to justice those responsible for such malpractices. It was a specific incident concerning the discovery of 28 workers from Mali who were irregularly transported into France, crowded in a lorry, which led to the adoption of the

⁵³ United Nations Economic and Social Council, 'Exploitation of Labour through Illicit and Clandestine Trafficking' (Resolution 1706 (LIII) July 1972) Preamble.

resolution.⁵⁴ In November of the same year, in light of Resolution 1706 (LIII), the United Nations General Assembly adopted Resolution 2920 (XXVII), calling upon Governments to:

[...] take or supervise the application of measures to put an end to the discriminatory treatment of which migrant workers in their territory are the victims and particularly to ensure the improvement of arrangements for receiving such workers.⁵⁵

The Committee attempted to ensure the compliance with the International Convention on the Elimination of All Forms of Racial Discrimination,⁵⁶ at the same time recommending that the Commission on Human Rights consider the “question of the exploitation of labour through illicit and clandestine trafficking.”⁵⁷

Although the early anti-trafficking instruments were concerned with a transnational *movement*, the issue of trafficking had not been conceived nor understood from a strictly migratory perspective, but rather from a soft human rights – and a strong criminal law – perspective. The issue was also more broadly linked to questions of morals. With the exception of Article 17 of the 1949

⁵⁴ United Nations Economic and Social Council, ‘Exploitation of Labour through Illicit and Clandestine Trafficking. Note by the Secretary-General. Study Prepared by Mrs. Halima Embarek Warzazi on the Exploitation of Labour through Illicit and Clandestine Trafficking’ (17 June 1974) 18.

⁵⁵ United Nations General Assembly, ‘Exploitation of Labour through Illicit and Clandestine Trafficking’ (A/RES/2920 (XXVII) 1972) para 1.

⁵⁶ ‘International Convention on the Elimination of All Forms of Racial Discrimination’ (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

⁵⁷ United Nations General Assembly, ‘Exploitation of Labour through Illicit and Clandestine Trafficking’ (n 55) para 3.

Convention,⁵⁸ the links between trafficking and the phenomenon of migration *per se*, had long gone unaddressed. Resolution 1706 (LIII) and Resolution 2920 (XXVII) re-opened the debate on trafficking, adding a specific and unprecedented dimension to the same. In 1973, the Commission on Human Rights examined the issue of exploitation of labour through illicit and clandestine trafficking during its twenty-ninth session. In considering the aspect of illicit trafficking in foreign labour, members of the Commission noted that:

It could be considered as a form of the slave trade and therefore one of the solutions to this problem would be a vigorous implementation of the existing international instruments on slavery, such as the Supplementary Convention on the Abolition of Slavery and the Slave Trade and Institutions and Practices similar to Slavery of 1956.⁵⁹

When the ECOSOC adopted Resolution 1789 (LIV) and Resolution 1790 (LIV), it stressed the idea that:

⁵⁸ ‘1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others’ (n 48) Article 17. According to Article 17, the Parties “undertake, in connection with immigration and emigration, to adopt or maintain such measures as are required, in terms of their obligations under the present Convention, to check the traffic in persons of either sex for the purpose of prostitution,” and in particular to “make such regulations as are necessary for the protection of immigrants or emigrants, and in particular, women and children, both at the place of arrival and departure and while en route”.

⁵⁹ United Nations Commission on Human Rights, ‘Report on the Twenty-Ninth Session (26 February-6 April 1973). Economic and Social Council Official Records: Fifty-Fourth Session. Supplement No. 6’ (1973) para 82.

[...] effective action to prevent exploitation of the victims of illegal trafficking in labour requires comprehensive measures designed to enhance the protection of human rights in respect of foreign workers.⁶⁰

The ECOSOC further requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider, as a matter of priority:

[...] the problem of the applicability of existing international provisions for the protection of human rights to individuals who are not citizens of the country in which they live.⁶¹

The Sub-Commission noted that the issues in some ways paralleled each other, and that “there was an irrefutable link between exploitation of labour through illicit and clandestine trafficking on the one hand, and racism and slavery on the other.”⁶² It issued several recommendations for dealing with the ‘problem’ of exploitation of labour through illicit and clandestine trafficking, among which the recommendation for governments to “enact laws which would provide for heavy penal sanctions against those who organize illicit traffic of migrant workers *and employers who benefit from it.*”⁶³

⁶⁰ United Nations Economic and Social Council, ‘Exploitation of Labour through Illicit and Clandestine Trafficking’ (Resolution 1789 (LIV) 18 May 1973) Preamble.

⁶¹ United Nations Economic and Social Council, ‘Question of International Legal Protection of the Human Rights of Individuals Who Are Not Citizens of the Country in Which They Live’ (Resolution 1790 (LIV) 18 May 1973) para 1.

⁶² United Nations Economic and Social Council, ‘Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Twenty-Sixth Session. Note by the Secretary-General’ (E/CN.4/1128, E/CN.4/Sub.2/3143 28 December 1973) para 95.

⁶³ *ibid* para 97 (emphasis added).

As Mrs. Halima Embarek Warzazi wrote in her study on the exploitation of labour through illicit and clandestine trafficking:

[...] the inquiries made to date reveal that the existence of illicit and clandestine practices for the recruitment of migrant workers has been reported in almost all countries of destination [and that] all too often [these] workers are recruited on the strength of deceitful promises, are transported clandestinely in deplorable conditions and are unable, because of their illegal situation, to benefit from the social legislation of the country of destination.⁶⁴

In exploring the principal causes of illicit migrations of workers, Mrs. Warzazi mentioned, *inter alia*, economic under-development, imbalance between rate of economic development and demographic growth in the developing countries, underemployment, and the manpower needs of the industrialized countries.⁶⁵ This analysis was complemented by the observations on a number of States, among which Belgium, Morocco, and the Government of the Ukrainian SSR, as well as the ILO, that highlight other possible causes such as the frequent complexity and length of recruitment and immigration procedures, and the distrust of public administrations that makes many workers ignore legal procedures. Interestingly, references were also made to potential structural causes, with the ILO stating that:

⁶⁴ United Nations Economic and Social Council, 'Exploitation of labour through illicit and clandestine trafficking. Note by the Secretary-General. Study prepared by Mrs Halima Embarek Warzazi on the exploitation of labour through illicit and clandestine trafficking' (n 54) 11.

⁶⁵ *ibid* 16.

[...] one may wonder to what extent such an attitude among migrants from under-developed countries constitutes an after-effect of the colonial period, characterized by a profound alienation of the people from their rulers.⁶⁶

The Government of the Ukrainian Soviet Socialist Republic further argued that:

Illicit traffic in migrant workers constitutes only one aspect of the exploitation of workers by national and multinational monopolies, which [are] inherent in the capitalist system[:] The migration of workers, whether legal or illegal, is actively encouraged by capitalist enterprises with a view to obtaining an abundant supply of cheap labour and keeping profits high[, with] exploitation [that] is greatest in the case of migrant workers who have entered illegally.⁶⁷

Similarly, the Government of Yugoslavia drew attention to:

[...] the interests pursued by employers, especially small employers, who, through their influence in the political life of their countries, prevent the adoption of legislation against illicit trafficking.⁶⁸

Following the publication of the study, the United Nations General Assembly (UNGA) invited all States to promote and to facilitate the adoption of bilateral agreements, “which would help to reduce the illicit traffic in alien workers,”⁶⁹ but refrained from engaging in discussions around a multilateral agreement. It was only in the 1990s that theoretical and empirical links between trafficking and migratory movements, both forced and non-forced, begun to be recognised. It was also only

⁶⁶ *ibid.*

⁶⁷ *ibid* 17.

⁶⁸ *ibid.*

⁶⁹ United Nations General Assembly, ‘Measures to Improve the Situation of Migrant Workers’ (Resolution 3224 (XXIX) 6 November 1974) para 4(b).

in the 1990s that the general discourse on trafficking begun to include reflections on labour exploitation and migration. During the 1980s, and above all at the beginning of the 1990s, migratory inflows increased in almost all countries of the so-called ‘global North’. This trend, as reported in a study of the Organisation for Economic Cooperation and Development (OECD), “peaked in 1992-93 for the main immigration countries such as Canada, Germany, Japan and the United States.”⁷⁰ This sharp increase in people’s mobility led the United Nations General Assembly to adopt Resolution 48/102 on ‘Prevention of the smuggling of aliens’,⁷¹ and to re-open the discussion around human trafficking, adding to the phenomenon a mobility lens, as well as dimensions beyond sexual exploitation.

In 1994 and 1995, the UNGA adopted two documents on trafficking, which correspond to a substantial, albeit partial, change in narrative. For the first time since the creation of international anti-trafficking norms, both documents affirmed that trafficking could take place for a range of purposes *beyond* sexual exploitation, such as “forced domestic labour, false marriage, clandestine employment and forced adoption,”⁷² as well as more general “economically oppressive and exploitative situations.”⁷³ Similarly, the 1994 Programme of Action of the International Conference on Population and Development called upon all

⁷⁰ Organisation for Economic Cooperation and Development, ‘Trends in International Migration: Continuous Reporting System on Migration’ (2001) 17.

⁷¹ United Nations Security Council, ‘Prevention of the smuggling of aliens’ (8 March 1994) UN Doc A/RES/48/102.

⁷² United Nations General Assembly, ‘Traffic in Women and Girls’ (23 December 1994) UN Doc A/RES/49/166, Preamble.

⁷³ United Nations General Assembly, ‘Traffic in Women and Girls: Report of the Secretary General’ (24 August 1995) UN Doc A/50/369, para 17.

Governments to prevent international trafficking in migrants, especially – but not solely – for the purpose of prostitution.⁷⁴ The Programme also called for the adoption of effective sanctions against those who organise undocumented migration, exploit undocumented migrants or engage in trafficking in undocumented migrants, especially those who engage in any form of international traffic of women and girl children. Despite the profound innovation concerning the understanding of the phenomenon, however, both documents were still linked to the historical understanding that trafficking could only affect women and children, especially girls. The UNGA, for example, condemned:

[The] illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing *women and girl children* into sexually or economically oppressive and exploitative situations.⁷⁵

Though “acknowledging that the problem of trafficking also victimizes young boys”,⁷⁶ the Resolution makes no further reference to males as ‘victims of trafficking’. Yet, for the first time, the early, exclusive focus on sexual exploitation that had contributed to the marginalisation of trafficking for purposes other than sexual exploitation from the debates around emerging anti-trafficking norms was

⁷⁴ United Nations Population Fund, ‘Programme of Action of the International Conference on Population Development, Adopted at the International Conference on Population and Development, Cairo (5–13 September 1994)’ (1994).

⁷⁵ United Nations General Assembly, ‘Traffic in Women and Girls’ (n 72) (emphasis added).

⁷⁶ *ibid* Preamble.

set aside, although it was not immediately translated into a comprehensive legal framework of protection.

The process that started in the early 1990s led to the adoption of the Palermo Protocol in 2000. Among the major outcomes of the adoption of the Palermo Protocol was the crystallisation of a definition of trafficking in human beings, which expanded the element of purpose as to encompass forced labour or services, slavery or practices similar to slavery, and servitude. At a general level, the purpose element introduced the idea that it is the *intention* to exploit, and not the exploitation *per se*, which gives rise to a situation of trafficking. In other words, “[i]t is sufficient that such exploitation was the intention of the conduct.”⁷⁷ While this definition contributes to the differentiation between human trafficking and slavery, it also introduced a reference to forced labour as part of the exploitative practices that characterise the *dolus specialis* of trafficking, which allows for a connection to be established between the Palermo Protocol and the ILO Forced Labour Convention.⁷⁸ Indeed, even if marginalised in the anti-trafficking discourse and in its instruments until the late 1990s, a process aimed at giving forced labour a legal definition was being undertaken in a parallel forum, the ILO.

In 1930, the ILO adopted the Forced Labour Convention (C029), which called upon all ratifying Member States to suppress the use of forced or compulsory labour in all its forms, defining forced or compulsory labour as: “all work or service which

⁷⁷ Gallagher (n 23) 34.

⁷⁸ Working Group on Trafficking in Persons, ‘Analysis of Key Concepts of the Trafficking in Persons Protocol, Background Paper prepared by the Secretariat’ (16 February 2010) UN Doc CTOC/COP/WG.4/2010/2, para 13.

is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”⁷⁹ The commitment to the complete abolition of forced or compulsory labour was reinforced through, *inter alia*, the 1957 Abolition of Forced Labour Convention (C105).⁸⁰ The two Conventions, C029 and C105, are the most widely ratified of all the ILO instruments,⁸¹ contributing to the recognition of the prohibition of the use of forced or compulsory labour as a peremptory norm of international law, which therefore is not only of binding nature, but also allows for no derogations. The definition of forced or compulsory labour is also integral to the development of the general anti-trafficking action, not only because it has been included in the Palermo Protocol, but also

⁷⁹ International Labour Organisation, ‘Convention Concerning Forced or Compulsory Labour (C029)’ (adopted 28 June 1930, entered into force 1 May 1932) Articles 1 and 2. For the purposes of the Convention, for the purposes of this Convention, “the term forced or compulsory labour shall not include (a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character; (b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country; (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations; (d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population; (e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.”

⁸⁰ International Labour Organisation, ‘Abolition of Forced Labour Convention (C105)’ (adopted 25 June 1957, entered into force 15 January 1959).

⁸¹ The Forced Labour Convention (C029) has been ratified by 178 States, while the Abolition of Forced Labour Convention (C105) has been ratified by 176 States. See ILO, ‘Ratifications of C029 - Forced Labour Convention, 1930 (No. 29)’ <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312174> accessed 23 February 2021; and ILO, ‘Ratifications of C105 - Abolition of Forced Labour Convention, 1957 (No. 105)’ <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312250:NO> accessed 23 February 2021.

because it has been subject to a slow, albeit progressive, expansion. The definition under C029 contains three elements that shall be present for an activity to be defined as forced labour: The activity must constitute either work or services, it needs to be exacted from any person under the menace of any penalty, and the person need not to have offered themselves voluntarily. While the first element is quite straightforward, the second and third elements need further clarification. On the one hand, as far as the menace of penalty is concerned, the ILO has confirmed that it does not refer to strict penal sanctions, but also to a loss of rights or privileges.⁸² A situation of forced labour may arise in situations of physical or sexual violence, restriction of movement, debt bondage, refusal of payments, retention of identity documents, and threat of denunciation to the authorities. On the other hand, in considering the issue of voluntary offer:

[...] the ILO supervisory bodies have touched upon a certain number of different aspects: The form and subject matter of the consent; the role of external or indirect constraints for which the State or the employer may be accountable or not; the possibility for a minor (or his or her parents) to give a valid consent; and the possibility of revoking a freely given consent.⁸³

Where a person was induced to an activity by deceit, false promises and retention of identity documents or force, the ILO supervisory bodies have noted a violation of the Convention. At the same time, new forms of forced labour have emerged since the adoption of the Labour Conventions, among which offences related to trafficking in human beings. These developments have been followed, highlighted,

⁸² International Labour Organisation, *Fundamental Rights at Work and International Labour Standards* (2003) 36.

⁸³ *ibid.*

and interpreted by the ILO Committee of Experts on the Application of the Conventions and Recommendations (the Committee of Experts) in its general surveys and commentaries, particularly after the adoption of the Palermo Protocol. In its report on the application of Labour Conventions in 2001, the Committee of Experts explicitly asked governments to comment on “measures taken or contemplated to prevent, suppress and punish trafficking in persons for the purpose of exploitation.”⁸⁴ More recently, it went further and held that the definition of forced labour has come to encompass:

[Not only] traditional practices of forced labour, such as vestiges of slavery or slave-like practices, and various forms of debt bondage, [but also] new forms of forced labour that have emerged in recent decades, such as human trafficking.⁸⁵

The link between the definition of forced labour and human trafficking has been further reiterated in the ILO’s 2014 Protocol to the Forced Labour Convention of 1930, which provides that the measures referred to in the Protocol “shall include specific action against trafficking in persons for the purposes of forced or compulsory labour.”⁸⁶

⁸⁴ International Labour Organisation, ‘Report of the Committee of Experts on the Application of Conventions and Recommendations’ (2001) International Labour Conference, 89th Session.

⁸⁵ International Labour Organisation, ‘Report III(1B): Giving Globalization a Human Face (General Survey on the Fundamental Conventions)’ (2 March 2012) para 272 <http://www.ilo.org/ilc/ILCSessions/101stSession/reports/reports-submitted/WCMS_174846/lang--en/index.htm> accessed 9 November 2017.

⁸⁶ International Labour Organisation, ‘Protocol of 2014 to the Forced Labour Convention, 1930 (P029)’ (adopted 11 June 2014, entered into force 9 November 2016) Article 1(3). Such measures include, according to Article 2: (a) educating and informing people,

While the ILO instruments on forced labour have been widely ratified, specific instruments seeking to ensure protection of migrant workers' rights, including the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC),⁸⁷ remain largely under-ratified. Part III of the MWC, which sets out the rights to be enjoyed by all migrants, regardless of their status, includes some of the civil and political rights found in the International Covenant on Civil and Political Rights (ICCPR)⁸⁸ – such as the right to life, freedom from torture, freedom from arbitrary arrest and detention, and freedom from slavery – and some of the economic, social and cultural rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸⁹ – such as the rights to join trade unions and to medical care. Although the MWC was primarily an attempt to synthesise the existing rights protection for migrant workers as it emerged from the plethora of human rights and labour rights related treaties, rather than a revolutionary convention, it has only been ratified by 55 States, none of which are in the so-called 'global North'. The lack of engagement

especially those considered to be particularly vulnerable, in order to prevent their becoming victims of forced or compulsory labour; (b) educating and informing employers, in order to prevent their becoming involved in forced or compulsory labour practices; (c) undertaking efforts to ensure that: (i) the coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the economy; and (ii) labour inspection services and other services responsible for the implementation of this legislation are strengthened; (d) protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process; (e) supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour; and (f) addressing the root causes and factors that heighten the risks of forced or compulsory labour.

⁸⁷ 'International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families' (adopted 18 December 1990, entered into force 1 July 2003).

⁸⁸ 'International Covenant on Civil and Political Rights' (adopted 16 December 1966, entered into force 23 March 1976) 99 UNTS 171.

⁸⁹ 'International Covenant on Economic, Social and Cultural Rights' (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

with the MWC is only partially counterbalanced by Objective 10 of the Global Compact for Migration, ‘Prevent, combat and eradicate trafficking in persons in the context of international migration’, which includes a commitment to:

Provide migrants who have become victims of trafficking in persons with protection and assistance, such as measures for physical, psychological and social recovery, as well as measures that permit them to remain in the country of destination, temporarily or permanently, in appropriate cases, facilitating victims’ access to justice, including redress and compensation, in accordance with international law.⁹⁰

Objective 6 of the Global Compact, ‘Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work’, is also relevant insofar as States committed to “promote signature and ratification of, accession to and implementation of relevant international instruments related to international labour migration, labour rights, decent work and forced labour,”⁹¹ which ought to include the MWC. However, the low number of ratification of the MWC are linked to States’ objection, “in particular, although not only, ... to the fact that the Convention specifies that undocumented migrants benefit from human rights guarantees.”⁹² This reasoning is consistent with the decision of States to adopt, in 2000, a Protocol that, while aiming at preventing and combating human trafficking, had little to offer in terms of protection of the human rights of trafficked individuals.

⁹⁰ United Nations General Assembly, ‘Global Compact for Safe, Orderly and Regular Migration’ (2018) para 26(h), A/CONF.231/3 Annex.

⁹¹ *ibid* para 22(a).

⁹² Alan Desmond (ed), *Shining New Light on the UN Migrant Workers Convention* (Pretoria University Law Press 2017) Foreword.

1.4 The development of a human rights approach and of human rights standards

While it had initially been widely contemplated from a human rights perspective, anti-trafficking legal norms only emerged when, in the 1990s, the issue began to be considered through other lenses, notably from the transnational criminal law perspective. The first and, to date, most important international instrument safeguarding the rights of persons trafficked, or at risk of being trafficked, for the purpose of labour exploitation, the 2000 Palermo Protocol, whose content has been replicated in several regional and national legal agreements, emphasises a security based approach. This approach comes at the expense of a nuanced understanding of the connection between human trafficking and the inequitable and unjust essence of globalisation,⁹³ on the one hand, and of the human experiences lived by individuals on the move, on the other hand. Observers and activists criticised this strategy,⁹⁴ advocating for an alternative, human rights-based approach which was to interpret human trafficking not only as a crime *sui generis*, but also and primarily as a human rights violation. The notion of primacy of human rights, that is to say the belief that human rights “must be at the centre of all efforts to prevent and combat trafficking,”⁹⁵ was reaffirmed and supported by a number of international organisations, among which the Office of the United Nations High Commissioner

⁹³ Gallagher (n 23) 4; see also Anne T Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 Human Rights Quarterly 975; Nicole J Siller, ‘Human Trafficking in International Law Before the Palermo Protocol’ (2017) 64 Neth Int Law Rev 407.

⁹⁴ Gallagher (n 23) 4.

⁹⁵ ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking. Addendum to the Report of the United Nations High Commissioner for Human Rights’ (2002) UN Doc. E/2002/68/Add.1, 1.

for Human Rights, the Council of Europe, and the European Union. This framework greatly contributes to a wider process of strengthening national legal frameworks to combat trafficking and its forced labour outcomes. In particular, since 2000 the majority of States have adopted anti-trafficking laws which reflect the internationally agreed definition contained in the Palermo Protocol, albeit with different degrees of consistency. In addition, a number of regional treaties have been enacted, among which the 2005 European Convention on Action against Trafficking,⁹⁶ which faithfully replicates the Palermo Protocol's definition.

As it has already been highlighted, during the formation of the anti-trafficking norm at international level it was clear that the international human rights law framework, given its system's "inherent political, legal, and structural weaknesses,"⁹⁷ could not have been enough on its own to build a substantial anti-trafficking structure. Because of its very nature, human trafficking can be looked at through different lenses such as migration, organised crime, security, border control, sovereignty, gender, or human rights. Although it is possible and reasonable for different actors to favour an approach over others, there was and there still is a general understanding that "no human rights treaty would have prompted the raft of international, regional, and national reforms that we have witnessed over the past decades."⁹⁸ This means that actions against human trafficking have entailed and will always entail a State interests-based component.

⁹⁶ 'Council of Europe's Convention on Action against Trafficking in Human Beings' (adopted 16 May 2005, entered into force 1 February 2008) vol CETS No. 197.

⁹⁷ Gallagher (n 23) 4.

⁹⁸ *ibid.*

Indeed, even if it is true that “re-ignited interest in the issue of human trafficking in the 1990s did ... owe much to the advocacy work of identifiable moral entrepreneurs, most prominently women’s NGOs and social movements,”⁹⁹ norms did not emerge from this re-ignition alone. It was the intersection of those efforts with State interests that allowed for the obtainment of one of the major results in the international action against trafficking in persons, the Palermo Convention, and its supplementary Protocols.

Drawing on Finnemore and Sikkink’s theory of the lifecycle of international norms,¹⁰⁰ and Wylie’s analysis of the same in the context of human trafficking,¹⁰¹ it is evident that the actors involved in the establishment of the anti-trafficking norms had different perspectives on what trafficking was, how it should have been framed, and what kind of legal responses were appropriate. In the process leading to the adoption of the 2000 Trafficking Protocol, each actor pushed for a specific perspective to be adopted. While the ‘moral entrepreneurs’ pushed for a strong emphasis on gender and human rights, despite substantial internal disagreements between the International Human Rights Network and the Human Rights Caucus,¹⁰² State interests in the post-Cold War era mainly revolved around tackling organised crime while strengthening security and border control.¹⁰³ As drafts progressed:

⁹⁹ Wylie (n 40) 43.

¹⁰⁰ Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 887.

¹⁰¹ Wylie (n 40).

¹⁰² *ibid* 54–59.

¹⁰³ *ibid* 59–68. *See also* Gallagher (n 93).

[...] traces of the concern contemporary states have with border control in response to various categories of ‘irregular’ migration became ever more present.¹⁰⁴

Although the involvement of non governmental organisations and civil society in the drafting of the Protocol was unprecedented, their “progress in constructing a new identity for trafficked persons as victims of severe human rights abuse, rather than as criminals and illegal migrants ... may prove to be largely symbolic.”¹⁰⁵ Indeed, the Protocol was not itself a human rights treaty. Given the fora in which the Palermo Protocol was shaped and agreed upon, it was both clear that it was never intended as a human rights document, and reasonable to expect that its focus would have been on security, law enforcement, and combating organised crime. It followed that, although protection and assistance to ‘victims of trafficking’ was listed as one of its main objectives, the treaty disappointed in relation to commitments of protection and support for ‘victims’.¹⁰⁶

Despite the weak protection language contained in the final document, it has been appropriately noted that such flaws could be compensated for by international human rights law, which could have provided for substantial protection and for a basis to fill remaining gaps.¹⁰⁷ Even more, human rights law and its enforcement mechanisms can be crucial in ensuring that any response to trafficking does not

¹⁰⁴ Wylie (n 40) 63.

¹⁰⁵ Joan Fitzpatrick, ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking’ (2003) 24 Michigan Journal of International Law 1143, 1151.

¹⁰⁶ Gallagher (n 23) 2.

¹⁰⁷ *ibid* 5.

violate established human rights provisions. The fact that the Protocol is not a human rights treaty does not mean that it does not contain human rights related provisions, or that it prevents other instruments from providing protection. On the one hand, the Protocol recognises trafficked persons as ‘victims’ of human rights abuses,¹⁰⁸ and, on the other hand, it is important to remember that there are other instruments that can be used for the protection of human rights in the framework of trafficking, even though they are not primarily concerned with the trafficking phenomenon. In addition, in 2002 the United Nations High Commissioner for Human Rights submitted Recommended Principles and Guidelines for Human Rights and Human Trafficking which, challenging the structure of the Trafficking Protocol, stressed the primacy of human rights, affirming that:

[They must] be at the centre of all efforts to prevent and combat trafficking [in the context of] a human rights-based approach ... normatively based on international human rights standards and ... operationally directed to promoting and protecting human rights.¹⁰⁹

Approaching trafficking through a human rights lens not only acknowledges that “trafficking is intertwined with racial, gender and other forms of discrimination”¹¹⁰ and that “trafficking is woven deeply and inextricably into the fabric of an

¹⁰⁸ ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’ (n 18) Articles 2(a), 6, 7, 8 and 14.

¹⁰⁹ ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking Addendum to the Report of the United Nations High Commissioner for Human Rights’ (n 95) 50–51.

¹¹⁰ Secretary-General’s remarks at High-level meeting of the General Assembly on the appraisal of the UN Global Plan of Action to Combat Trafficking in Persons [as delivered] <<https://www.un.org/sg/en/content/sg/statement/2017-09-27/secretary-generals-remarks-high-level-meeting-general-assembly>>.

inequitable, unjust, and hypocritical world,”¹¹¹ but it also reflects the view that trafficking entails violations of several human rights recognised in international and regional treaties.

In the context of trafficking for the purpose of labour exploitation, these rights include, among others, the prohibition on slavery, the prohibition on discrimination, the right to personal autonomy, the right to liberty and security of person, the right to safe and healthy working conditions, the freedom of movement, the right to seek asylum, and the right to a remedy. This understanding of trafficking is rooted in the idea that human rights violations occur at different stages of the trafficking cycle and that:

[...] trafficking victims are peculiarly vulnerable to multiple victimization by virtue of their lack of legal status, language barriers, poverty, youth, trauma resulting from sexual exploitation or forced labor, and exposure to violence.¹¹²

While early anti-trafficking instruments do not address these issues, provisions on the protection from violations of the above-mentioned rights can be found in many international treaties and instruments, regardless of their specific focus on trafficking.¹¹³ They also generally apply to all individuals within a State’s territory

¹¹¹ Gallagher (n 23) 4.

¹¹² Fitzpatrick (n 105) 1154.

¹¹³ See, inter alia, ‘ICCPR’ (n 88); ‘ICESCR’ (n 89); ‘European Convention for the Protection of Human Rights and Fundamental Freedoms’ (n 30); ‘Convention on the Elimination of All Forms of Discrimination Against Women’ (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; International Labour Organisation, ‘Convention concerning Forced or Compulsory Labour (C029)’ (n 79); International Labour Organisation, ‘Abolition of Forced Labour Convention (C105)’ (n 80);

or jurisdiction, regardless of their nationality or citizenship and of their legal status, despite the scope of human rights protection for aliens is still controversial.¹¹⁴ Indeed, the working of general human rights treaties tends to embrace every human being as a human rights holder by virtue of their common humanity,¹¹⁵ irrespective of their migration status. Although human rights law is framed in a way that oscillates between statements of universalism and, “the attraction of particularism or closure [whereby] only those who are recognised as belonging to the polity”¹¹⁶ seem to have full enjoyment of human rights,¹¹⁷ all third-country nationals enjoy *prima facie* a broad catalogue of human rights on a non-discriminatory basis.

The applicability of human rights law to non-citizens is recognised in several instruments relevant to the phenomenon of human trafficking, among which the ICCPR. The ICCPR not only provides that its application is extended to “all individuals within [the] territory and subject to [a State Party’s] jurisdiction ... without distinction of any kind,”¹¹⁸ but it also guarantees equality and equal

‘Convention on the Rights of the Child’ (adopted 20 November 1989, entered into force 2 September 1990).

¹¹⁴ ‘Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live’ (United Nations General Assembly 13 December 1985) A/RES/40/144. See also Gallagher (n 23) 146.

¹¹⁵ See *inter alia* Universal Declaration on Human Rights, where Article 2 stipulates that ‘everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind’; ‘ICCPR’ (n 88) Article 2(1); ‘CRC’ (n 113) Article 2(1); ‘CMW’ (n 87) Article 7.

¹¹⁶ Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 251.

¹¹⁷ Marie-Bénédicte Dembour, ‘Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg’ (2003) 21 *Netherlands Quarterly of Human Rights* 63; Dembour (n 120) 251; Marie-Bénédicte Dembour and Tobias Kelly (eds), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Routledge 2011) 6–11.

¹¹⁸ ‘ICCPR’ (n 88) Article 2(1).

protection before the law to all persons, as it applies *ratione personae* to everyone. The Human Rights Committee (HRCtee) commented on the non-discrimination clause several times, affirming that the rights contained in the ICCPR apply to everyone, irrespective of nationality among other criteria, so that “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”¹¹⁹ In particular, the HRCtee affirmed that aliens may not be held in slavery or servitude, and that they have the full right of liberty and security of the person and are entitled to equal protection before the law.¹²⁰ Even though derogations from selected non-fundamental rights are permitted in times of public emergency, and differentiations on the grounds of citizenship are not unreasonable *per se*, restrictions in the application of the rights need to respect the principle of equality of rights between citizens and aliens.

Analogously to the ICCPR, the ICESCR includes an almost identical non-discrimination clause.¹²¹ Although the provisions included in the ICESCR appear to be weaker on the rights of non-citizens, it is worth highlighting that Article 6 establishes the right for everyone to gain a living by work which is freely chosen or accepted.¹²² In addition, the Committee on Economic, Social and Cultural Rights has interpreted the Covenant in an expansive manner, and its General Comment No. 20 provides that:

¹¹⁹ UN Human Rights Committee, ‘General comment No. 15: The position of aliens under the Covenant’ (1986) para 2.

¹²⁰ *ibid*, para 7.

¹²¹ ‘ICESCR’ (n 89) Article 2(2).

¹²² *ibid* Article 6.

The ground of nationality should not bar access to Covenant rights [as] they apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.¹²³

Similarly, General Recommendation XXX of the UN Committee on the Elimination of Racial Discrimination (CERD) explicitly addresses the issue of discrimination against non-citizens.¹²⁴ Article 1(2) of the International Convention on Elimination of Racial Discrimination (ICERD) provides that the Convention “shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.”¹²⁵ Although CERD noted that some civil, political, economic, social and cultural rights, including the right to vote and to participate in elections, “may be confined to citizens, [it recognised that] human rights are, in principle, to be enjoyed by all persons.”¹²⁶ In its Concluding Observations, CERD has often expressed concerns with respect to States Parties’ anti-trafficking action, or with migration laws and policies more broadly, recognising, as the ECtHR did, the “situation of vulnerability [of] irregular migrants without resources and at risk of being arrested, detained and deported,”¹²⁷ as well as subjected to human trafficking and exploitation. With respect to Serbia, for example, CERD requested the authorities to “continue [their]

¹²³ UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights’ (2009) UN Doc E/C.12/GC/20, 30. *See also* Gallagher (n 23) 151.

¹²⁴ UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation XXX on Discrimination against Non-Citizens’ (2005).

¹²⁵ ‘ICERD’ (n 56) Art 1(2).

¹²⁶ UN Committee on the Elimination of Racial Discrimination (n 124) para 3.

¹²⁷ *Chowdury and Others v Greece* No. 21884/15, para 97 (European Court of Human Rights 30 March 2017).

efforts to prevent, combat and punish trafficking in persons and to focus [their] efforts on members of ethnic minorities and non-citizens, who are particularly vulnerable to trafficking.”¹²⁸ In addition, CERD has requested States Parties to “take a human-rights based approach and integrate a non-discrimination perspective into its migration governance,”¹²⁹ and to ensure that laws and any other restriction:

[...] concerning the removal of non-citizens from [their] jurisdiction do not discriminate in purpose or effect on the grounds of race, colour or ethnic or national origin and that non-citizens have equal access to effective remedies with respect to refoulement claims in removal proceedings.¹³⁰

In the Concluding Observations on Italy, CERD expressed concerns about the exploitation, both physical and financial, of migrants and the lack of access to effective and appropriate legal protection against such exploitation. Italy was therefore requested to “ensure that all migrants ... can lodge complaints of violations of their rights without fear of arrest, detention or deportation,”¹³¹ and to

¹²⁸ UN Committee on Elimination of Racial Discrimination, ‘Concluding observations on the combined second to fifth periodic reports of Serbia’ (2018) UN Doc CERD/C/SRB/CO/2-5, para 19.

¹²⁹ UN Committee on Elimination of Racial Discrimination, ‘Concluding observations on the combined twentieth to twenty-second periodic reports of Bulgaria’ (2017) UN Doc CERD/C/BGR/CO/20-22, para 22.

¹³⁰ UN Committee on Elimination of Racial Discrimination, ‘Concluding observations on the twenty-third periodic report of Finland’ (2017) UN Doc CERD/C/FIN/CO/23, para 25.

¹³¹ UN Committee on Elimination of Racial Discrimination, ‘Concluding observations on the combined nineteenth and twentieth periodic reports of Italy’ (2017) UN Doc CERD/C/ITA/CO/19-20, para 24.

“provide access to basic services to all migrants, regardless of their immigration status, in accordance with international human rights standards.”¹³²

Finally, it is worth mentioning that the Inter-American Court of Human Rights in its Advisory Opinion on the Juridical Conditions and Rights of Undocumented Migrants (Undocumented Migrants Case) affirmed that:

The regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination, because ... this principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory. This does not mean that they cannot take any action against migrants who do not comply with national laws. However, it is important that, when taking the corresponding measures, States should respect human rights and ensure their exercise and enjoyment to all persons who are in their territory, without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reason.¹³³

1.5 Concluding remarks

By providing an overview of feminist critique to international law as gendered and biased in favour of men, Chapter I unpacks the idea that the anti-trafficking legal framework represents at the same time both a reversed exception and a coherent *continuum* of gendering legal processes. Bringing the silencing of male ‘victims’ in

¹³² *ibid.*

¹³³ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, IACHR Series A no 18, IHRL 3237 (IACHR 2003) para 118 (Corte Interamericana de Derechos Humanos 17 September 2003).

the anti-trafficking context under the spotlight is an attempt to contribute to the dismantlement of the stereotype of the trafficked person that was created through the anti-trafficking structure, and to move away from the gendered assumptions about both males and females.

Chapter I has provided the historical context in which the anti-trafficking structure emerged. The Chapter analysed the movement that led to the adoption of international legal instruments concerned with the abolition of the so-called ‘White Slave Traffic’, tracing the roots of the exclusion of men from the anti-trafficking discourse at the beginning of the XX century. Although the trafficking discourse has progressively been de-racialised and un-gendered in international legal instruments, this has not alone been sufficient to shift the narrative of the phenomenon, which is centered on sexual exploitation, and framed as concerning primarily women and girls. In 2020, the Committee on the Elimination of Discrimination Against Women published its General Recommendation No. 38 on trafficking in women and girls in the context of global migration.¹³⁴ The goal of the General Recommendation was to provide guidance with respect to Article 6 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),¹³⁵ which requires States Parties to take all appropriate measures to suppress trafficking in women and the exploitation of the prostitution of women. The engagement of the CEDAW Committee with trafficking and global migration

¹³⁴ UN Committee on the Elimination of Discrimination against Women, ‘General recommendation on Trafficking in Women and Girls in the Context of Global Migration’ (2020).

¹³⁵ ‘CEDAW’ (n 113) Article 6. It provides that: “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

was seen as a potential game-changer, and the Committee was invited to avoid “using analysis and language that exceptionalises, sensationalises and stigmatises women and girls impacted by trafficking.”¹³⁶ Yet, despite the wealth of submissions made to the Committee highlighting the need for the use of inclusive language:¹³⁷

[...] the draft general recommendation utilizes phrasing that perpetuates the incorrect notion that trafficking primarily affects women and girls. This serves to obscure the vast numbers of men and boys who fall victim to it, and often goes hand in hand with a presumption that trafficking equals sex trafficking.¹³⁸

The Global Alliance Against Traffic in Women (GAATW) further criticised the references of the General Recommendation to the 1949 Convention, which is considered to have colonial and racist origins and is limited in scope, and the use of the moralising language that was prevalent in the early XX century movements.¹³⁹ These concerns raised with respect to General Recommendation No. 38 are indicative of the continuing struggle in shifting the narrative of the phenomenon of human trafficking towards a more inclusive, non-discriminatory,

¹³⁶ Ishita Dutta and Alexandra Gray, ‘Is the UN about to Change How States Address Trafficking in Women and Girls?’ (*OpenDemocracy*, 30 July 2020) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/un-about-change-how-states-address-trafficking-women-and-girls/>>.

¹³⁷ See Call for contributions: Draft general recommendation on trafficking of women and girls in the context of global migration <<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/GRTrafficking.aspx>> accessed 20 January 2021.

¹³⁸ IWRAW-AP et al, ‘Joint Response to the Draft CEDAW General Recommendation on TWGCGM’ (2020) 1.

¹³⁹ Global Alliance Against Trafficking in Women (GAATW), ‘Comments on the Draft CEDAW General Recommendation on Trafficking in Women and Girls in the Context of Global Migration’ (2020) 2.

and truly gender-based understanding – as opposed to a gender-biased understanding.

Chapter I further also contextualised the development of soft law initiatives and the tensions between a criminal law approach and a human rights approach to anti-trafficking actions. Once the primacy of human rights has been established, however, it is of paramount importance to assess how it is translated in anti-trafficking efforts, and who benefits from the protection mechanisms put in place by international organisations and States. Because of the nature of the anti-trafficking system and its colonial and gendered history, the narrative built around the stereotypical *female* ‘victim’ has produced a rhetoric that has sidelined men and boys, as well as *masculine* females, placing emphasis on their agency and resilience and ignoring systemic factors that produce vulnerability across the gender *spectrum*. As Russell noted in her analysis on anti-trafficking measures in Israel, “the image, however accurate, of who gets trafficked ... has already been shaped by the services that have been provided.”¹⁴⁰ The consequences of such a construction are especially evident, as Chapter III and IV will highlight, in the way in which domestic anti-trafficking systems operate, and in the way in which the anti-trafficking discourse has exacerbated gender stereotypes with respect to females and males alike.

¹⁴⁰ Amy M Russell, “‘Victims of Trafficking’: The Feminisation of Poverty and Migration in the Gendered Narratives of Human Trafficking” (2014) 4 *Societies* 532, 535.

Chapter II – Anti-trafficking and protection mechanisms: The European regional framework and the applicable law in Italy and in the United Kingdom

The Palermo Protocol focusses almost entirely on the prosecution and punishment of traffickers, neglecting the sphere of protection for trafficked persons,¹ with limited exceptions found in Articles 6 and 7, and the saving clause in Article 14.² Within the European context, European Union law and other regional instruments, most notably the 2005 Council of Europe Convention on Action against Trafficking in Human Beings,³ have attempted to fill this gap, establishing higher standards of protection for trafficked persons. In parallel, the 1951 Refugee Convention and its Protocol have been interpreted by the United Nations High Commissioner for Refugees (UNHCR),⁴ and subsequently by asylum decision-making bodies and domestic courts, as to include trafficked persons, understanding trafficking as a form of persecution, and providing guidance on the assessment of asylum claims brought by trafficked persons.

¹ Anne T Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 Human Rights Quarterly 975.

² See Chapter I for a more detailed discussion on this issue.

³ 'Council of Europe's Convention on Action against Trafficking in Human Beings' (adopted 16 May 2005, entered into force 1 February 2008) vol CETS No 197.

⁴ 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); 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).

Chapter II

The adoption of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings and the development of the European Court of Human Rights' (ECtHR) jurisprudence on human trafficking have introduced positive obligations on Member States to identify and to protect trafficked persons. They have also highlighted the tensions between the criminal and human rights approaches to trafficking in persons, and differences in approach to the concept of vulnerability. Building on Chapter I, the aim of this Chapter is to analyse and to evaluate the developments of the law and of protection processes that are available to trafficked persons. In particular, Chapter II looks at the applicable international and regional standards of protection, at national anti-trafficking legislation, and at international protection. Chapter II presents an analysis of applicable international, European and domestic law on trafficking in human beings, in terms of protection processes available to trafficked persons. It examines the developments of international and regional human rights law on trafficking in persons, and how such legal developments have been given effect into the domestic framework. Finally, Chapter II analyses the connections between the protection of trafficked persons and the right to seek and to enjoy asylum, in light of the 2006 UNHCR Guidelines on the application of the Refugee Convention to people who have been trafficked.

2.1 Regional European responses to human trafficking: European Union and Council of Europe

Shortly after the entry into force of the Palermo Protocol, the European Union adopted two instruments with the aim to combat human trafficking and protect

trafficked persons – the European Union Council Framework Decision of 19 July 2002 on combating trafficking in human beings,⁵ and the European Union Council Directive of 29 April 2004 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.⁶ In 2005, the Council of Europe adopted the Convention on Action against Trafficking in Human Beings,⁷ the first regional convention of its kind, and in 2010 the ECtHR recognised that trafficking in human beings fell under the scope of Article 4 of the European Convention on Human Rights (ECHR), the prohibition of slavery and forced labour, in its landmark judgment *Rantsev v Cyprus and Russia*.⁸ In 2011, the European Parliament and the Council adopted Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims,⁹ replacing the Council Framework Decision of 2002. This section aims at providing an overview of the key provisions in the above mentioned instruments, with a particular focus on measures on ‘victim’ protection, and on the developments of the understanding of the concept of vulnerability.

⁵ Council Framework Decision of 19 July 2002 on combating trafficking in human beings (European Union 19 July 2002) 2002/629/JHA, OJ L 203.

⁶ Directive 2004/81/EC of 29 April 2004 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, and who co-operate with the competent authorities (European Union 29 April 2004).

⁷ ‘Council of Europe Trafficking Convention’ (n 3).

⁸ *Rantsev v Cyprus and Russia* No. 25965/04 (European Court of Human Rights 7 January 2010).

⁹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA 36 (European Union 5 April 2011).

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Council Directive 2004/81/EC of 29 April 2004 – which has been transposed by Italy but not by the United Kingdom – introduced the possibility of granting residence permits to trafficked persons, subject to a number of conditions. Such permit shall, *inter alia*, authorise eligible individuals to have access to the labour market and pursue vocational training and education. The Directive is to be applied without prejudice to the protection granted to refugees, to beneficiaries of subsidiary protection and to persons seeking international protection under international refugee law, and without prejudice to other human rights instruments.¹⁰ It should also be given effect by Member States:

[...] without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.¹¹

Importantly, the text also provides that Member States shall apply the Directive to:

[...] the third-country nationals who are, or have been victims of offences related to the trafficking in human beings, even if they have illegally entered the territory of the Member States.¹²

Access to this permit, which according to the Directive ought to be of at least six months, is however conditional to the cooperation of the ‘victim’ with the competent authorities (e.g., in criminal proceedings). Competent authorities in each

¹⁰ Directive 2004/81/EC of 29 April 2004, para 4.

¹¹ *ibid* para 7.

¹² Directive 2004/81/EC of 29 April 2004 Article 3.

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Member State are responsible for assessing three elements before issuing a residence permit, namely whether the presence of the trafficked person serves a useful purpose for the investigation; whether the trafficked person has shown a clear intention to cooperate; and whether they have severed all relations with those suspected of the given offences. If a Member State decides to extend the scope of this Directive, the residence permit can also be granted to third-country nationals who have been the subject of an action that would qualify as smuggling, to whom the residence permit offers a sufficient incentive to cooperate with the competent authorities. A 2010 report from the European Commission on the application of the Directive showed that the impact of the Directive varied considerably among Member States.¹³ While in some, including Italy,¹⁴ the number of permits was significant, at times exceeding 100 per year, in other instances the figures were smaller, mostly between 1 and 20 per year,¹⁵ or no residence permit was issued at all – or no information in such respect was provided.¹⁶ According to a 2014 Report of the European Commission:

¹³ European Commission, ‘Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/81 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’ (2010).

¹⁴ As well as Belgium, the Netherlands, France, and Denmark.

¹⁵ Including the Czech Republic, Finland, Hungary, Poland, and Sweden.

¹⁶ The report indicates in this latter category the following Member States: Bulgaria, Estonia, Spain, Latvia, Lithuania, Romania, Slovenia and Slovakia.

[...] in the 23 [Member States] that were able to provide data 2,171 non-EU citizens were identified/presumed victims of trafficking in 2012 and 2,002 were identified/presumed victims in 2011.¹⁷

This means that the average number of individuals identified as ‘presumed victims of trafficking’ was, between 2011 and 2012, 90 per year per Member State. One of the reasons behind the scarcity of residence permits granted to trafficked persons on the basis of Directive 2004/81/EC has been the presence of a requirement of cooperation with the competent authorities.¹⁸ Indeed, such a requirement has acted as a deterrent for many trafficked persons, particularly those in danger of deportation, that were unwilling or unable to testify. More broadly, the issue was one of lack of a human rights based approach to protection. As Probst argued:

[...] the issue with residency status is that temporary residence permits which are connected to cooperation in criminal proceedings cannot be the basis of providing unconditional access to assistance, support and protection of trafficked persons.¹⁹

In 2005, Member States of the Council of Europe agreed to adopt the first regional anti-trafficking convention, whose aim was to protect the human rights of trafficked persons, to design a comprehensive framework for the protection and assistance of ‘victims’ and witnesses, and to promote international cooperation on action against

¹⁷ European Commission, ‘Communication from the Commission to the Council and the European Parliament on the Application of Directive 2004/81 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’ (2014) 3.

¹⁸ Evelyn Probst, ‘Victims’ Protection within the Context of Trafficking in Human Beings and European Union Standards’ (2019) 19 ERA Forum 357.

¹⁹ *ibid* 366.

trafficking in human beings. The Convention adopts the same definition of trafficking contained in the Palermo Protocol, but:

[...] as a complement to and development of this United Nations Protocol, which emphasises the crime prevention aspect of trafficking, the Council of Europe Convention clearly defines trafficking as being first and foremost an issue of violation of human rights and emphasises the victims' protection aspect of trafficking.²⁰

As the explanatory report highlights, “the main added value of the [Council of Europe Anti-Trafficking] Convention in relation to other international instruments is its Human Rights perspective and its focus on ‘victim’ protection.”²¹ In addition, the Convention provides for a comprehensive scope of application, which includes all forms of trafficking (national/transnational, linked/non-linked with organised crime), and applies to all persons who have been trafficked, regardless of their biological sex and their age.²² The focus of the Convention on ‘victim’ protection is reinforced by, and operationalised through the provision contained in Article 10, according to which:

Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall

²⁰ Council of Europe, ‘Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings’ (2005) para 49.

²¹ *ibid* para 46.

²² *ibid* para 51.

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ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified ...²³

The identification of trafficked persons is deemed to be crucial, as a failure to identify them will mean their continued to be denied their fundamental rights. In addition to each party being required to adopt such legislative or other measures as may be necessary to identify trafficked persons, States shall also ensure that if the competent authorities have reasonable grounds to believe, rather than the absolute certainty, that a person has been trafficked, that person shall not be removed from its territory until the identification process has been completed.²⁴ Besides the prohibition of removal from the territory, States shall provide trafficked persons with a recovery and reflection period of at least 30 days, during which the individual can recover and escape the influence of traffickers, as well as take an informed decision on whether to cooperate with the competent authorities.²⁵ When a person is identified as having been trafficked, each State party shall further adopt measures necessary to provide assistance in the physical, psychological and social recovery of the trafficked person, taking into account their safety and protection needs.²⁶ While Council Directive 2004/81/EC provides for the issuance of a residence permit conditional on the cooperation of the victim with the competent authorities,

²³ 'Council of Europe Trafficking Convention' (n 3) Article 10.

²⁴ *ibid* Article 10.

²⁵ *ibid* Article 13.

²⁶ *ibid* Article 12. Such assistance shall include at least standards of living capable of ensuring their subsistence (appropriate and secure accommodation, psychological and material assistance), access to emergency medical treatment; translation and interpretation services, when appropriate; counselling and information in a language that they can understand; and legal assistance in criminal proceedings against offenders.

Article 14 of the Council of Europe Convention requires State parties to issue a renewable residence permits to trafficked persons when:

[...] the competent authority considers that their stay is necessary owing to their personal situation; [or when] the competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings.²⁷

The Convention thus requires the issuance of the residence permit to be non-conditional on the trafficked person's cooperation in criminal proceedings. Article 14 establishes an higher standard of protection, compared to that of Council Directive 2004/81/EC. Yet, only 22 countries out of the 42 State Parties had legislation envisaging the issuing of residence permits to trafficked persons, both owing to their personal situation and for the purpose of co-operating with the investigation or criminal proceedings.²⁸ The Group of Experts on Action against Trafficking in Human Beings (GRETA) stressed that granting a residence permit on account of the personal situation of the trafficked person tallies with the human rights-based approach to combating trafficking in human beings. Indeed, the main difference in protection standards between the Council of Europe Convention and Council Directive 2004/81/EC lies in the conceptualisation of residence permits as a utilitarian concession, on the one hand, and as a human rights remedy, on the other hand. Residence permits, or more broadly secure immigration statuses:

²⁷ *ibid* Article 14.

²⁸ Group of Experts on Action against Trafficking in Human Beings, '9th General Report on GRETA's Activities' (2020) 58.

[...] could be viewed as human rights remedy and not merely as munificence on the part of the host country, or as a contingent benefit conditional upon cooperation with legal authorities in the prosecution of traffickers.²⁹

When trafficking is understood as a human rights violation, and the role of so-called destination countries is taken into account, Macklin argues that “we should conceive of the host country owing the trafficked person a remedy arising from its complicity in the violation of her human rights.”³⁰

In addition to provisions on identification, assistance, and issuance of residence permits, the Convention also introduced a provision on the non-punishment of trafficked persons, calling upon States to:

[...] provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.³¹

The non-punishment principle has become increasingly significant not only in situations of trafficking for forced criminality, but also in situations of sexual and labour exploitation. In the context of sexual exploitation, the provision is relevant when, for example, trafficked persons find themselves in countries where prostitution is criminalised. In situations of labour exploitation, the non-punishment principle is relevant when trafficked persons are forced to work in the irregular market, without a proper contract and often in violation of labour laws. Lastly, it is

²⁹ Audrey Macklin, ‘Dancing Across Borders: “Exotic Dancers,” Trafficking, and Canadian Immigration Policy’ (2003) 37 *International Migration Review* 464, 495.

³⁰ *ibid.*

³¹ ‘Council of Europe Trafficking Convention’ (n 3) Article 26.

also relevant for trafficked persons who are exploited for forced criminality, as the activities they perform may constitute crimes under the domestic criminal law (e.g., cannabis cultivation), but also as some countries, including Italy, criminalise activities such as begging.³² The application of the non-punishment principle is conditional, in practice, on the correct identification of trafficked persons during criminal – or civil – proceedings. At times, Prosecutors will be called upon to evaluate whether a person has been trafficked in absence of an anti-trafficking competent authority decision. In completing the assessment of the circumstances in which a potentially trafficked person has engaged in an unlawful activity, Prosecutors will often need to establish whether the person’s position of vulnerability was abused by the trafficker. In this respect, the explanatory report of the Council of Europe Anti-Trafficking Convention provides for clarifications on the concept of ‘abuse of a position of vulnerability’, defining it as:

[An] abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse [and that] the vulnerability

³² Ministero dell’Interno, ‘Decreto-legge 4 ottobre 2018, n.113, recante “Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell’interno e l’organizzazione e il funzionamento dell’Agenzia nazionale per l’amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata”, convertito con modificazioni, dalla legge 1° dicembre 2018, n.132.’ (2018); *Legge 1 dicembre 2018, n 132: Conversione in legge, con modificazioni, del decreto-legge 4 ottobre 2018, n 113, recante disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell’interno e l’organizzazione e il funzionamento dell’Agenzia nazionale per l’amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata Delega al Governo in materia di riordino dei ruoli e delle carriere del personale delle Forze di polizia e delle Forze armate* Law 1 December 2018, n 132, 132 (Italy).

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may be of any kind, whether physical, psychological, emotional, family-related, social or economic.³³

This includes situations of insecurity or irregularity of the trafficked person's administrative status, as well as economic dependence or any other state of hardship in which a person is impelled to accept being exploited. The wide understanding of vulnerability – and of its abuse – in the Explanatory Report is not only instrumental in the correct application of the non-punishment principle, but it is also key in providing competent authorities with an operational definition to assist in the identification of trafficked persons. Indeed, 'abuse of a position of vulnerability' could arguably be considered among the most subtle, as well as subjective, means deployed by traffickers to reduce and maintain a person in an exploitative situation.

Many of the innovations introduced in the Convention were later also included in Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims,³⁴ which was transposed by both Italy and the United Kingdom. Compared to Directive 2004/81/EC, Directive 2011/36/EU "adopts a broader concept of what should be considered trafficking in human beings ... and therefore includes additional forms of exploitation."³⁵ These additional forms include forced begging as a form of forced labour or services, as defined in the 1930 International Labour Organisation (ILO) Convention No 29 concerning Forced or

³³ Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) para 83.

³⁴ Directive 2011/36/EU of the European Parliament and of the Council, 36.

³⁵ *ibid* para 11.

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Compulsory Labour,³⁶ as well as the exploitation of criminal activities, which should be understood:

[...] as the exploitation of a person to commit, *inter alia*, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.³⁷

Informed by the 2005 Council of Europe Anti-Trafficking Convention, and in light of the inclusion of additional forms of exploitation in the definition of trafficking deployed, the Directive stresses that trafficked persons should be protected from prosecution or punishment for criminal activities, such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The Directive also provides, in Article 11, that assistance and support for trafficked persons shall be provided as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to trafficking, and that such measures shall not be made conditional on the person's willingness to cooperate in the criminal investigation, prosecution or trial.³⁸ The Directive places emphasis on the gendered nature of trafficking, recognising:

³⁶ International Labour Organisation, 'Convention Concerning Forced or Compulsory Labour (C029)' (adopted 28 June 1930, entered into force 1 May 1932) 29.

³⁷ Directive 2011/36/EU of the European Parliament and of the Council, para 11.

³⁸ *ibid* Article 11.

[...] the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes [and therefore that] assistance and support measures should also be gender-specific where appropriate.³⁹

The Directive further places emphasis on the concept of vulnerability. It recognises all children as *particularly* vulnerable persons, and indicates several factors, among which gender, pregnancy, state of health and disability, that could be taken into account when assessing the vulnerability of a trafficked person. Despite the broader understanding of trafficking and of forms of exploitation, no mention is made of, for example, socio-economic or legal status as vulnerability factors. However, Article 2, which addresses the notion of position of vulnerability, defining it as, “a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved,”⁴⁰ seems to suggest, in light of the Explanatory Report to the 2005 Council of Europe Convention, that a dire economic situation, or a position of irregularity on the territory, could be understood as forcing an individual to accept an exploitative situation, due to not having a real or acceptable alternative.

2.1.1 The jurisprudence of the European Court of Human Rights on trafficking in human beings and States’ positive obligations

In 2004, while the Council of Europe was finalising the preparatory work for the 2005 Council of Europe Anti-Trafficking Convention, the ECtHR received an application filed by Mr. Nikolay Mikhaylovich Rantsev, a Russian national, father

³⁹ *ibid* para 3.

⁴⁰ *ibid* Article 2.

of Ms. Oxana Rantseva, who died in Cyprus in 2001. Ms. Rantseva had travelled to Cyprus on a ‘cabaret-artiste’ visa in March 2001. A 2003 Ombudsman report cited in the ECtHR’s judgment highlighted how the word ‘artiste’ in Cyprus has become synonymous with ‘prostitute’,⁴¹ providing the context in which to situate Ms. Rantseva’s experience. Soon after she started working in the cabaret, she left the workplace. She was later found by the manager of the cabaret and brought to the police station, where the police did not identify her as a ‘potential victim of trafficking’ and surrendered her to the cabaret manager, who brought her to a private accommodation. She died that same night in unclear circumstances. The Court was called upon to establish whether Cyprus and Russia had violated, *inter alia*, Article 4 of the ECHR.⁴² Drawing extensively on the 2005 Council of Europe

⁴¹ *Rantsev v Cyprus and Russia* (n 8) paras 80–90 The report further explained that since the mid-1970s, thousands of young women had legally entered Cyprus to work as artistes but had in fact worked as prostitutes in one of the many cabarets in Cyprus. Since the beginning of the 1980s, efforts had been made by the authorities to introduce a stricter regime in order to guarantee effective immigration monitoring and to limit the well-known and commonly acknowledged phenomenon of women who arrived in Cyprus to work as artistes. However, a number of the measures proposed had not been implemented due to objections from cabaret managers and artistic agents.

⁴² ‘European Convention for the Protection of Human Rights and Fundamental Freedoms’ (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, Article 4. Article 4, insofar as relevant, states that: ‘1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour.’ The applicant contended, referring to both *Siliadin v. France* and to the Council of Europe Anti-Trafficking Convention that the Cypriot authorities were under an obligation to adopt laws to combat trafficking and to establish and strengthen policies and programmes to combat trafficking. Considered that the situation of ‘cabaret artists’ in Cyprus was known or ought to have been known by the authorities, the appellant claimed that the obligations incumbent on Cyprus to combat trafficking had not been met. In particular, it was pointed out that the Cypriot authorities were unable to explain why they had surrendered Ms. Rantseva over to her former employer at the police station instead of releasing her, and in so doing failing to take measures to protect her from trafficking. According to the applicant, the Cypriot authorities had also failed to conduct any investigation into whether Ms. Rantseva had been a victim of trafficking or had been subjected to sexual or other exploitation. In this respect, although it was accepted that Ms. Rantseva had entered Cyprus voluntarily to work in the cabaret, relying on *Van der Musselle v. Belgium* it was argued that prior consent, without more, does not negate a finding of compulsory labour. In respect of Russia, the applicant

Anti-Trafficking Convention, in 2010 the ECtHR handed down a landmark judgment. In establishing the scope of application of Article 4, the ECtHR noted that the absence of an express reference to trafficking in the ECHR was unsurprising, as it was inspired by another instrument, the Universal Declaration of Human Rights, which itself made no explicit mention of trafficking.⁴³ Yet, the Court found that sight should not be lost of the fact that the Convention is a living instrument which must be interpreted in the light of present-day conditions,⁴⁴ and that:

[...] the object and purpose of the Convention, as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.⁴⁵

Bearing in mind that trafficking in human beings was being recognised an increasingly relevant global phenomenon, the Court found that, just like slavery, “trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership.”⁴⁶ Therefore, it concluded that it was unnecessary to identify whether the treatment suffered by Ms.

pointed out that at the relevant time, the Russian Criminal Code did not contain provisions which expressly addressed trafficking in human beings. Mr. Rantsev further argued that the Russian authorities were aware of the particular problem of young women being trafficked to Cyprus to work in the sex industry and that, therefore, the Russian Federation was under an obligation to adopt measures to prevent the trafficking and exploitation of Russian women but had failed to do so.

⁴³ *Rantsev v Cyprus and Russia* (n 8) para 277.

⁴⁴ *ibid.*

⁴⁵ *ibid* para 275.

⁴⁶ *ibid* para 281.

Rantseva constituted slavery, servitude, or forced and compulsory labour, but rather that trafficking itself fell within the scope of Article 4 of the Convention.⁴⁷

In assessing whether there had been a violation of Article 4, the Court noted that the safeguards set out in national law must be adequate to ensure the practical and effective protection of the rights of trafficked persons, and that Member States are required to put in place:

[Both] adequate measures regulating businesses often used as a cover for human trafficking [and] immigration rules [that] address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.⁴⁸

The Court further recognised that Article 4 not only poses a negative obligation on States, but also – and foremost – a number of positive obligations. States are indeed required to penalise and prosecute effectively any act aimed at maintaining a person in a situation amounting to slavery, servitude or forced or compulsory labour, to investigate human trafficking regardless of whether a complaint has been filed with the authorities, and to take operational measures to protect trafficked persons and persons at risk of being trafficked. In order for this latter positive obligation to arise, it has to be demonstrated that:

⁴⁷ *ibid* para 282.

⁴⁸ *ibid* para 284.

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State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited.⁴⁹

The fact that State authorities were aware, or ought to have been aware, clearly needs to be balanced against the difficulties involved in policing modern societies, and the positive obligations need to be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. With respect to Cyprus, while the Court noted that there was legislation prohibiting trafficking and sexual exploitation in place at the time of the events, it also highlighted several shortcomings and weaknesses in the general legal and administrative framework. Therefore, the Court concluded that the regime of ‘artiste visas’ in Cyprus did not afford to Ms. Rantseva practical and effective protection against trafficking and exploitation. In assessing the compliance with the positive obligation to take protective measures, the Court noted that the failures of the police authorities were multiple, including the failure to make further inquiries into whether Ms. Rantseva had been trafficked in circumstances which gave rise to a credible suspicion that she might have been trafficked or exploited. This resulted in a failure by the Cypriot authorities to take measures to protect Ms. Rantseva. Lastly, with respect to the obligation to investigate, the Court considered that the requirement incumbent on the Cypriot authorities to conduct an effective investigation into the trafficking allegations was subsumed by the general obligation arising under Article 2 to

⁴⁹ *ibid* para 286.

conduct an effective investigation into Ms. Rantseva's death, for which a violation had been found.

This approach taken by the Court to expand the textual boundaries of Article 4 and accommodate in that context any type of exploitation included in the definition of trafficking in human beings has been subject to both praise and criticism.⁵⁰ The substantive consequence of the judgement, insofar as relevant to this research, is that of having established a precedent, a possibility to access the protection of the Court for trafficked persons that could not access effective domestic remedies. After 2010, the Court has been called upon to decide on a number of trafficking cases, including *L.E. v Greece*,⁵¹ *S.M. v Croatia*,⁵² *Chowdury and Ors v Greece*,⁵³ and *V.C.L. and A.N. v the United Kingdom*.⁵⁴

The case of *Chowdury and Ors v Greece*, lodged in 2015 and decided in 2017, was the first case where the applicants were males, who had been trafficked for the

⁵⁰ Jean Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10 Human Rights Law Review 546; Vladislava Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30 Netherlands Quarterly of Human Rights 163; Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015); Valentina Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of *L.E. v Greece*: A Disturbing Setback?' (2017) 17 Human Rights Law Review 701; Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017).

⁵¹ *LE v Greece* No. 71545/12 (European Court of Human Rights 21 January 2016).

⁵² *SM v Croatia* No. 60561/14 (European Court of Human Rights 19 July 2018); *SM v Croatia [GC]* No. 60561/14 (European Court of Human Rights 25 June 2020).

⁵³ *Chowdury and Others v Greece* No. 21884/15 (European Court of Human Rights 30 March 2017).

⁵⁴ *VCL and AN v The United Kingdom* No. 77587/12 and 74603/12 (European Court of Human Rights 16 February 2021).

purpose of labour exploitation. The 42 Bangladeshi complainants alleged that their irregular work in strawberry fields in Manolada, Greece, amounted to forced labour and that their situation constituted human trafficking. The applicants alleged that they were recruited on different dates between October 2012 and February 2013 in Athens and other places, and promised a wage of €22 euros for seven hours' work and €3 for each hour of overtime, with €3 per day deducted for food. They reported living in makeshift shacks made of cardboard, nylon and bamboo, without toilets or running water. They also reported that their employers had warned them that they would only receive their wages if they continued to work for them. On several occasions, the workers unsuccessfully went on strike demanding payment of their unpaid wages. On 17 April 2013, the employers recruited other Bangladeshi migrants to work in the fields. Due to concerns around not being paid, between 100 and 150 workers confronted the employers. One of the armed guards proceeded to open fire against the workers, seriously injuring thirty of them. The wounded were taken to the hospital and were subsequently questioned by police. The four suspects were charged with several offences, including with human trafficking under Article 323A of the Criminal Code. On 22 April 2013, the public prosecutor acknowledged that thirty-five workers, who had all been injured during the incident, had been trafficked, and made them lawful residents under section 12 of Law no. 3064/2002.⁵⁵ In May 2003, 120 other workers, including some applicants in the

⁵⁵ Law no. 3064/2002 (amending the Criminal Code in matters of human trafficking, pornography, incitement of a minor to immorality, assisting or benefiting from prostitution, victim assistance). Article 323A reads as follows: "1. Anyone who, through the use of force or the threat thereof, or any other means of coercion or abuse of authority or power or abduction, recruits, transports, brings into the country, detains, protects, delivers – with or without consideration – or obtains from a third party, any person, with the aim of taking cells, tissue or organs from that person, or of exploiting that person's work or begging,

case who had not been injured, applied to the public prosecutor for charges of human trafficking, attempted murder and assault, in respect of them also, to be brought against the four defendants. In its decision 26/2014 of 4 August 2014, the public prosecutor rejected their application, explaining that the denial was a consequence of the lack of credibility of the claimants, who:

[...] if they had really been the victims of the offences complained of, they would have gone to the police immediately on 17 April 2013, like the thirty-five other workers had done, and would not have waited until 8 May 2013.⁵⁶

Another element upon which the prosecutor relied to dismiss the claimants' case, arguing that it indicated 'bad faith', was the acknowledgment that:

[...] all the complainants had stated that they had made statements to the police after learning that they would receive residence permits as victims of human trafficking.⁵⁷

The appeal brought to the Court of Appeal against this decision was dismissed in January 2015. In parallel, the four alleged perpetrators stood trial before the Assize

whether this is done for personal gain or on behalf of another, shall be punished by imprisonment of up to ten years and a fine of between EUR 10,000 and EUR 50,000. 2. The above-mentioned punishment shall also be imposed on offenders who, pursuing the same purpose, obtain the consent of any person or attract the latter under false pretences, taking advantage of the person's vulnerability, by means of promises, gifts, sums of money or other benefits. 3. Anyone who, with full knowledge of the facts, accepts the work provided by persons who have been subjected to the conditions described in paragraphs 1 and 2 above, shall be punished by imprisonment for a minimum term of six months. 4. Anyone who has committed the offence provided for in the preceding paragraphs shall be punished by imprisonment for at least ten years and a fine of between EUR 50,000 and EUR 100,000 if the offence: ... (b) is committed repeatedly; ... (d) has as a consequence particularly serious harm to the health of the victim or has exposed the victim's life to grave danger."

⁵⁶ *Chowdury and Others v Greece* (n 53) para 14.

⁵⁷ *ibid.*

Court. In a judgment delivered on the 30th July 2014, the Assize Court acquitted the defendants on the charge of trafficking in human beings. It noted that the conditions of employment were known by the Bangladeshi migrant workers, who had accepted them after finding them satisfactory.⁵⁸ It was further noted that their movement was not restricted during their free time. More importantly for the scope of this research, the Assize Court held that it had not been shown that anyone had:

[...] under false pretences and by means of promises, coerced the workers into agreeing to work for him by taking advantage of their situation of vulnerability, *especially as it found that they were not in such a situation.*⁵⁹

In elaborating on the issue of vulnerability, the Assize Court indicated that:

[...] for the notion of vulnerability to be constituted, the victim had to be in a state of impoverishment such that his refusal to submit to the offender would appear absurd; in other words the victim had to be *in a state of absolute weakness* preventing him from protecting himself.⁶⁰

As the workers had not submitted themselves unconditionally to the offender and were not cut off from the outside world entirely, they were not found to be exploited as a result of their vulnerability. Although the workers' lawyers lodged an application asking the prosecutor at the Court of Cassation to appeal against the Assize Court judgment, the prosecutor refused to lodge an appeal.

⁵⁸ *ibid* para 24.

⁵⁹ *ibid* para 25 (emphasis added).

⁶⁰ *ibid* para 27 (emphasis added).

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A report of the national Ombudsman provided the general context in which to situate the alleged violations. The report contained information with respect to numerous cases of large-scale exploitation of foreigners in the district of Ilia, where hundreds of ‘economic migrants’ lived in impoverished conditions in improvised camps in the region and where the labour relations were characterised by an uncontrolled exploitation of migrants.⁶¹ The applicants complained that the State had failed to fulfil its positive obligation to prevent their subjection to human trafficking, to adopt preventive measures to that effect and to impose sanctions on their employers who, in their view, were guilty of that offence. In establishing whether Greece had violated Article 4, the Court focussed in particular on the concept of vulnerability and that of consent. The Court observed that the applicants did not have a residence permit, nor were they in possession of a work permit. Consequently, they were at risk of being arrested and detained with a view to their removal from Greece. In addition, an attempt to leave their work would have made it almost impossible to receive the wages due to them, even in part. The Court further considered that:

[...] where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily. *The prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour.* The question whether an individual offers himself for work voluntarily is a factual

⁶¹ *ibid* paras 48–53.

question which must be examined in the light of all the relevant circumstances of a case.⁶²

The employer was able to obtain the applicants' consent at the time of recruitment by promising them rudimentary shelter and a daily wage, which was the only solution for the applicants to have any means of subsistence, as they were "in a situation of vulnerability as irregular migrants without resources and at risk of being arrested, detained and deported."⁶³ The failure of the Greek national courts to recognise that this was a situation of human trafficking and forced labour was, in the opinion of the Court, based on their very narrow interpretation of the concept of human trafficking, virtually equating it to that of servitude. Although Greece had essentially complied with the positive obligation to put in place a legislative framework to combat human trafficking, it failed to take operational measures to prevent trafficking and to protect the 'victims', despite it knew or ought to have known about the circumstances of the case. In addition, the Court held that Greece also violated the procedural obligation to conduct an effective investigation into the situation of human trafficking and forced labour complained of by the applicants, both those who had participated in the domestic criminal proceedings and those who were prevented from doing so. In this respect, the Court noted that the authorities failed to ascertain whether the allegations of that group of applicants were well founded. In addition, it found that the prosecutor, in rejecting the request because the applicants' complaint to the police was belated:

⁶² *ibid* para 95 (emphasis added).

⁶³ *ibid* para 97.

[...] disregarded the regulatory framework governing human trafficking. Article 13 of the Council of Europe's Anti-Trafficking Convention provides for a "recovery and reflection period" of at least thirty days for the person concerned to be able to recover and escape from the influence of the traffickers and knowingly take a decision about cooperating with the authorities.⁶⁴

In February 2021, the ECtHR delivered another landmark judgment in the case of *V.C.L. and A.N. v the United Kingdom*.⁶⁵ The cases, which were originally submitted separately, concern the prosecution of the (then) minor applicants, V.C.L. and A.N., both of whom were recognised as having been trafficked by the United Kingdom's Competent Authority (CA), for criminal offences connected to their involvement as 'gardeners' in cannabis factories. Both applicants were found in properties that had been transformed into cannabis factories, respectively in Cambridge and in London, in May and April 2009. V.C.L. claimed he was fifteen, and that he had been smuggled into the United Kingdom. A.N. initially stated that he was born in 1972, but it was later accepted that he was a minor. When questioned by the police, V.C.L. and A.N. admitted realising that cannabis was being grown in the houses and, although they claimed they did not know that it was illegal, they were charged with production of a controlled drug. In both cases, counsels advised to plead guilty, as they believed there was no defence available to the applicants. V.C.L. was sentenced to twenty months detention in a young offenders' institution, and A.N. was sentenced to an eighteen-month detention and training order.

⁶⁴ *ibid* para 121.

⁶⁵ *VCL and AN v The United Kingdom* (n 54).

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In the case of V.C.L., a referral to the CA to determine whether he had been trafficked was made in the course of the criminal proceedings. Before a decision was reached by the CA, however, the Crown Prosecution Service (CPS) concluded that there was no credible evidence that he had been trafficked, and reviewed its decision to prosecute. When the CPS received notification from the United Kingdom Border Agency (UKBA) indicating that the CA had found reasonable grounds to believe that the applicant was indeed trafficked, V.C.L. was granted a forty-five day ‘reflection period’, and his case was adjourned. Despite confirmation by the CA in November 2009 that the applicant was trafficked, the Chief Crown Prosecutor confirmed that he should be prosecuted. No official reasons were given for this decision, but a letter to a Member of Parliament explained that the prosecution had not been discontinued as the offences were considered to be extremely serious, there was no defence of duress and no clear evidence of trafficking. The CPS further argued that “to be a victim of trafficking was not a defence; rather, the decision to prosecute was taken in light of information they had and had to be kept under review.”⁶⁶

In the case of A.N., it was only after his conviction that a social worker concluded that there were reasonable grounds to believe that he had been trafficked. This finding, however, was based on elements that had been available to the police since A.N.’s first interview upon arrest. Indeed, A.N. claimed that, soon after his arrival in the United Kingdom, he met some Vietnamese people, including a man who gave him accommodation, clothes and food for a week. He was told that it was

⁶⁶ *ibid* para 15.

best for him not to go out, and after a week he was taken to the cannabis factory. According to A.N., the windows of the factory were bricked up, the only door was locked from the outside and he believed that the factory was guarded. He slept, ate and worked in the factory, and he was not paid for his work. When he wished to leave, he received death threats and was returned to the factory. On 16 November 2010, almost a year after A.N. was convicted, the UKBA notified him that the CA had concluded that he had been trafficked. However:

[...] as he had turned eighteen and was not receiving any counselling, it was not accepted that he was a person “in need”. As such, he was no longer considered to be a victim of human trafficking and was not eligible for a residence permit.⁶⁷

In June 2011, a Special Casework Lawyer from the CPS reviewed A.N.’s case in light of updated guidance from the CPS, as well as the conclusions of the social workers and UKBA. She remained firmly of the view that A.N. had not been trafficked and that the public interest would require a prosecution. In reaching that decision, she had particular regard to, *inter alia*, the fact that A.N. was a child of mature years, the inconsistencies in the accounts he had given, the absence of physical injury to him or any of the other ‘gardeners’, the fact that he had a sum of money on him when he was recovered, and the possibility that he could have escaped from the cannabis factory.

Both V.C.L. and A.N. appealed their conviction and sentence. Permission was granted, and the two appeals were joined. In the judgment handed down on 20

⁶⁷ *ibid* para 34.

February 2012, the Court of Appeal found that Article 26 of the Council of Europe Anti-Trafficking Convention:

[...] was directed at sentencing decisions as opposed to prosecutorial decisions and could not, therefore, be interpreted as creating immunity for victims of trafficking who had become involved in criminal activities; nor could it extend the defence of duress by removing the limitations inherent in it.⁶⁸

Having considered the facts of the applicants' cases, the Court of Appeal dismissed their appeal against conviction, arguing that the decision to prosecute was amply justified. The applications for permission to appeal to the Supreme Court were refused. A further appeal of V.C.L. was refused by the Court of Appeal in 2013.

Before the ECtHR, the applicants complained under Article 4 of the ECHR that the CPS failed adequately to protect them in the aftermath of their trafficking experience, and that there was a failure to conduct an Article 4 compliant investigation into whether they had been trafficked, as well as a failure to adopt operational measures to protect them. For the Court, the issue at the core of the case was that:

[...] the CPS, in its original decisions to prosecute and/or in subsequent reviews of those decisions, disagreed with the conclusions of the Competent Authority and found that the applicants were not in fact victims of trafficking,

⁶⁸ *ibid* para 43.

and this conclusion was held by the Court of Appeal to have been amply justified.⁶⁹

The Court noted both the guidance published by the CPS in 2007 and 2009, as well as a ‘scoping report’ of the Child Exploitation and Online Protection Command, highlighting cannabis cultivation as an offence likely to be carried out by trafficked minors. In this respect, Vietnamese boys and girls were identified as a particularly vulnerable group. In view of the fact that both applicants were Vietnamese minors at the time of their discovery, the Court considered that “from the very outset the police and subsequently the CPS should have been aware of the existence of circumstances giving rise to a credible suspicion that he had been trafficked.”⁷⁰ Therefore, in both cases a positive obligation to take operational measures to protect the applicants arose shortly after they were discovered. In its role as third party intervener, GRETA stressed that in order to protect and assist trafficked persons, it was of the utmost importance to identify them correctly. Despite the guidance provided by, *inter alia*, the Association of Chief Police Officers (“ACPO”) on how to safeguard children found on cannabis factories, there had been cases in the United Kingdom of trafficked persons being arrested, prosecuted and convicted in relation to cannabis cultivation. Anti-Slavery International further submitted that:

[...] when assessing whether a person is a victim of trafficking, credibility must be viewed through the trafficking perspective; so-called “traditional”

⁶⁹ *ibid* para 113.

⁷⁰ *ibid* para 118.

adverse credibility factors may not be relevant and may even operate to the opposite effect.⁷¹

The Court acknowledged that no general prohibition on the prosecution of trafficked persons can be construed from the Council of Europe Anti-Trafficking Convention or any other international instrument. Nevertheless:

[It] considers that the prosecution of victims, or potential victims, of trafficking may, in certain circumstances, be at odds with the State's duty to take operational measures to protect them where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked.⁷²

Indeed, the Court found, *inter alia*, that the prosecution of trafficked persons would be detrimental to their physical, psychological and social recovery, as well as that it could potentially leave them vulnerable to being re-trafficked in the future. Moreover, the Court noted that:

[...] given that an individual's status as a victim of trafficking may affect whether there is sufficient evidence to prosecute and whether it is in the public interest to do so, any decision on whether or not to prosecute a potential victim of trafficking should – insofar as possible – only be taken once a trafficking assessment has been made by a qualified person.⁷³

This is particularly important, the Court stressed, where children are concerned, as they are deemed to be *particularly* vulnerable. Although the Prosecutor might not

⁷¹ *ibid* para 145.

⁷² *ibid* para 159.

⁷³ *ibid* para 161.

be bound by the findings made in the course of a trafficking assessment, they would need to have clear reasons for disagreeing with it. In the case of V.C.L., the CPS twice found that the decision to prosecute him was justified, without providing adequate reasons for its decision, and disagreeing with the Competent Authority assessment. Accordingly, the Court found that there has been a violation of Article 4 ECHR. With respect to A.N., in dismissing his appeal, the Court of Appeal held that criticism of the process which culminated in A.N. being sentenced ignored the fact that he himself had provided accounts suggesting that he had been ‘smuggled’ into the United Kingdom. The ECtHR, however, stressed the inconsistency of the decision with the CPS’s own guidance, which indicated that trafficked children might be reluctant to disclose the circumstances of their exploitation and as a consequence prosecutors should themselves be alert to the possibility. In this respect, the Court noted that certain elements of A.N.’s discovery and subsequent police interviews should have raised concerns that he might have been trafficked. From that point on, the Court held, the State had a positive obligation to take operational measures to protect him, and failed to do so by allowing the prosecution to continue, without providing clear reasons for this decision. Therefore, the Court found a violation of Article 4 of the Convention.

The applicants further complained that, as a result of the violation of the United Kingdom’s positive obligation under Article 4, they were also denied a fair trial within the meaning of Article 6 of the Convention. The Court acknowledged that trafficked persons are “not immune from prosecution,”⁷⁴ but it also recognised

⁷⁴ *ibid* para 196.

that, as the status of ‘victim of trafficking’ can affect whether there is sufficient evidence to prosecute and whether it is in the public interest to do so:

[...] evidence concerning an accused’s status as a victim of trafficking is ... a ‘fundamental aspect’ of the defence which he or she should be able to secure without restriction.⁷⁵

The failure to recognise indicators of human trafficking on the part of criminal defence lawyers, or the failure on the part of the trafficked person to self-identify during criminal proceedings, “cannot by itself absolve the State and its agents of their responsibility to do so.”⁷⁶ Since it is the State which, in the context of Article 4 ECHR, is under a positive obligation to identify and to protect trafficked persons, as well as to investigate situations of potential trafficking, the State:

[...] cannot ... rely on any failings by a legal representative or indeed by the failure of a defendant – especially a minor defendant – to tell the police or his legal representative that he was a victim of trafficking.⁷⁷

While the Court held that an applicant may waive the right to have a criminal case examined on the merits, a decision to accept a plea bargain should be accompanied by certain conditions – including the full awareness of the facts and the legal consequences of accepting the plea, and a sufficient judicial review of the fairness of the manner in which the plea bargain is reached between the parties.⁷⁸ In the

⁷⁵ *ibid.*

⁷⁶ *ibid* para 198.

⁷⁷ *ibid* para 199.

⁷⁸ *ibid* para 201.

cases of V.C.L. and A.N., the Court found that “the applicants’ guilty pleas were ... not made ‘in full awareness of the facts’,”⁷⁹ and that it could therefore not consider that the applicants waived their rights under Article 6§1 of the Convention. As the reasons given by the CPS, and later by the Court of Appeal, for disagreeing with the Competent Authority were “wholly inadequate,”⁸⁰ the ECtHR concluded that “in respect of both applicants the proceedings as a whole could not be considered ‘fair’,”⁸¹ and that therefore there has been a violation of Article 6§1 ECHR.

Although the jurisprudence of the ECtHR on Article 4 of the ECHR is positive and progressive, it is not without fault. Critics have argued that it has remained primarily focused on shortcomings in criminal justice investigations and protective operational measures, and that it fails to, *inter alia*, assess in rigor the definitional boundaries of key concepts – including slavery, servitude, and forced labour – and to address long-term issues with respect to trafficked persons’ right of residence.⁸² With respect to the former, in particular, it is worth recalling that in *Rantsev* the Court conflated human trafficking and slavery, by defining the former through the definition of slavery in international law. The ‘original sin’ in *Rantsev* has not been completely remedied in subsequent case-law, which has instead

⁷⁹ *ibid* para 202.

⁸⁰ *ibid* para 207.

⁸¹ *ibid* para 209.

⁸² Stoyanova, ‘Dancing on the Borders of Article 4’ (n 50); Stoyanova, *Human Trafficking and Slavery Reconsidered* (n 50).

contributed to an amplification of the definitional quagmire. In *Chowdury*, for example, the Court held that:

[...] exploitation of labour is one of the forms of exploitation in the definition of trafficking in human beings, which highlights the intrinsic relationship between forced and compulsory labour and trafficking in human beings.⁸³

However, the Court failed to unpack the relationship between human trafficking and forced labour, using them as synonyms throughout the judgment. *S.M. and V.C.L. and A.N.*,⁸⁴ despite their significance with respect to the inclusion of domestic trafficking and the non-punishment principle in the jurisprudence of the Court, do not provide further clarifications on the boundaries of trafficking in human beings and the scope of Article 4.⁸⁵

The regional framework highlighted in this section, both with respect to the European Union and to the Council of Europe, provides the context in which domestic law in Italy and in the United Kingdom operates. With the exception of Council Directive 2004/81/EC of 29 April 2004, which was not transposed by the United Kingdom, all other instruments are either directly applicable in domestic law, or have been given effect in the legislative framework through domestic legislation. The following section will focus on the national development of anti-trafficking law and protection processes, exploring both the key legislative

⁸³ *Chowdury and Others v Greece* (n 53) para 83.

⁸⁴ *SM v Croatia [GC]* (n 52); *VCL and AN v The United Kingdom* (n 54).

⁸⁵ For an in-depth analysis of the limits of the European Court of Human Rights' Article 4 jurisprudence, see Stoyanova, *Human Trafficking and Slavery Reconsidered* (n 50).

instruments and the broader narrative deployed in framing the phenomenon of trafficking in human beings in Italy and in the United Kingdom.

2.2 Anti-trafficking instruments and protection processes in Italy and in the United Kingdom

In the European context, Italy and the United Kingdom can be respectively considered the pioneer and the late-comer in the adoption of domestic anti-trafficking legislation. The *Testo Unico sull'Immigrazione* (TUI),⁸⁶ adopted in Italy in 1998, and the Modern Slavery Act,⁸⁷ adopted in the United Kingdom in 2015, have two substantially different approaches not only with respect to the processes of emergence, assistance and protection of trafficked persons, but also and foremost with respect to the conceptualisation of the phenomenon. Italy, on the one hand, has adopted a highly specialised, although fragmented, legislative framework maintaining the crime of trafficking and that of exploitation as specific and independent crimes. While human trafficking has progressively come to encompass the majority of forms of sexual exploitation, labour exploitation remains an independent crime, and the links to human trafficking are still not entirely recognised and established. The United Kingdom, on the other hand, has consolidated the practices of slavery, servitude, forced labour and human trafficking under the umbrella category of *modern slavery*. Although the legal definitions of slavery and of trafficking remain distinct, as discussed in Chapter I,

⁸⁶ *Testo Unico sull'Immigrazione of 1998* (Italy 1998).

⁸⁷ *Modern Slavery Act of 2015* (UK 2015).

the revival of anti-slavery activism that begun around the year 2000 has led several States, including the United Kingdom, to adopt the narrative of slavery to address the phenomenon of human trafficking. The implications of this shift in the approach to trafficking will be addressed throughout this section.

2.2.1 A country-specific overview of trafficking in human beings

Both Italy and the United Kingdom are often labelled as countries of transit and destination for trafficked persons. Considered their geographical location and their economic structures, however, there are differences with respect to the number, and to the so-called profile, of identified trafficked persons. This section will provide an overview of the similarities and differences between the two jurisdictions in terms of identified trafficked persons and sectors of exploitation, which will contribute to the understanding of the reasons behind the adoption of specific legislation and policy on anti-trafficking issues. The data referred to in this section relates to the number of identified and/or assisted trafficked persons, which the author recognises as only partial. Indeed, the bias of data collection in the anti-trafficking sector has been highlighted by scholars and NGOs alike.⁸⁸ This data, however, is relied upon by the authorities to justify the adoption of certain policies, including National Action Plans, and to decide on budgetary allocations for anti-trafficking actions. The official statistics can therefore be understood as both a consequence and a cause of selective identification and gender stereotypes, and for

⁸⁸ See, *inter alia*, Jo Goodey, 'Human Trafficking: Sketchy Data and Policy Responses' (2008) 8 *Criminology & Criminal Justice* 421.

this reason they will be used in this section to comment on the perceived dimension of the trafficking phenomenon, but they will also be further analysed in Chapter III.

In Italy, the perception of human trafficking is a highly gendered one, and it focusses almost entirely on trafficking for the purpose of sexual exploitation. Representatives of leading NGOs in the anti-trafficking sector have confirmed that the identification of trafficked persons suffers from the existence of a stereotyped image of the ‘victim’, which is young, female and trafficked for the purpose of sexual exploitation.⁸⁹ It is therefore unsurprising that data from SIRIT,⁹⁰ shows that the vast majority of identified trafficked persons are female Nigerian nationals, followed by Chinese and Romanian nationals, and that, among these individuals, the majority had been subject to sexual exploitation. In the last decade, particular attention has been dedicated to female Nigerian nationals and their experience of trafficking for the purpose of sexual exploitation, both in academia and in public policy.⁹¹ On the contrary, little attention has been provided to other aspects of the trafficking phenomenon, including trafficking for labour exploitation, forced criminality, and forced begging. While 90% of the surveyed NGOs and entities

⁸⁹ All respondents to the questionnaire have indicated that the identification of trafficked persons suffers from this bias.

⁹⁰ *Sistema Informatizzato di Raccolta Informazioni sulla Tratta*, or Computerised system for the collection of information on trafficking in human beings.

⁹¹ See, inter alia, Marina Mancuso, ‘Not All Madams Have a Central Role: Analysis of a Nigerian Sex Trafficking Network’ (2014) 17 *Trends in Organized Crime* 66; CS Baarda, ‘Human Trafficking for Sexual Exploitation from Nigeria into Western Europe: The Role of Voodoo Rituals in the Functioning of a Criminal Network’ (2016) 13 *European Journal of Criminology* 257; Paolo Campana, ‘The Structure of Human Trafficking: Lifting the Bonnet on a Nigerian Transnational Network’ (2016) 56 *British Journal of Criminology* 68; Francesca Esposito and others, ‘Voices of Nigerian Women Survivors of Trafficking Held in Italian Centres for Identification and Expulsion’ (2016) 54 *International Migration* 133; CA Olufade, *Oath Taking and the Transnationalism of Silence among Edo Female Sex Workers in Italy* (African Studies Centre Leiden ASCL 2020).

regularly work on issue of sexual exploitation, only 65% engages on a daily basis with issues of labour exploitation, and less than half with forced criminality and forced begging.⁹² Similarly, while 90% of the surveyed organisations work regularly with adult women, less than half engages with adult men. When they do, only one entity reported men being more than 20% of the total of assisted individuals, while more than half reported men being less than 5% of the assisted persons.⁹³ Despite the focus on trafficking for the purpose of sexual exploitation, and more generally the regulation of prostitution, Italy has an estimated 1.5 million unregistered workers and 3.7 million ‘irregular’ workers who are at risk of being exploited due to lack of regular access to the labour market.⁹⁴ In the agricultural sector, for example, experts estimated that 150.000 to 180.000 workers, particularly seasonal workers, are vulnerable to exploitation and human trafficking.⁹⁵ As of the end of 2018, however, out of the 1.373 persons in the anti-trafficking system, only 7.36% were exiting a situation of labour exploitation, and only 9.35% were males.⁹⁶

In the United Kingdom, due to the adoption of the concept of modern slavery as an umbrella term that includes human trafficking, but also forced labour, servitude and slavery, data is not disaggregated and it is therefore more difficult to

⁹² Out of 8 respondents, 3 engage only with trafficking for the purpose of sexual exploitation, 1 only with trafficking for the purpose of labour exploitation and forced criminality, and 4 work on trafficking for the purpose of sexual and labour exploitation.

⁹³ Respondent 7 indicated that more than 20% of the total of assisted individuals per *annum* are usually adult men. Respondent 8 indicated an average between 10% and 20%. Respondents 1, 3, 4, 5, and 6 indicated an average of less than 5%.

⁹⁴ United States State Department, ‘2020 Trafficking in Persons Report: Italy’ (2020).

⁹⁵ *ibid.*

⁹⁶ Dipartimento per le pari opportunità, ‘Dati Estratti Dal Sistema Informatizzato per La Raccolta Di Informazioni Sulla Tratta (SIRIT). Dati Riferiti Alle Persone Che Sono Emerse e Che Sono Risultate in Carico Al Sistema Antitratta Nell’anno 2018’ (2019).

understand the number and the profile of identified trafficked persons. The authorities rather refer to ‘victims of modern slavery’, and do not distinguish in their data the number of individuals that were identified as trafficked, held in slavery, or subjected to exploitation. In 2018, there were 6.985 persons referred into the National Referral Mechanism (NRM), of which 3.990 for labour exploitation and 1.926 for sexual exploitation.⁹⁷ In 2019, 10.627 potential ‘victims of modern slavery’ were referred to the NRM, the majority of whom males and referred as potential ‘victims’ of labour exploitation,⁹⁸ and a further 7.586 individuals were referred in the first three quarters of 2020. In the three year period, most of the referred individuals were UK nationals (in particular minors), followed by Albanian and Vietnamese nationals. Despite the statistics seem to indicate a higher rate of emergence of male ‘victims of modern slavery’, in particular if compared to the available data in the Italian context, surveyed NGOs and CSOs believed that the identification process, in so far as trafficked persons are concerned, suffers from the existence of a stereotyped image of the ‘victim’, which is – once again – young, female and trafficked for the purpose of sexual exploitation.⁹⁹ They also believed that adult men are particularly affected by such a stereotype.¹⁰⁰

Analysing the available data against the insights of leading NGOs and CSOs in the field, it seems that in both countries, the identification of adult men as

⁹⁷ National Crime Agency (NCA) *National Referral Mechanism Statistics—End of the Year Summary 2018* (UK England and Wales NCA 2019).

⁹⁸ UK Home Office *National Referral Mechanism statistics UK: End of year summary 2019 second edition* (UK England and Wales 2020).

⁹⁹ All respondents but one indicated the existence of such bias.

¹⁰⁰ All respondents that selected ‘yes’ in the previous question indicated that adult men are particularly affected by the stereotype.

trafficked persons suffers from a systemic bias that exists within the anti-trafficking structure. In order to assess whether this bias is linked to existing legislation or to the application of the same, the next section will provide a critical analysis of the relevant domestic framework, its development and its gaps.

2.2.2 Legal and policy responses to human trafficking in Italy and in the United Kingdom

2.2.2/A Italy: *The pioneer in anti-trafficking legislation*

At the time of the adoption of the first anti-trafficking legislation in Italy, the 1998 *Testo Unico sull'Immigrazione*, international law had very little to say on the phenomenon of trafficking, especially in terms of protection of trafficked persons. Two more years would have passed before the adoption of the Palermo Protocol, and another five years before the conclusion of the Council of Europe Anti-Trafficking Convention. In this scenario, Italy was among the first countries to adopt an instrument of protection for trafficked persons – although it did not act in a *vacuum*, as trafficking in human beings had increasingly become a priority in the international and European policy agendas since the beginning of the 1990s. Article 18 *TUI* provided for the possibility of issuing a special residence permit to victims of violence or severe exploitation, including trafficked persons, to enable their participation in assistance and social integration projects. This provision was – and to some extent still is – regarded as one of the most advanced protection measures on trafficking in human beings at European, if not global, level. Article 18(1) *TUI*, as adopted in 1998, reads:

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When, in the course of police operations, investigations or proceedings for some of the crimes referred to in Article 3 of Law 20 February 1958, n. 75, or of those provided for by Article 380 of the Code of Criminal Procedure,¹⁰¹ or during welfare interventions of the social services of local authorities, the authorities ascertain situations of violence or serious exploitation against a foreigner, and concrete elements of danger for his or her own safety emerge as a result of attempts to escape the constraints of an association dedicated to one of the aforementioned crimes or as a result of statements made during the preliminary investigation or trial, the Commissioner, at the proposal of the Public Prosecutor or with a favourable opinion of the same authority, issues a special residence permit to allow the foreigner to escape the violence and the conditioning of the criminal organization and to participate in a program of assistance and social integration.¹⁰²

Article 18 *TUI*, in conjunction with Article 27 of the Decree of the President of the Republic n. 394/99,¹⁰³ provided for the issuance of a residence permit in favour of a foreign national who satisfied two conditions – they had been a ‘victim’ of violence or serious exploitation, and they were exposed to a real danger for their safety due to statements made in the criminal proceedings or due to the decision to escape the exploitative situation. In order to be granted a residence permit pursuant to Article 18, the foreign national must access a program of assistance and social integration. The permit has an initial duration of six months, and it may be renewed

¹⁰¹ The situation of exploitation and danger for the person must be ascertained in the context of a criminal proceeding for one or more of the crimes expressly indicated by the law, which are the offense referred to in Article 3 of Law 75/58 (procuring and pandering of prostitution) and the offenses referred to in Article 380 of the Code of Criminal Procedure for which a mandatory *in flagrante delicto* is foreseen, including articles 600, 601 and 602 of the Penal Code, or during the interventions of the services to protect victims of trafficking.

¹⁰² *TUI* (n 86) Article 18.

¹⁰³ *Decree of the President of the Republic n 394/99 of 1999* (Italy 1999).

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for one year or for a greater period of time if required for ‘reasons of justice’. The residence permit allows access to the welfare services and to education, to the registration to Employment Centre’s lists and to the performance of subordinate work. It can also be converted into a permit for study and work purposes. The permit issued pursuant to Article 18 *TUI* is likely to be revoked in case of interruption of the program of assistance and social integration. It is also likely to be revoked in case of conduct incompatible with the purposes of the program, or when the conditions that justified its release cease to exist.

With respect to participation in criminal proceedings, the issuance of the permit was not made conditional on the participation of trafficked persons in such proceedings. Indeed, it can be released both following a complaint by the trafficked person, as well as in the case in which they are unable or unwilling to turn to the judicial authorities. In this sense, Article 18 *TUI* foresees a double-track – a judicial one and a so-called social one. While the judicial track presupposes the filing of a complaint, and therefore the launch of a criminal proceeding, the social track differs from the judicial one in many respects. In the judicial track, the exploitative situations are established by charitable entities and associations that identify such circumstances in the course of their work and operations. The identification of trafficked persons follows a two-stages model, whereby they are first identified in a preliminary, and informal, manner on a reasonable grounds threshold, and only later they are identified formally. Consequently, the proposal for the issuance of the permit ought to be filed by the charitable entity that would take responsibility for supporting the foreign national through the program of assistance and social integration. In this initial phase, no complaints nor criminal proceedings are

envisaged. It will be the chief of police, the *questore*, to evaluate the gravity of the danger that would lead to the issuance of a permit, independently from the public Prosecutor. It follows that a wide discretion is left in the hands of the *questore*, especially considered that they would have to rely almost entirely on the elements contained in the declaration of the charitable entity.

The introduction of the social track in the domestic legal framework served a precise purpose. As it was recognised that, in situations of grave exploitation, undocumented or irregular foreigners would be deterred from approaching the authorities to claim protection if the initiation of criminal proceedings was required, the social track proscribed the possibility to fully access the social protection mechanism without the need to file an official complaint. Yet, despite the language of Article 18 *TUI*, in the first decade after its adoption, access to residence permits was in practice limited to individuals who cooperated with the authorities. In addition, as noted by Mancini, it was only after 2016 that persons trafficked for the purpose of labour exploitation were allowed in practice to access the social protection programmes.¹⁰⁴ The underlying reasoning behind the narrow interpretation of Article 18 *TUI* lied in the prevalent interest of the authorities in criminal prosecutions rather than in social protection, and in the prosecution of trafficking for the purpose of sexual rather than labour, or any other kind of, exploitation. It was only following the adoption of Law n. 228/2003 on “Measures against trafficking in persons”¹⁰⁵ and of the EU instruments mentioned in the

¹⁰⁴ David Mancini, ‘Contrasto Penale Allo Sfruttamento Lavorativo: Dalla “Legge 30” Alla Legge n. 199/2016’ in *Agromafie e caporalato Quarto rapporto* (2018) 81.

¹⁰⁵ *Legge 11 agosto 2003, n 228 Misure contro la tratta di persone of 2003 228/2003* (Italy 2003).

previous section that the logic behind the issuance of permits started to be reversed. Instead of a mechanism of reward, the permit was progressively understood as a subjective right to which ‘victims’ of exploitation were entitled. Through Article 13, Law n. 228/2003 established a special assistance program for ‘victims’ of the crimes set out in Articles 600 and 601, aimed at temporarily guaranteeing adequate accommodation, food and healthcare conditions to all ‘victims’, including national of the Member State, without prejudice to the protection measures provided for in Article 18 *TUI* when the ‘victim’ is a foreign national.¹⁰⁶ Law n. 228/2003 further introduced amendments to the Criminal Code, in particular to Article 600 (“Placing or holding a person in condition of slavery or servitude”), Article 601 (“Trafficking in persons”) and Article 602 (“Purchase and sale of slaves”). Article 600 was replaced by the following:

Whoever exerts on any other person powers and rights corresponding to ownership; places or holds any other person in conditions of continuing enslavement, sexually exploiting such person, imposing coerced labour or forcing said person into begging, or exploiting him/her in any other way, shall be punished with imprisonment from eight to twenty years. Placement or maintenance in a position of slavery occur when use is made of violence, threat, deceit, or abuse of power; or when anyone takes advantage of a situation of physical or mental inferiority and poverty; or when money is promised, payments are made or other kinds of benefits are promised to those who are responsible for the person in question.¹⁰⁷

In parallel, Article 601 was amended to read:

¹⁰⁶ *ibid* Article 13.

¹⁰⁷ *Codice Penale Italiano* (Italy) Article 600.

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Whoever carries out trafficking in persons who are in the conditions referred to in article 600, that is, with a view to perpetrating the crimes referred to in the first paragraph of said article; or whoever leads any of the aforesaid persons through deceit or obliges such person by making use of violence, threats, or abuse of power; by taking advantage of a situation of physical or mental inferiority, and poverty; or by promising money or making payments or granting other kinds of benefits to those who are responsible for the person in question, to enter the national territory, stay, leave it or migrate to said territory, shall be punished with imprisonment from eight to twenty years.¹⁰⁸

With the entry into force of the Council of Europe Convention on Action against Trafficking in Human Beings, the legislative framework underwent further changes. Law n. 108/2010¹⁰⁹ led to further amendments of the Criminal Code. In particular, it introduced Article 602-ter, which provides that:

The penalty for the crimes provided for in Articles 600, 601 and 602 is increased from one third to half: a) if the offended person is less than eighteen; b) if the facts are directed *at the exploitation of prostitution* or in order to subject the injured person to organ harvesting; c) if the event results in a serious danger to the life or physical or mental integrity of the injured person.¹¹⁰

The law, however, does not contain new, specific provisions that could have contributed to a further refinement of the system to protect trafficked persons in full compliance with the Council of Europe Trafficking Convention, but rather it is was

¹⁰⁸ *ibid* Article 601.

¹⁰⁹ *Legge 2 luglio 2010, n 108 Ratifica ed esecuzione della Convenzione del Consiglio d'Europa sulla lotta contro la tratta di esseri umani, fatta a Varsavia il 16 maggio 2005, nonché norme di adeguamento dell'ordinamento interno of 2010 108/2010 (Italy 2010).*

¹¹⁰ *ibid* Article 3 (emphasis added).

limited to giving ‘full and entire execution’ to the Convention itself, a wording that is as vague as problematic. Indeed, the law did not transpose the clear obligation of identification flowing from Article 10 of the Convention, nor did it transpose the obligation to provide trafficked persons with a reflection and recovery period and to respect the non-punishment provision.

On 28 March 2014, Legislative Decree n. 24/2014,¹¹¹ transposing Directive 2011/36/EU, entered into force. It provided for amendments to Articles 600 and 601 of the Criminal Code, introducing the concepts of *illegal activities* and *organ harvesting* as purposes of exploitation, *vulnerability* as a specific situation, as well as rephrasing Article 601 as follows:

Whoever recruits, introduces into the territory of the State or transfers outside of it, carries, transfers authority over the person, or hosts one or more persons who find themselves in the conditions referred to in Article 600 or carries out the same conduct on one or more persons through deception, violence, threat, *abuse of authority or advantage of a situation of vulnerability*, of physical or psychological inferiority, or of necessity, or by promising or giving money or other advantages to the person who has authority over it, in order to induce them or force them to perform *work, sex or begging* or otherwise illegal activities that involve exploitation or organ harvesting, shall be punished with imprisonment from eight to twenty years.¹¹²

¹¹¹ *Decreto Legislativo 4 marzo 2014, n 24 Attuazione della direttiva 2011/36/UE, relativa alla prevenzione e alla repressione della tratta di esseri umani e alla protezione delle vittime, che sostituisce la decisione quadro 2002/629/GAI of 2014 24/2014 (Italy 2014).*

¹¹² *ibid* Article 2 (emphasis added).

For the first time, the language of vulnerability – and of ‘abuse of a situation of vulnerability’ – was introduced in domestic law. Legislative Decree n. 24/2014 also amended Article 18 *TUI*, introducing a further comma, which reads:

3-bis. For both foreigners and [EU] citizens ... victims of the crimes provided for in articles 600 and 601 of the penal code ... , based on the National action plan against trafficking and serious exploitation of human beings pursuant to Article 13, comma 2-bis of Law n. 228/2003, ... a single program of emergence, assistance and social integration is provided. The single program guarantees, on a transitory basis, adequate conditions of accommodation, food and health care ... and, subsequently, the continuation of assistance and social integration¹¹³

The intent of the legislator, as suggested by Vettori,¹¹⁴ was to simplify and strengthen the already existing protection mechanism, establishing a legal coordination between the provisions contained in Article 13 of Law n. 228/2003 and Article 18 *TUI*. The former would be applied with a view to provide first assistance rather than to integration, for which the latter would be most suitable. With respect to protection, Legislative Decree n. 24/2014 introduced a number of relevant provisions, among which Article 1(1) on the necessity to take into account the specific situations of vulnerable people, attributing such characteristic to:

[...] minors, unaccompanied minors, elderly, people with disabilities, women, in particular if they are pregnant, single parents with minor children, people with psychological disturbs, *people who have been subject to torture*,

¹¹³ *ibid.*

¹¹⁴ Carlo Vettori, ‘La Tratta Degli Esseri Umani: Evoluzione Normativa e Aspetti Sociologici’ [2014] *ADIR - L’altro diritto*.

*rape or other forms of psychological, physical, sexual or gender-based violence.*¹¹⁵

Legislative Decree n. 24/2014 further introduced Article 1(2), which recognises that the Decree is without prejudice to the rights, duties and responsibilities of the State and of individuals in light of international law, humanitarian law and human rights law, and in particular, where applicable, the 1951 Refugee Convention and its Protocol, as well as the principle of *non-refoulement*.¹¹⁶

The first National Action Plan against Trafficking and Severe Exploitation (NAPAT), anticipated through Legislative Decree n. 24/2014 and covering the period between 2016 and 2018, was eventually adopted by the Council of Ministers on the 26th of February 2016.¹¹⁷ The NAPAT envisaged, *inter alia*, the adoption of measures on improving knowledge on trafficking in human beings,¹¹⁸ the setting up of adequate mechanisms for the rapid identification of trafficked persons, and the establishment of a NRM and of a comprehensive database on trafficking. In addition, it envisaged the cooperation with the private sector, to encourage corporate social responsibility, and with the National Labour Inspectorate, with a view to combating trafficking for the purpose of labour exploitation. The NAPAT was adopted with a number of annexes, among which the ‘Guidelines for the definition of a mechanism for rapid identification of victims of trafficking and serious exploitation’, describing the situations in which potentially trafficked

¹¹⁵ *Decreto Legislativo 4 marzo 2014, n 24* (n 111) Article 1(1) (emphasis added).

¹¹⁶ See Chapter III for a more detailed discussion on the trafficking-asylum nexus.

¹¹⁷ Consiglio dei Ministri, ‘Piano nazionale d’azione contro la tratta e il grave sfruttamento 2016-2018’ (2016).

¹¹⁸ Through, *inter alia*, research and awareness raising.

persons could be found, and the roles and responsibilities of professionals who may have contact with them.¹¹⁹ One of the aims of the NAPAT was to design a new model for assisting trafficked persons, which was completed by the 2016 Decree of the President of the Council of Ministers setting up the ‘Single programme for the emergence, assistance and social integration of victims of trafficking and exploitation’, irrespective of their legal status, age, nationality, gender or type of exploitation experienced. The single programme’s legal basis lies in Legislative Decree n. 24/2014, and it replaced the previous dual assistance approach based on Article 13 of Law n. 228/2003 and Article 18 *TUI*. It was to be implemented through projects carried out at regional level, which would cover actions from the moment of detecting a trafficked person, through their identification, protection, assistance and social inclusion. The entities that are authorised to realise such programs can be the social services of local authorities, charitable associations, and other private bodies.

Parallel to the development of anti-trafficking legislation and protection instruments, the correlated – albeit different – phenomenon of labour exploitation had already been addressed through other legislative instruments. Yet, before the introduction in 2016 of Article *603bis*, which will be discussed later in this section, the Criminal Code was silent with respect to instances of exploitation where the elements of either slavery or human trafficking could not be established, and would therefore not fall under Articles 600, 601, and 602 of the Criminal Code. This silence left instances of labour exploitation not amounting to, or recognised as

¹¹⁹ Including immigration officials, asylum officers, labour inspectors, prosecutors, judges, and social workers.

slavery or human trafficking in a grey area, which was only partially filled by the provisions contained, *inter alia*, in Legislative Decree n. 276/2003.¹²⁰ Article 18 of Legislative Decree n. 276/2003 introduced a provision punishing illegal gangmastering. This, however, only covered one dimension of labour exploitation, as it was centred on the figure of the gangmaster, or *caporale*, the individual who performed the activity of intermediation – recruiting manpower in order to place it with specific employers, against payment of a fee. When the Criminal Code was amended in 2011 to include a provision, at Article 603*bis*, on the crime of illicit brokerage and labour exploitation,¹²¹ the conduct of the employer in absence of a *caporale* was left out of the scope of Article 603*bis*, and therefore hidden from scrutiny. It was only in 2016, in response to both the acknowledgment of the flawed formulation of Article 603*bis* CC and the increase in detected cases of labour exploitation in sectors such as agriculture, that Law n. 199/2016 on “Provisions to counter the phenomena of undeclared employment, exploitative labour in agriculture and the realignment of wages in the agricultural sector” amended Article 603*bis* of the Criminal Code and criminalised labour exploitation, regardless of the presence of a broker. Article 603*bis*, as amended, reads:

Unless the facts constitute a more serious offence, whoever:

- 1) recruits workers, taking advantage of their state of need, in order to place them to work with third parties in exploitative conditions;

¹²⁰ *Decreto Legislativo 10 settembre 2003, n 276 Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003, n 30 of 2003 (Italy 2003).*

¹²¹ *Decreto Legge 13 agosto 2011, n 138, coordinato con la legge di conversione 14 settembre 2011, n 148 Ulteriori misure urgenti per la stabilizzazione finanziaria e per lo sviluppo of 2011 (Italy 2011).*

2) uses, hires or employs workers, also through the intermediation activity referred to in number 1), subjecting them to exploitative conditions and taking advantage of their state of need;

is punished with imprisonment from one to six years and with a fine of 500 to 1,000 euros for each worker recruited. If the facts are committed through the use of violence or threats, the person will be punished with a prison sentence of five to eight years, and a fine of 1,000 to 2,000 euros for each recruited worker.

For the purposes of this article, the following conditions constitute indicators of exploitation:

- 1) the repeated payment of wages in a manner that clearly differs from the national or territorial collective agreements stipulated by the most representative unions at national level, or in any case the repeated payment of wages in a manner that is disproportionate with respect to the quantity and quality of work performed;
- 2) the repeated violation of the regulations relating to working hours, rest periods, weekly rest periods, mandatory leave, holidays;
- 3) the existence of violations of the rules on safety and hygiene in the workplace;
- 4) the submission of workers to degrading working conditions, surveillance methods, or housing situations.

An analysis conducted by Carchedi, based on interviews with provincial secretaries of Flai-Cgil, one of the main workers' unions in Italy, highlights how, in the first year after the adoption of Law n. 199/2016, most of the respondents noted a degree of (positive) change compared to the situation before Law n. 199/2016.¹²² In elaborating on the degree to which the positive changes have impacted both national

¹²² Francesco Carchedi, 'Legge n. 199/2016. Riflessioni Valutative Sullo Stato Di Attuazione' in *Agromafie e caporalato Quarto rapporto* (2018) 34.

and foreign workers, Carchedi notes that foreign workers have rarely filed complaints with the authorities, compared to national workers. He identifies two reasons behind this trend. The first element is the existence of a ‘state of need or necessity’, whereby vulnerable workers – in particular foreign workers – tend to accept any offer of employment, regardless of standards of occupation. The second element is the level of subjection that foreign workers experience in their relationship with the *caporale* or the employer, which is higher compared to that of national workers due to several factors, including with reference to language ability and migration status.¹²³ The different degree to which national and foreign workers have engaged with unions and with Law n. 199/2016 are also unequivocally linked to the degree of protection afforded by the law to foreign ‘victims’ of exploitation. In this respect, Law n. 199/2016 was once again a turning point. Indeed, through the addition of Article 603*bis* to the list of offences for which arrest in *flagrante delicto* is mandatory, ‘victims’ of the crime covered by Article 603*bis* were allowed to access the protection mechanism contained in Article 18 *TUI*, and therefore both the judicial and the social protection track. This is of utmost importance, as before the 2016 amendments it was Law Decree n. 109/2012, implementing Directive 2012/52/UE, to provide for the only protection mechanism available to foreign ‘victims’ of severe labour exploitation:

12-*quater*. In cases of severe labour exploitation ... the foreigner *who has lodged a complaint and cooperates in the criminal proceedings instituted against the employer* is issued a residence permit by the police commissioner,

¹²³ *ibid* 49.

following a proposal or with the favourable opinion of the public prosecutor, pursuant to article 5, paragraph 6.

12-quinquies. The residence permit referred to in paragraph 12-quater has a duration of six months and can be renewed for one year or for a longer period, if necessary for the definition of the criminal proceedings. The residence permit is revoked in the event of conduct incompatible with the purpose of the same, reported by the public prosecutor or ascertained by the *quaestor*, or if the conditions that justified its release cease to exist.¹²⁴

The residence permit substantially differed from that provided for in Article 18 *TUI*, as its issuance was made conditional on the cooperation in criminal proceedings – and precisely because of its nature, it has produced very little results.¹²⁵ With the introduction of Law n. 199/2016, however, the social track foreseen in Article 18 *TUI* was made equally accessible to ‘victims’ of labour exploitation, regardless of the existence of a broker, as per Article 603*bis*. In addition, the NAP against labour exploitation and *caporalato*,¹²⁶ adopted for the triennium 2020-2022, explicitly foresees the harmonisation and the strengthening of forms of protection for foreign nationals trafficked for the purpose of labour exploitation, in order to “offer to these individuals the opportunity to access both the ‘judicial track’ as well as the ‘social track’.”¹²⁷ In Chapter III, the effectiveness of these protection mechanisms will be assessed.

¹²⁴ Amending Article 22(12) of the Testo Unico sull’Immigrazione, Law Decree n. 109/2012 (emphasis added).

¹²⁵ Mancini (n 104) 88.

¹²⁶ Ministero del Lavoro e delle Politiche Sociali, ‘Piano Triennale Di Contrasto Allo Sfruttamento Lavorativo in Agricoltura e Al Caporalato 2020-2022’ (2020).

¹²⁷ *ibid* 30.

2.2.2/B *The United Kingdom: Introducing the concept of ‘modern slavery’*

While Italy was the first country in Europe to adopt specific anti-trafficking legislation in 1998, the United Kingdom’s approach to the phenomenon has been substantially different. The development of anti-trafficking legislation in the United Kingdom has been characterised by the increasing reliance on a narrative that has reconceptualised trafficking as ‘modern slavery’. This narrative, which was first deployed as a political and moral discursive tool,¹²⁸ entered the legislative framework in 2015 through the *Modern Slavery Act*. Although other countries, including Australia, the United States, and France have adopted – or are in the process of adopting – similar legislation, the *Modern Slavery Act* was, as noted by Broad and Turnbull:

[...] the first national legislation to use the term ‘modern slavery’ and to explicitly target ‘slavery’ as opposed to ‘human trafficking’, ‘forced labour’, or other terms.¹²⁹

This shift in narrative, however, was not sudden, and the *Modern Slavery Act* does not constitute the first instrument adopted, or implemented, in the United Kingdom to combat trafficking in human beings. On the contrary, the three-pieced primary legislation adopted in 2015, which includes the *Modern Slavery Act (England and Wales)*, the *Human Trafficking and Exploitation Act (Scotland)* and the *Human*

¹²⁸ Rose Broad and Nick Turnbull, ‘From Human Trafficking to Modern Slavery: The Development of Anti-Trafficking Policy in the UK’ (2018) 25 *European Journal on Criminal Policy and Research* 1.

¹²⁹ *ibid* 1.

Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland), has consolidated previously existing provisions criminalising slavery, servitude, forced labour and human trafficking.

Human trafficking for the purpose of sexual exploitation had been criminalised in 2003 through Section 57-59 of the *Sexual Offences Act* in England, Wales and Northern Ireland, as well as Section 22 of the *Criminal Justice Act* in Scotland. Prior to this legislative phase, UK responses to activities of this nature were managed through legislation that was not suited to tackle the problem – including, *inter alia*, the Sexual Offences Act as amended in 1995, which stated that:

- (1) It is an offence for a person—
 - (a) to procure a woman to become, in any part of the world, a common prostitute; or
 - (b) to procure a woman to leave the United Kingdom, intending her to become an inmate of or frequent a brothel elsewhere; or
 - (c) to procure a woman to leave her usual place of abode in the United Kingdom, intending her to become an inmate of or frequent a brothel in any part of the world for the purposes of prostitution.¹³⁰

In parallel, the *Immigration Act 1971* addressed the facilitation of illegal entry into the United Kingdom, and had been used to deal with circumstances involving ‘illegal’ movement, where there was not enough evidence to pursue other offences. This provision, however, was only intended to punish traffickers and smugglers

¹³⁰ *Sexual Offences Act 1956 of 1995* s 22 (UK 1995).

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alike, but it offered no protection to trafficked persons. As of 2003, the legal framework to combat trafficking was partial at best, as it only provided a minimum framework to address the procurement of women for sexual exploitation, and could not be deemed to be compliant with the Palermo Protocol. In 2004, therefore, the scope of the provisions was expanded to cover slavery, forced labour and organ removals, through Section 4 of the *Asylum and Immigration Act*, ‘Trafficking people for exploitation’, which stated that:

- (1) A person commits an offence if he arranges or facilitates the arrival in the United Kingdom of an individual (the “passenger”) and—
 - (a) he intends to exploit the passenger in the United Kingdom or elsewhere, or
 - (b) he believes that another person is likely to exploit the passenger in the United Kingdom or elsewhere.

The provision of Section 4(1) was also applicable to people that arranged or facilitated travel within the United Kingdom, as well as departure from the United Kingdom, of an individual, provided that the conditions (a) or (b) were proven. Section 4 also provided that:

- (4) For the purposes of this section a person is exploited if (and only if)—
 - (a) he is the victim of behaviour that contravenes Article 4 of the Human Rights Convention (slavery and forced labour),
 - (b) he is encouraged, required or expected to do anything as a result of which he or another person would commit an offence under the Human Organ Transplants Act 1989 (c. 31) or the Human Organ Transplants (Northern Ireland) Order 1989 (S.I. 1989/2408 (N.I. 21)),

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(c) he is subjected to force, threats or deception designed to induce him—

(i) to provide services of any kind,

(ii) to provide another person with benefits of any kind, or

(iii) to enable another person to acquire benefits of any kind, or

(d) he is requested or induced to undertake any activity, having been chosen as the subject of the request or inducement on the grounds that—

(i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and

(ii) a person without the illness, disability, youth or family relationship would be likely to refuse the request or resist the inducement.

A person guilty of an offence under Section 4 would be punished, on conviction on indictment, with imprisonment for a term not exceeding 14 years, to a fine, or to both. In 2009, Section 71 of the *Coroners and Justice Act*, ‘Slavery, servitude and forced or compulsory labour’, was introduced. It provided that:

(1) A person (D) commits an offence if—

(a) D holds another person in slavery or servitude and the circumstances are such that D knows or ought to know that the person is so held, or

(b) D requires another person to perform forced or compulsory labour and the circumstances are such that D knows or ought to know that the person is being required to perform such labour.

(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).

A person guilty of an offence under this section was liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years, or a fine, or both. Following the ratification of the 2005 Council of Europe Anti-Trafficking Convention, in 2009 the United Kingdom also introduced the NRM, an initiative aimed at providing more support to trafficked individuals. The functioning of the NRM will be discussed in detail in the next chapter.

As noted by Broad and Turnbull, in this first phase:

[...] the policy problematisation clearly divided trafficking into two distinct problems; sexual exploitation and labour exploitation, with the focus firmly on the former, via the global frame.¹³¹

With respect to employment-driven migration and labour exploitation, the earlier policies and legislative developments were dominated by a migration-crime-security approach,¹³² rather than being driven by an understanding of exploitation associated with employment and migration. Indeed, the emphasis was placed on measures to tackle crimes against the State, rather than crimes against a person. As labour exploitation was instead framed not only as deprioritised, but also as exceptional, actions aimed at targeting it only arose from exceptional circumstances. In particular, it was the Morecambe Bay tragedy of 2004,¹³³ which

¹³¹ Broad and Turnbull (n 128) 5.

¹³² Goodey (n 88) 423.

¹³³ In February 2004, 23 Chinese cockle pickers drowned when they were trapped by sweeping tides while working in Morecambe Bay, Lancashire. They had been hired by two English entrepreneurs through local criminal agents of international Chinese Triads to pick cockles for £5 per 25 kg, far less than the average local rate at the time. Gangmaster Lin Liang Ren was found guilty of manslaughter. The gangmaster and two more individuals were also found guilty of facilitating illegal immigration.

led to the adoption of the *Gangmasters (Licensing) Act* to establish the Gangmasters Licencing Authority (GLA) and to make provision for the licensing of activities involving the supply or use of workers in connection with agricultural work, the gathering of wild creatures and wild plants, the harvesting of fish from fish farms, and certain processing and packaging, and for connected purposes. Under Section 12 of the *Gangmasters Act*, a person guilty of having performed unlicensed gangmastering activities is liable to imprisonment for a term not exceeding ten years, or to a fine, or to both. The adoption of the *Gangmasters Act* was highly criticised both because it was remedial, rather than preventative, and because it missed the opportunity to establish a meaningful relationship between the *Gangmasters Act* and authorities involved in anti-trafficking actions.¹³⁴ It was only in 2011 that the United Kingdom's government acknowledged that trafficking for labour exploitation could become more prevalent than other forms of trafficking,¹³⁵ although limitations persisted both because trafficking was being interpreted narrowly, and because policy responses continued to focus on trafficking for sexual exploitation.¹³⁶

Following the ECtHR judgment in *C.N. v. the United Kingdom*,¹³⁷ where the Court found a violation of Article 4, the United Kingdom was called upon to introduce in its domestic legislation criminal law provisions which penalised the

¹³⁴ Klara Skrivankova, 'United Kingdom (UK)' in *Collateral damage: the Impact of Anti-Trafficking Measures on Human Rights around the World* (GAATW 2007).

¹³⁵ UK Home Office, 'Human Trafficking: The Government's Strategy' (2011).

¹³⁶ Peter Dwyer and others, 'Forced Labour and UK Immigration Policy: Status Matters?' (Joseph Rowntree Foundation 2011) 31.

¹³⁷ *CN v the United Kingdom* No. 4239/08 (European Court of Human Rights 13 November 2012).

practices of slavery, servitude and forced labour as stand-alone offences. Policy consultations around the *Modern Slavery Act* started throughout 2013, and the act was later adopted in March 2015. The 2015 *Modern Slavery Act* has substantially transformed the legal framework of anti-trafficking action in the United Kingdom. Adopting surely an expansionist approach to the interpretation of slavery, which, in contraposition to a narrow interpretation of the same as limited to chattel slavery,¹³⁸ subsumes a breadth of practices among which servitude, forced labour and human trafficking, the United Kingdom has attempted to gain a leading role in the international fight against un-freedom. It is arguable that this framing served two main purposes. On the one hand, it served to evince a strong moral component, supported by the international ‘new abolitionist’ discourse echoed at domestic level. On the other hand, it served to reduce the complexity of the trafficking issue, providing a symbolic meaning to and of it.¹³⁹ Considered that the term ‘trafficking’ has been criticised for its lack of consistency of meaning,¹⁴⁰ the term ‘slavery’ was deemed to be more readily understandable and, being heavily weighted, also serves a political function,¹⁴¹ using “the ‘moral’ as a legitimate basis for policy interventions.”¹⁴² Part 1 of the MSA defines the offences of slavery, servitude and

¹³⁸ See Chapter I for a detailed analysis of the relationship between chattel slavery, human trafficking, and *modern* slavery.

¹³⁹ Lucy Mayblin, ‘Complexity Reduction and Policy Consensus: Asylum Seekers, the Right to Work, and the “Pull Factor” Thesis in the UK Context’ (2016) 18 *The British Journal of Politics and International Relations* 812.

¹⁴⁰ Janie Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) 108 *The American Journal of International Law* 609.

¹⁴¹ Alex Balch, ‘Understanding and Evaluating UK Efforts to Tackle Forced Labour’ in *Vulnerability, Exploitation and Migrants Insecure Work in a Globalised Economy* (Palgrave Macmillan UK 2015).

¹⁴² Broad and Turnbull (n 128) 10.

forced or compulsory labour and of human trafficking. The former is defined as follows:

- (1) A person commits an offence if—
 - (a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or
 - (b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.¹⁴³

In determining whether a person is being held in slavery or servitude, or required to perform forced or compulsory labour, references to the circumstances are to be construed accordance with Article 4 ECHR,¹⁴⁴ and regard may be had to all the circumstances, including:

- (4) [...]
 - (a) to any of the person's personal circumstances (such as the person being a child, the person's family relationships, and any mental or physical illness) which may make the person more *vulnerable* than other persons;
 - (b) to any work or services provided by the person, including work or services provided in circumstances which constitute exploitation within section 3(3) to (6).¹⁴⁵

¹⁴³ MSA 2015 (n 87) s 1(1).

¹⁴⁴ *ibid* s 1(2).

¹⁴⁵ *ibid* s 1(4) (emphasis added).

With respect to the issue of consent, subsection (5) provides that:

[...] the consent of a person (whether an adult or a child) [...] does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour.¹⁴⁶

The act subsequently defines human trafficking, providing that:

(1) A person commits an offence if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.

(2) It is irrelevant whether V consents to the travel (whether V is an adult or a child).

(3) A person may in particular arrange or facilitate V’s travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.

(4) A person arranges or facilitates V’s travel with a view to V being exploited only if—

(a) the person intends to exploit V (in any part of the world) during or after the travel, or

(b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel.

(5) “Travel” means—

(a) arriving in, or entering, any country,

(b) departing from any country,

(c) travelling within any country.¹⁴⁷

¹⁴⁶ *ibid* s 1(5).

¹⁴⁷ *ibid* s 2.

While the definition of trafficking contained in the MSA appears to cover the ‘action’ and ‘purpose’ elements of the international definition of trafficking, as well as both its international and domestic dimensions, Haynes noted that:

[It] is ... unclear on the question of whether the ‘means’ element, that is force, threats, or deception, needs to be present in order for the offense of human trafficking to be committed under domestic law.¹⁴⁸

Although this approach could be interpreted as potentially expanding the application of the trafficking definition to all people that have been, even with their consent, recruited, transported, harboured or received for the purpose of exploitation, the apparent amalgamation of the ‘means’ and ‘purpose’ element is potentially problematic. In particular, it becomes problematic when, as Chapter III will discuss, the presence of (initial) consent is seen and evaluated by the Home Office and Tribunals as a tool to prevent individuals from accessing protection mechanisms. On the issue of protection of ‘victims of modern slavery’, Part 5 of the MSA provides for a non-punishment clause. Following criticism for the United Kingdom’s approach to the punishment of trafficked persons who have committed unlawful activities as a result of having been trafficked, Section 45 of the MSA provides that:

- (1) A person is not guilty of an offence if—
 - (a) the person is aged 18 or over when the person does the act which constitutes the offence,

¹⁴⁸ Jason Haynes, ‘The Modern Slavery Act (2015): A Legislative Commentary’ (2016) 37 *Statute Law Rev* 33, 39.

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- (b) the person does that act because the person is compelled to do it,
- (c) the compulsion is attributable to slavery or to relevant exploitation, and
- (d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.

(2) A person may be compelled to do something by another person or by the person's circumstances.

(3) Compulsion is attributable to slavery or to relevant exploitation only if—

- (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
- (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.¹⁴⁹

If the person is under the age of 18, they are not guilty of an offence:

[...] if the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, [and] a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.¹⁵⁰

The distinction between adult and child 'victims of modern slavery' is a consequence of the effort of the legislature to ensure that proper weight is given to the particular circumstances of children, formulating a lower threshold compared to that applicable to adults in the process of establishing the defence. Although Section 45 does not provide for an overall immunity to 'victims of modern slavery'

¹⁴⁹ MSA 2015 (n 87) s 45.

¹⁵⁰ *ibid* s 45(4).

who commit unlawful offenses, it affords a defence in line with the Council of Europe Anti-Trafficking Convention. Before the enactment of the MSA, the approach of domestic Courts to the sensitive issue of non-punishment resulted in a number of negative human rights externalities and was at best inconsistent. As highlighted by Ofer, one of the most common situations in which issues of non-punishment arises is in relation to cannabis cultivation – interviews with leading specialist criminal defence solicitors revealed, “a caseload of approximately 50 meritorious cases at any one time, of which an estimated 80 per cent involve challenging wrongful convictions and 70 per cent cannabis cultivation.”¹⁵¹ Arising from these circumstances, two cases were submitted to the ECtHR in 2012, *A.N. v the United Kingdom* and *V.C.L. v the United Kingdom*, both of which have been communicated to the United Kingdom in 2018 and were decided, as a combined case, in February 2021.¹⁵² The introduction of Section 45 was welcomed by both practitioners and academics. Yet, as Ofer noted,¹⁵³ the prosecution of trafficked persons in breach of the right to non-punishment continued even after the entry into force of the *Modern Slavery Act*, mostly due to a partial or incomplete implementation of the *Modern Slavery Act*. This was particularly evident with respect to the lack of clear policies and of training of key actors, as well as the existence of conflicting state policy priorities that militate against the intended outcome. Surely, another factor contributing to the continued punishment of trafficked persons for crimes committed as a consequence of their trafficking

¹⁵¹ Nogah Ofer, ‘Implementation of the Non-Punishment Principle in England: Why Are Victims of Trafficking Not Benefiting from the Protection from Prosecution Provided by International Law?’ (2019) 11 *Journal of Human Rights Practice* 486, 489.

¹⁵² *VCL and AN v The United Kingdom* (n 54).

¹⁵³ Ofer (n 151) 502.

experience is the lack of – or lateness of – identification. In this respect, Part 5 of the *Modern Slavery Act* places on the Secretary of State the responsibility to issue guidance and regulations about, *inter alia*, trafficking ‘indicators’, criteria to determine whether there are reasonable grounds to believe that a person may be a ‘victim of modern slavery’, and arrangements for providing assistance and support to persons for those individuals in respect to whom there are reasonable grounds to believe they may be ‘victims of slavery’.¹⁵⁴

As noted by Haynes, the failure of the State to place the specific rights and arrangements to which trafficked persons are entitled on a statutory footing:

[...] runs the risk of [guidance] being disproportionately brief and non-specific, thereby creating uncertainty for both victims and competent national authorities who might not be able to determine which arrangements are available and, indeed, most suitable in the specific circumstances of a case.¹⁵⁵

The Home Office’s latest guidance, the 2020 *Modern Slavery Act 2015 – Statutory Guidance for England and Wales*, provides for indicators of modern slavery and defines roles and responsibilities for key actors involved in the identification and support procedures. The guidance also provides a table outlining physical, psychological, and situational indicators of modern slavery,¹⁵⁶ and specific

¹⁵⁴ MSA 2015 (n 87) ss 49–50.

¹⁵⁵ Haynes (n 148) 51–52.

¹⁵⁶ UK Home Office, ‘Modern Slavery Act 2015 – Statutory Guidance for England and Wales’ (March 2020) 29–30. It provides that victims may, *inter alia*, show fear or anxiety; be distrustful of the authorities; believe that they must work against their will; show signs that their movements are being controlled; feel that they cannot leave; not know their home or work address; be afraid of revealing their immigration status; be threatened with being handed over to the authorities; be subjected to violence or threats of violence against

indicators that apply to sexual exploitation, forced labour, domestic servitude, and forced criminality.¹⁵⁷

The referral of ‘potential victims of modern slavery’ into the NRM is regulated, *inter alia*, by section 52 of the MSA. Public authorities have a statutory duty to notify the Home Office when they come across potential ‘victims of modern slavery’.¹⁵⁸ First Responders Organisations (FROs) are also authorised to refer potential ‘victims’ into the NRM, although they are under no statutory obligation to do so.¹⁵⁹ FROs discharge their functions by, *inter alia*: identifying potential

themselves or against their family members and loved ones; suffer injuries that appear to be the result of an assault or of control measures; have false identity or travel documents (or none at all); not be in possession of their passports or other travel or identity documents, as those documents are being held by someone else; be found in or connected to a type of location likely to be used for exploiting people; be forced, threatened or deceived into working in poor conditions; be disciplined through punishment; be unable to negotiate working conditions; receive little or no payment; have no access to their earnings; work excessively long hours over long periods; not have any days off; live in poor or substandard accommodations; have no access to medical care; be under the perception that they are bonded by debt; be in a situation of dependence; have acted on the basis of false promises; be unfamiliar with the local language; allow others to speak for them when addressed directly; be unable to communicate freely with others; act as if they were instructed by someone else; have limited or no social interaction; have limited contact with their families or with people outside of their immediate environment.

¹⁵⁷ UK Home Office, ‘Modern Slavery Act 2015 – Statutory Guidance for England and Wales’ (n 156) Annex A.

¹⁵⁸ MSA 2015 (n 87) s 52 The authorities to which Section 52 applies are: (a) a chief officer of police for a police area, (b) the chief constable of the British Transport Police Force, (c) the National Crime Agency, (d) a county council, (e) a county borough council, (f) a district council, (g) a London borough council, (h) the Greater London Authority, (i) the Common Council of the City of London, (j) the Council of the Isles of Scilly, (k) the Gangmasters Licensing Authority. The duty to notify is discharged by either referring a ‘potential victim of modern slavery’ into the NRM, or by notifying the Home Office where an adult does not consent to enter the NRM.

¹⁵⁹ UK Home Office, ‘Modern Slavery Act 2015 – Statutory Guidance for England and Wales’ (n 156) 36. Both public and private authorities are recognised as FROs. In England and Wales, public FROs include law enforcement (police, NCA, GLAA), local authorities, and Border Force, UKVI and Immigration Enforcement, while FROs that are not public authorities include Barnardo’s, BAWSO, Kalayaan, Medaille Trust, Migrant Help, New Pathways, NSPCC, Poppy Project, Refugee Council, The Salvation Army, and Unseen UK.

‘victims of modern slavery’ and recognising the indicators of modern slavery; gathering information in order to understand what has happened to them; referring persons into the NRM; and providing a point of contact for the Single Competent Authority (SCA) to assist with the Reasonable Grounds and Conclusive Grounds decisions and to request a reconsideration.

In contrast to the Italian identification procedure, the responsibility to identify an individual as a ‘victim of modern slavery’ rests with the Home Office, and more specifically with the Single Competent Authority (SCA), which replaced the Competent Authorities in April 2019. The decision process is articulated in two stages, Reasonable Grounds (RG) and Conclusive Grounds (CG) decisions, which differ with respect to both timing and standard of proof. At the RG stage, the SCA reaches a decision in a target date of five working days, on the basis of a test grounded in the paradigm ‘from the information available so far, I believe but cannot prove’. At the CG stage, which is ideally completed within the 45 days of reflection and recovery period, the SCA team considers the balance of probability, or the ‘it is more likely than not’ test. After the CG has evaluated a case, the individual is either recognised as a ‘victim of modern slavery’ (human trafficking); as a ‘victim of modern slavery’ (slavery, servitude and forced or compulsory labour); or they are not identified as a ‘victim of modern slavery’. There is currently no formal right of appeal against a NRM decision. Although an informal

reconsideration request can be made, FROs highlighted how this process is inaccessible in practice for many individuals.¹⁶⁰

For foreign nationals without a valid permission to stay in the United Kingdom, a positive CG decision does not result in an automatic grant of immigration leave. Still, the SCA – although it is not responsible for considering any steps in live immigration cases – is able to consider whether a grant of discretionary leave to remain (DL) is appropriate following a positive CG decision. The United Kingdom, like Italy, foresees a double track for accessing DL. Indeed, the granting of DL to the individual may be considered when survivors are helping police with their enquiries, but also when leave is necessary owing to personal circumstances or when leave is necessary to pursue compensation. According to the 2018 ‘Home Office Guidelines on Discretionary leave considerations for victims of modern slavery’, leave should normally be for no more than 30 months,¹⁶¹ with shorter or longer periods that may be granted if the facts of the case justify it. Reasons for granting a period of less than 30 months, or less than the time requested by the person, must be included in the decision letter addressed to the individual. When the initial leave expires, a further period of leave may be granted on application.

¹⁶⁰ Anti-Slavery International and others, ‘Joint Civil Society Report on Trafficking and Modern Slavery in the UK to the UN Human Rights Committee. UN Human Rights Committee, 128th Session (02 Mar 2020 - 27 Mar 2020), Examination of the Eighth Periodic Report of the United Kingdom (List of Issues Prior to Reporting)’ (2020) 7.

¹⁶¹ UK Home Office, ‘Discretionary Leave Considerations for Victims of Modern Slavery’ (10 September 2018) 16.

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While the SCA is considering the CG decision, potential ‘victims of modern slavery’ who have received a positive RG decision will be able to access support for at least 45 days. If individuals then receive a positive CG decision, they will receive at least 45 days of support during the move-on period, and will be exited from Victim Care Contract (VCC) support only when appropriate to do so. Those not recognised as ‘victims of modern slavery’, on the other hand, receive 9 working days of move-on support following their negative CG decision. For trafficked adults, support is provided through a mixture of mainstream and specialist support, and may include access to Government-funded support through the VCC;¹⁶² outreach support if the individual is already in a safe, secure and appropriate accommodation;¹⁶³ access to legal aid for immigration advice; medical care and counselling; and assistance to return to their home country if not a UK national. The type of support to be provided to an individual will be decided upon completion of an Initial Needs Based Assessment (INBA), aimed at ascertaining the immediate welfare needs of the individual (and their dependents, if applicable), and at determining whether the individual’s needs to be accommodated. The INBA ought to include, at a minimum, an evaluation of the individual’s emotional and mental

¹⁶² Including accommodation, material assistance, financial support, translation and interpretation services, information and advice.

¹⁶³ UK Home Office, ‘Modern Slavery Act 2015 – Statutory Guidance for England and Wales’ (n 156) Annex F. According to the guidance, ‘where a potential victim is already in appropriate accommodation, such as Local Authority accommodation, asylum accommodation or other safe, secure and adequately furnished accommodation, and there is no risk to them in remaining at their current location, they will usually continue to remain in that accommodation unless a needs-based assessment reveals a need for Victim Care Contract accommodation.’

wellbeing,¹⁶⁴ their physical health,¹⁶⁵ the support currently received,¹⁶⁶ their ability to live independently, their language and cultural needs, and their family situation, as well as risks to self and others. Following completion of the INBA, a Detailed Needs Based Assessment (DNBA) ought to be performed in order to identify the detailed support needs of the individual while in VCC support. The DNBA shall include physical (including sexual) health needs, psychological and emotional needs, cultural and spiritual needs, practical needs such as, but not limited to, the need for material assistance, interpretation services, legal advice and representation, welfare needs and payment of financial support, and access to education for school-aged dependents.¹⁶⁷ In the event of a positive CG decision, the individual will also receive, when deemed necessary, a Recovery Needs Assessment (RNA) to help them transition out of VCC support.

2.3 The trafficking-asylum nexus

Both Italy and the United Kingdom have adopted legislation with respect to domestic protection mechanisms available to trafficked persons – in Italy, the specialised residence permit pursuant to Art. 18 *TUI*, and in the United Kingdom, the general discretionary leave to remain. Both jurisdictions nonetheless recognise that trafficked persons might be entitled to access other forms of protection,

¹⁶⁴ Including level of trauma, risk of self-harm, risk of suicide.

¹⁶⁵ Including long-term medical conditions, need for emergency or immediate medical care.

¹⁶⁶ Including external services that the individual may already be accessing – for example, counselling or medication.

¹⁶⁷ UK Home Office, ‘Modern Slavery Act 2015 – Statutory Guidance for England and Wales’ (n 156) 53.

including asylum. Such a possibility is implicit in Article 14 of the Palermo Protocol, which states that:

Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.¹⁶⁸

This provision has been reinforced by, *inter alia*, the United Nations Agenda for Protection, which calls upon States to ensure that their asylum systems are open to receiving claims from trafficked persons,¹⁶⁹ and the Explanatory Report accompanying the Council of Europe Convention.¹⁷⁰ In addition, the OHCHR ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ address the importance of ensuring that procedures and processes are in place for the consideration of asylum claims from trafficked persons (as well as from smuggled asylum-seekers), and that the principle of *non-refoulement* is

¹⁶⁸ ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime’ (adopted 12 December 2000, entered into force 25 December 2003) 2237 UNTS 319.

¹⁶⁹ United Nations General Assembly, ‘Agenda for Protection (Addendum)’ (26 June 2002) para 11.

¹⁷⁰ Council of Europe (n 20) para 377. In relation to Article 40 of the Convention, the report states that ‘the fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have appropriate access to fair and efficient asylum procedures. Parties shall also take whatever steps are necessary to ensure full respect for the principle of non-refoulement.’

respected and upheld at all times.¹⁷¹ This was also highlighted and emphasised in the 2018 Global Compact on Refugees, that recognised the need for:

[The] identification and referral of victims of trafficking in persons and other forms of exploitation to appropriate processes and procedures, including for identification of international protection needs or victim support.¹⁷²

Asylum, indeed, represents a major alternative to other forms of protection or residence available in either international or EU law,¹⁷³ particularly when the latter do not offer long-term protection, making the a grant of asylum the strongest form of protection available to trafficked persons.

In 2006, the UNHCR issued its guidance on ‘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’,¹⁷⁴ which complements the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. The involvement of UNHCR with the issue of trafficking is articulated as follows:

Firstly, the Office has a responsibility to ensure that refugees, asylum-seekers, internally displaced persons (IDPs), stateless persons and other persons of

¹⁷¹ Office of the High Commissioner for Human Rights (OHCHR), ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (2002) 4.

¹⁷² United Nations General Assembly, ‘Global Compact on Refugees’ (2018) para 60.

¹⁷³ Kelsey M McGregor, ‘Human Trafficking and U.S. Asylum: Embracing the Seventh Circuit’s Approach’ (2014) 88 Southern California Law Review 197; Jean-Pierre Gauci, ‘Why Trafficked Persons Need Asylum’ in *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Brill 2015).

¹⁷⁴ UNHCR (n 4).

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concern do not fall victim to trafficking. Secondly, the Office has a responsibility to ensure that individuals who have been trafficked and who fear being subjected to persecution upon a return to their country of origin, or individuals who fear being trafficked, whose claim to international protection falls within the refugee definition contained in the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ... are recognized as refugees and afforded the corresponding international protection.¹⁷⁵

The 2006 UNHCR Guidelines recognise that a claim for international protection by a ‘victim’ or potential ‘victim of trafficking’ can arise in a number of circumstances: the individual may have been trafficked abroad, escaped the traffickers and sought protection of the State in which they found themselves at any given time; they may have been trafficked within the borders of a State, escaped the traffickers and fled abroad in search of protection; or they may not have been trafficked but may be in fear of being trafficked, fleeing the country on such grounds.¹⁷⁶ These circumstances are exacerbated in the context of current large movements of migrants. Even though the refugee definition requires the applicant to be outside of their country of origin, it is not required that the individual has left on account of a well-founded fear of persecution. Indeed, the location where the persecution takes place is a crucial aspect in correctly assessing asylum claims made by individuals who have been trafficked. Where an individual has been trafficked within their country of origin and seeks protection abroad, or where they have been trafficked from the country of origin to another country and seek protection there, the link between the fear of persecution and the unwillingness to return, as well as the

¹⁷⁵ *ibid* para 5.

¹⁷⁶ *ibid* para 13.

motivation of the flight in the first instance, is evident. Where an individual has been trafficked outside of their country of origin, be it within a country of transit or a country of destination, such link is not immediately evident, although that does not preclude the existence of a well-founded fear of persecution in the individual's own country.

In 2020, GRETA adopted a 'Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection',¹⁷⁷ building on – and expanding – the 2006 UNHCR Guidelines. GRETA noted that:

[...] people are not generally trafficked because of their religion, nationality, race or political opinions [but] are [rather] likely to be targeted above all because of their perceived or potential commercial value to the traffickers rather than persecution on a Refugee Convention ground.¹⁷⁸

Yet, it is possible that some people who have been trafficked may be members of a Particular Social Group, and that they fear persecution on such basis. The Guidance Note acknowledges that trafficking for the purpose of sexual exploitation is more frequently recognised as giving rise to an asylum claim, but it also stresses that it is essential to recognise that the trafficking definition applies to other forms of exploitation, which may also give rise to asylum claims. While a detailed analysis of the trafficking-asylum nexus will be performed in Chapter III – including with respect to the hardships faced by trafficked males, or males at risk of being

¹⁷⁷ Group of Experts on Action against Trafficking in Human Beings, 'Guidance Note on the Entitlement of Victims of Trafficking, and Persons at Risk of Being Trafficked, to International Protection' (2020).

¹⁷⁸ *ibid* 6 GRETA recognised that there are exceptions, e.g., Yazidi women who have been trafficked by members of the Islamic state group for sexual exploitation.

trafficked, in accessing asylum – the following section will provide an overview of the functioning of Refugee Status Determination (RSD) processes in both jurisdictions, highlighting, in particular, its connections with the anti-trafficking structures.

2.3.1 Refugee Status Determination (RSD) in Italy and in the United Kingdom

In several jurisdictions across the Council of Europe, asylum seekers who have been identified as having been trafficked are either subjected to different procedures with respect to their asylum applications, or have their applications assessed in light of guidelines on human trafficking that are specific to the asylum context.¹⁷⁹ In order to complete the overview of the legal framework regulating access to protection for trafficked persons, and in order to better understand the complicated processes regulating access to asylum, this section will provide a brief description of the functioning of the asylum system both in Italy and in the United Kingdom.

The Italian asylum process is regulated through Legislative Decrees n. 251/2007 on the Implementation of Directive 2004/83/EC and n. 25/2008 on the Implementation of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.¹⁸⁰ The Procedure

¹⁷⁹ Commissione Nazionale per il diritto d'asilo and UNHCR *L'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral Linee Guida per le commissioni territoriali per il riconoscimento della protezione internazionale* (Italy 2017); UK Home Office, 'Asylum Policy Instruction: Asylum Interviews' (2019).

¹⁸⁰ *Decreto Legislativo 25/2008 Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della*

Decree foresees four modalities of examination of an asylum application – prioritised examination, ordinary procedure, accelerated procedure and immediate procedure. In all instances, the competence lies with the Territorial Commissions (TCs).¹⁸¹ While applications are pending, asylum seekers are generally allocated to accommodation facilities within the national reception system. The system is essentially built on a two-stages reception model, according to which the government has established both first- and second line reception centres.¹⁸² Article 28 of Legislative Decree n. 25/2008 provides that an application shall be assessed in a prioritised manner when, *inter alia*, the applicant is a member of a vulnerable category. Legislative Decree n. 142/2015, which transposed Directives 2013/33/EU and 2013/32/EU, added ‘victims of human trafficking’ to the list of vulnerable persons. Examination of applications for international protection filed by trafficked persons, therefore, is to be prioritised by the Territorial Commissions. TCs ought to interview the applicant within 30 days from reception of the application, and ought to decide on the outcome in the three following working days. When the TC is unable to take a decision within this time limit and needs additional information,

revoca dello status di rifugiato of 2008 25/2008 (Italy 2008). Also known as Procedure Decree.

¹⁸¹ Territorial Commissions are the bodies appointed to examine applications for international protection. They are chaired by a prefectural career officer (with the qualification of Vice-prefect) and composed by administrative officials specialised in asylum, as well as a representative from UNHCR. Currently, there are 20 Territorial Commissions on the national territory, in addition to 21 Sections, for a total of 41 Colleges.

¹⁸² The former include includes governmental centres for accommodation of asylum seekers (CARA), accommodation centres (CDA), and Temporary Reception Centres (CAS), while the latter forms part of the System for the Protection of Asylum Seekers and Refugees (SPRAR).

the examination procedure may be extended. In light of the different possibilities of extension, the asylum procedure may last for a maximum period of 18 months.

If a trafficked person enters the asylum process without having been identified and if, during the examination procedure, well-founded reasons arise to believe the applicant has been trafficked, the Territorial Commissions (TCs) may suspend the procedure and inform the *Questura*, the Prosecutor's office and NGOs providing assistance to trafficked persons. Once a trafficked person is identified, Legislative Decree n. 142/2015 provides that the individual shall be channelled into one of the specialised programmes of social assistance and integration, while their asylum claim continues to be evaluated. Giving effect to Law Decree n. 24/2014, detailed guidelines for the Commissions on the identification of trafficked persons among applicants for international protection and the referral mechanism were published by the National Commission for Asylum together with UNHCR in 2017, and updated in 2021.¹⁸³ The guidelines aimed at building an instrument supporting the correct and early identification of trafficked persons in the framework of international protection applications, by establishing Standard Operating Procedures (SOPs) to be adopted in the course of the determination process. The guidelines recognise that:

[...] alongside trafficking for the purpose of sexual exploitation ... other exploitation contexts have established themselves, among which labour exploitation, exploitation of criminal activities and begging, as well as

¹⁸³ *L'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral Linee Guida per le commissioni territoriali per il riconoscimento della protezione internazionale* (n 179). Updated by the Commissione Nazionale and UNHCR in 2021.

trafficking for the purpose of organ extraction or of illegal international adoption, although [these latter forms of exploitation] are not yet well known.¹⁸⁴

Although the guidelines stress the high incidence of trafficking on women and children, they do not ignore the fact that:

[...] trafficking concerns a wide composition of victims from different countries of origin and exploited in diverse and at times overlapping areas of exploitation [such as] women, men and LGBTI people ... who are subject to sexual or labour exploitation.¹⁸⁵

Overall, the guidelines have been deemed necessary by UNHCR due to the fact that:

Territorial Commissions ... play an important role as, in the context of the examination of the application for international protection, they may find elements that constitute reasonable grounds to believe that the person requesting international protection is a victim of trafficking.¹⁸⁶

Before 2018, there were four potential outcomes of an asylum application. The applicant could have been recognised a refugee, obtained subsidiary protection or humanitarian protection, or be issued a negative decision. Looking at data from

¹⁸⁴ Commissione Nazionale per il Diritto d'Asilo and UNHCR, 'L'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral. Linee Guida per le Commissioni Territoriali per il riconoscimento della protezione internazionale' (2017) 8.

¹⁸⁵ *L'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral Linee Guida per le commissioni territoriali per il riconoscimento della protezione internazionale* (n 179) 9.

¹⁸⁶ *ibid* at 10.

the period between 2015 and 2018, out of a total of 335.322 first-instance decisions issued, negative decisions amounted to 60.7% of the total. With respect to positive decisions, refugee status was recognised in 6.6% of cases; subsidiary protection to 10.2% of applicants; and humanitarian protection to 22.3% of protection seekers.¹⁸⁷ Many trafficked persons that were deemed not eligible to qualify for refugee status were granted humanitarian protection.¹⁸⁸ This framework, however, substantially changed in 2018. Decree-law n. 113/2018 on international protection, immigration and public security, also known as the ‘Salvini Decree’, and its conversion Law n. 132/2018, amended certain provisions of the Consolidated Act on Immigration and Legislative Decree n. 142/2015. In particular, it replaced the general ‘humanitarian protection’, or ‘residence permit for humanitarian reasons’, with a restricted number of *special* permits for specific and limited situations.¹⁸⁹ Considered that ‘humanitarian protection’ was the most common type of protection granted to trafficked persons, Law n. 132/2018 limited, in practice, access to the right of asylum provided for in Article 10 of the Constitution.¹⁹⁰ According to data from the Ministry of the Interior, in 2019 there were 95.060 decisions adopted by TCs, of which 81% were negative. Among positive decisions, 11% recognised the applicant

¹⁸⁷ Ministero dell’Interno, ‘I numeri dell’asilo’ (2018).

¹⁸⁸ This emerged from Interviews No. 1, 4 and 6.

¹⁸⁹ The permits are articulated according to the following categories: medical treatment (Article 19.2(d) *bis* TUI), natural disaster (Article 20 *bis* TUI), acts of particular civic value (Art. 42 *bis* TUI), and special protection (Article 32.3 L.D. 25/2008).

¹⁹⁰ In terms of numbers, in 2017 the Territorial Commissions evaluated 81.527 asylum applications with the following outcomes at first instance: Refugee status (8%), subsidiary protection (8%), humanitarian protection (25%), negative outcome (58%), other (1%). Compared to these statistics, in September 2018, a month before the introduction of the *Salvini Decree* and two months after the release of a *circolare* from the Government to the Territorial Commissions, the percentage of individuals who received humanitarian protection at first instance was reduced to 17% and it further decreased in October 2018, when the decree came into force, to 12%.

as a refugee, 7% granted subsidiary protection, and only 1% allowed access to protection for ‘special cases’.¹⁹¹ As Chapter III will highlight, these changes have had a significant effect on the number of trafficked persons able to obtain protection through the asylum system.

In the United Kingdom, access to asylum in general is regulated through, *inter alia*, the *Asylum and Immigration (Treatment of Claimants, etc.) Act of 2004* and the *Immigration Act of 2016*.¹⁹² The responsibility for asylum decision-making is allocated to the Secretary of State for the Home Department, and more specifically to the UK Visas and Immigration Department (UKVI).¹⁹³ The immigration rules and guidance drawn up by the Home Secretary govern the operations of UKVI in this respect. Once an application for asylum is filed on the territory, at port or from detention, applicants undergo a screening interview and are then channelled through the third country unit of the Home Office if the case is a potential safe third country case,¹⁹⁴ through the regular procedure, or through the accelerated procedure. Although the immigration rules provide that the decision must be taken ‘as soon as possible’, there is no enforceable time limit for deciding asylum applications. There is also no established system of prioritised examination for cases of people who are deemed to be vulnerable, nor a specific mechanism to

¹⁹¹ See Commissione Nazionale per il Diritto di Asilo, Dati Asilo Anni 2015-2019 (2019) available at http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/nuove_schede_riepilogative_al_31_dicembre_2019_0.pdf

¹⁹² *Asylum and Immigration (Treatment of Claimants, etc.) Act of 2004* (UK 2004); *Immigration Act of 2016* (UK 2016).

¹⁹³ Limited responsibility is allocated to the Home Office UK Border Force (UKBF) for applications at the borders.

¹⁹⁴ Including potential transfers under the Dublin Regulation. A decision by the third country unit can only be challenged through judicial review in the Upper Tribunal.

identify asylum seekers with vulnerabilities, and therefore in need of specific procedural guarantees. If, at any time during the asylum process, the applicant self-identifies as trafficked, or indicators emerge so that it is reasonable to think that the applicant has been trafficked, a referral shall be made to the NRM. Once a person has been referred, the decision-making process of the Home Office with respect to the asylum claim is suspended until a conclusive grounds decision is reached. At the same time, a person that is referred to the NRM before seeking international protection can apply for asylum and other kinds of protection at any point in time after the referral has been made. The structure and functioning of the NRM will be analysed in detail in Chapter III.

The Home Office drafted several guidance notes containing instructions for dealing with asylum claims that present a trafficking component, including the ‘Asylum Policy Instruction’. In *Section 5: Investigating the asylum claim*, the Home Office lays down key principles and standards of the interview process, explaining interviewing techniques and approaches to issues such as human trafficking. Paragraph 5.4 of the guidelines states that:

[...] it is important that allegations of torture or trafficking ... or other forms of ill-treatment are investigated with appropriate sensitivity and awareness of the effects of trauma on memory, which may lead to gaps in details, inconsistencies or delayed disclosure.¹⁹⁵

Similarly, paragraph 5.7 highlights how:

¹⁹⁵ UK Home Office, ‘Asylum Policy Instruction: Asylum Interviews’ (n 179) para 5.4.

[...] victims of torture or other forms of violence may have difficulties in recounting the details because of the sensitive nature of those experiences and/or because of the effect of traumatic events on their memory.¹⁹⁶

Section 5.9 deals specifically with human trafficking, and differentiates between interviewing for the purposes of the asylum claim and interviewing for the purposes of a decision under the NRM. As far as the asylum interview is concerned, the guidance provides that those whose accounts include details of trafficking should be interviewed in the same way as other asylum applicants, as far as establishing the material facts and testing their credibility is concerned. After the interview, unless the legal representatives request more time to submit further information, a decision is taken.¹⁹⁷ The possible outcomes of a claim, if it is accepted, are the granting of refugee status, humanitarian protection, or discretionary leave. An appeal, which must be lodged within 14 days from the notification of the refusal of the asylum claim and has suspensive nature, can be brought to the First Tier Tribunal (Immigration and Asylum Chamber), while a further appeal may be made to the Upper Tribunal on a point of law. Again, applications for permission to appeal must be made within 14 days from the date of the decision of the First Tier Tribunal. In both cases, asylum appeals are heard by a specialist Immigration and Asylum Chamber. Importantly, the Upper Tribunal has the power to make findings of facts, which constitute binding country guidance for other cases.

¹⁹⁶ *ibid* para 5.7.

¹⁹⁷ *ibid* para 5.9.

2.4 Concluding remarks

The adoption of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings and the development of the ECtHR jurisprudence on human trafficking, have further developed the positive obligations on Member States to identify and protect trafficked persons. At the same time, they have highlighted the tensions between criminal justice and security centred responses to human trafficking, and human rights law approaches. The Council of Europe Anti-Trafficking Convention and the jurisprudence of the ECtHR reinforce the protection standards contained in Directive 2011/36/EU,¹⁹⁸ which is required to be transposed in domestic law, and in relevant provisions in Directive 2013/33/EU,¹⁹⁹ as well as in the Charter of Fundamental Rights of the European Union²⁰⁰ and in the European Social Charter.²⁰¹ Chapter II presented an analysis of applicable international, European and domestic law on trafficking in human beings, examining the forms of protection available to trafficked persons and the guarantees against non-refoulement.

The analysis in Chapter II demonstrates the engagement of international organisations with the protection of trafficked persons, and the mechanisms through

¹⁹⁸ Directive 2011/36/EU of the European Parliament and of the Council.

¹⁹⁹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (European Union 2013).

²⁰⁰ *Charter of Fundamental Rights of the European Union of 2012* (Council of Europe 2012).

²⁰¹ 'European Social Charter' (first published 1961, 1965) vol ETS 35. See, for example, the engagement of the European Committee of Social Rights with respect to the issue of the prosecution of trafficked children in its 2019 Conclusions on, inter alia, Romania, Poland, France, Turkey, and the United Kingdom.

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which sovereign States have given effect to international legal obligations, as well as EU law, into their domestic legal systems. It emerges that the applicable legislation in terms of identification and access to protection for trafficked persons, both in Italy and in the United Kingdom, is comprehensive in terms of purposes of exploitation – recognising all forms of exploitation – and in terms of categories of trafficked persons – not limiting the provision of services and access to protection to specific *profiles* of trafficked persons. Both the Italian Criminal Code, as well as the 1998 *TUI* as amended, and the 2015 MSA provide for an inclusive definition of human trafficking, covering all exploitative purposes and a gender-neutral definition of ‘victim’. Access to protection is provided for regardless of age, sex, or migration status. In both jurisdictions, domestic legal systems have been progressively transformed to reflect changing understandings of the trafficking phenomenon and developing protection standards.

Noting the interconnections between the anti-trafficking structures and the asylum systems, in light of, *inter alia*, the 2006 UNHCR Guidelines on the application of the Refugee Convention to people who have been trafficked, Chapter II introduced the debate around the trafficking-asylum nexus, providing an overview of the asylum systems in both jurisdictions. The possibility that trafficked persons will find themselves in the asylum procedure, or that they will decide to apply for asylum after having been identified as trafficked persons, is recognised in both Italy and in the United Kingdom. Both countries have adopted guidance in this respect, providing for specific procedures, or Standard Operating Procedures, to be implemented when a trafficked person comes in contact with the asylum process.

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While international law, as well as international human rights Courts and bodies, has created and developed standards able to offer inclusive protection for trafficked persons, the enforcement of these laws remains reliant on States' political willingness, not only to adjust their domestic legal systems to reflect international obligations, but also to implement the available laws in good faith, in a truly gender-based manner, and through a human rights-based approach. Indeed, the availability in practice of assistance and protection is not guaranteed by the mere existence of inclusive legislation. As Chapter III will highlight, identification bias and gaps in access to protection emerge when the existing law is interpreted and implemented in a restrictive, and arguably biased, manner. Chapter III will further unpack the difficulties faced by trafficked persons in accessing asylum on the basis of their trafficking experience, and in doing so, it will focus on the concept of membership of a particular social group and risk on return.

Chapter III – Gendered protection? Conceptual and procedural obstacles for trafficked adult males in accessing protection mechanisms

Chapter III explores how access to protection is conditional on the correct and timely identification of trafficked persons, which suffers in practice from structural gender and racial biases. This Chapter also problematises the interconnections between human trafficking and asylum. An analysis of case-law in Italy and in the United Kingdom shows that trafficked persons in the asylum system tend to rely on their identification as members of a Particular Social Group (PSG) to be recognised as refugees. I argue that the recognition of trafficked persons as members of a PSG is negatively affected by gendered and colonial stereotypes relating to agency, vulnerability and victimhood, as well as by the lack of recognition of violations of socio-economic rights as grounds on which to seek asylum. The Chapter draws on interviews and field work conducted in Italy and in the United Kingdom in the summer of 2018 and in the summer of 2020, as well as on responses by professionals working in the asylum and anti-trafficking systems in both jurisdictions to qualitative questionnaires.

3.1 National Referral Mechanisms in Italy and in the United Kingdom: Reflecting on the working methods

As Chapter II has shown, access to protection mechanisms is not *legally* gendered nor exclusionary in neither jurisdiction. However, it remains conditional on the correct and timely identification of trafficked persons, which is, in practice, very problematic. The two National Referral Mechanisms (NRMs) in Italy and in the United Kingdom operate in substantially different manners. In the Italian context, the processes of identification of trafficked persons are only partially structured and there is a clear distinction between the asylum and the anti-trafficking structures with respect to the allocation of responsibilities. While the asylum process is highly centralised under the responsibility of the State, the functioning of the anti-trafficking structure is almost entirely entrusted to specialised NGOs and civil society. In the United Kingdom, on the opposite, there is a more structured NRM, and the main actor in both the asylum and the anti-trafficking fields is the Home Office. The Home Office not only decides the outcome of asylum claims, but it is also home to the Single Competent Authority for all cases referred into the NRM.¹ This section will provide insights into the functioning of the NRMs in practice, and a critical analysis of both the number of referrals and the quality of decision making. It also examines the role of NGOs, on the one hand, and of the State, on the other. In each jurisdiction, we see significant policy innovations on the part of the State,

¹ From the 29th of April 2019, the Single Competent Authority (SCA) has replaced the Modern Slavery and Human Trafficking Unit (MSHTU) and the previous Home Office Competent Authorities. The Single Competent Authority exists within the Serious and Organised Crime directorate of the Home Office and makes all National Referral Mechanism decisions, regardless of nationality or immigration status of the potential victim.

and at the same time significant fragmentation and gaps both in policy and in practice. These gaps impact in particular on trafficked males. As we shall see, trafficked males frequently fall through the cracks in identification procedures and referral mechanisms, and in national anti-trafficking policies and plans.

3.1.1. Italy: Identification procedures and practice

In Italy, the first NRM was introduced in 2016. At the time of its introduction, it was defined as:

[...] a set of recommendations and practical measures that will guide all actors involved during all the necessary steps in the fight against trafficking and in line with existing standards of human rights protection.²

Standard Operating Procedures (SOPs) are set out in five key areas: Identification, First assistance and protection, Long-term assistance and social inclusion, Voluntary return and social inclusion, and Criminal and civil proceedings. Identification is a process that entails two phases, namely preliminary identification and formal identification. Preliminary identification is carried out when there are reasonable grounds to believe that a person has been trafficked, and it includes orientation of an alleged trafficked person towards a first reporting centre, access to basic needs and information, a preventive risk assessment and the provision of a recovery and reflection period. Formal identification, on the other hand, is the determination of the status of ‘victim’ of trafficking by qualified and authorised

² Consiglio dei Ministri, ‘Piano nazionale d’azione contro la tratta e il grave sfruttamento 2016-2018’ (2016) Annex I.

bodies, including law enforcement or judicial authorities, specialised NGOs and International Organisations, that examine the circumstances of the case in detail and assess whether the person has been trafficked on a higher standard of proof. During the preliminary identification phase, a person can be brought to the attention of service providers through self-reporting, or by *inter alia* private citizens, law enforcement personnel, immigration services, labour inspectors, trade union staff, NGOs members, health workers, social workers, and personnel of prisons or administrative detention centres.

The focal point in terms of service provision at this stage can be a national coordination institution, law enforcement and/or judicial authorities, or assistance services such as NGOs and social services. In this phase, the National Action Plan (NAP) provides for a list of indicators to be considered while collecting information through a preliminary analysis of the circumstances. Data to be gathered include physical evidence, living and working conditions, and juridical status, while indicators include signs of physical violence, signs of fearful behaviour, irregular immigration status, absence of identity documents, and evidence of restriction of the person's liberty of movement.³ This preliminary analysis and the subsequent referral ought to be performed only if the potentially trafficked person has given

³ *ibid* Annex I. In the years after the adoption of the NAP, there have been a number of initiatives aimed at creating local protocols to supplement the national SOPs. Among these initiatives, the Teramo Protocol signed in 2017 by the Tribunal of Teramo and the NGO *On the Road*, laying down "Guidelines for approaching potential victims of trafficking in human beings and exploitation, and of aiding and abetting illegal immigration". The Teramo Protocol, which represents a best practice in the Italian context, regulates in detail the distinct roles of all actors involved in the identification and assistance processes, defining the operational procedures to be followed during in the framework of the cooperation between law enforcement agencies, the judiciary, public actors and civil society organisations.

their informed consent to the procedures, and in all instances taking into account the security, safety and privacy of the person. Similarly, the formal identification process can only be performed if the potentially trafficked person has given their informed consent, after having completed the recovery and reflection period. In this phase, the appointed case manager or the person designated at national or local level (NGO staff and/or law enforcement agencies) interviews the potentially trafficked person, assisted by an interpreter or cultural mediator if needed. According to the SOPs, formal identification ought to be performed through one or more bilateral interviews between a representative of the Police and/or the organisation providing services and the potentially trafficked person. Provision is also made for the collection and evaluation of other evidence to establish facts and to verify the information provided by the potentially trafficked person, and through the evaluation of the corroborative material available.⁴

In its 2018 report concerning the implementation of the Council of Europe Anti-Trafficking Convention by Italy, the Group of Experts on Action against Trafficking in Human Beings (GRETA) noted that, due to the absence of a uniform identification system, “there is no data on the number of presumed victims and victims of THB identified every year.”⁵ This gap that is only partially filled by statistics on the number of individuals who benefit from the assistance, protection and social integration programmes provided for by the Department of Equal

⁴ *ibid* Annex I.

⁵ 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 Italy* Council of Europe Rep GRETA(2018)28, para 15 (Council of Europe Council of Europe 2019).

Opportunities (DEO). According to the available DEO data, more than 90% of individuals in the national anti-trafficking system are women and girls that have been trafficked for the purpose of sexual exploitation.⁶ Similar data is found in reports on the number of potentially trafficked persons referred from the Territorial Commissions, in the course of the asylum process, to anti-trafficking organisations. In 2017, for example, 2.606 referrals were completed by 27 Territorial Commissions – of which 2.508 in respect of women (96.2%), and 2.257 in the context of sexual exploitation.⁷

Qualitative interviews conducted with professionals in the anti-trafficking sectors, as well as responses to a questionnaire distributed to the main NGOs operating in the field, reveal two main concerns with respect to the data on access to assistance measures for trafficked persons. On the one hand, the majority of interviewees agrees that the DEO data disaggregated by type of exploitation is not representative of the situation on the ground. Interviewees highlight the lack of awareness around trafficking for the purpose of labour exploitation among first responders as well as State authorities, and the influence of this gap on the (lack of) identification of trafficked persons.⁸ An administrator of an anti-trafficking project in the Latium region, for example, suggested that labour exploitation is generally

⁶ Dipartimento per le pari opportunità, 'Dati Estratti Dal Sistema Informatizzato per La Raccolta Di Informazioni Sulla Tratta (SIRIT). Dati Riferiti Alle Persone Che Sono Emerse e Che Sono Risultate in Carico Al Sistema Antitratta Nel Primo Semestre 2019' (2019).

⁷ See data presented by UNHCR at <http://www.piemonteimmigrazione.it/images/materiali/Convegno_tratta_feb_19/NICO_DEMI.pdf> accessed 20 January 2021.

⁸ Interviews n 1, 4, 6 and 7.

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tolerated by the authorities, and that it is only tackled when major incidents occur.⁹ Although the organisation deploys contact units to support the emergence and identification of trafficked persons, when labour inspectors are notified about instances of labour exploitation, they concentrate on violations of labour law, without conducting further investigations into the potential human rights and criminal law violations that the workers might be subjected to, including human trafficking. While lack of awareness of human trafficking plays a role, some interviewees also indicated that the number of labour inspectors is not sufficient to allow for a meaningful monitoring of the phenomenon.¹⁰ Interviewees also highlighted constraints in the identification of – and assistance to – persons trafficked for the purpose of labour exploitation and forced criminality, linked to national anti-trafficking policies and in uneven the allocation of funding to NGOs.¹¹

In 2018, there were 21 projects that were financed by the DEO to provide assistance to trafficked persons. The vast majority of these projects focussed on trafficking for the purpose of sexual exploitation, and only have shelters available to trafficked women. This is unsurprising, as:

⁹ Interview n 1. See e.g., John Hooper, ‘Racial violence continues in Italy as four migrant workers wounded in shootings’ *The Guardian* (9 January 2010) <<https://www.theguardian.com/world/2010/jan/08/standoff-italy-four-africans-wounded>> accessed 24 February 2021.

¹⁰ E.g., Interview n 4.

¹¹ Interviews n 1 and 4.

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[One of the] unintended result[s] of the focus on sex trafficking, [is that] agencies that focus on trafficking in a more inclusive matter often have received far less interest and funding.¹²

An interviewee noted that, even if NGOs identify persons trafficked for the purpose of labour exploitation or identify trafficked males, there are not enough centres that can accommodate and assist these persons.¹³ When persons potentially trafficked for the purpose of forced criminality or forced begging are identified, it was noted that the situation is further complicated, as there is only one NGO that works specifically on forced criminality and forced begging and is able to offer support, advice and assistance. The majority of interviewees and respondents working with NGOs and civil society further emphasised that the pressure that State authorities place on the organisations is extreme, as charities are responsible for conducting assessment interviews, carrying out identification processes, and providing assistance to trafficked persons.¹⁴ As of 2018, DEO-funded projects were able to assist up to 1.700 trafficked persons, while the scale of the phenomenon is, according to the interviewees, at least four times that number.¹⁵

¹² Robert Uy, 'Blinded by Red Lights: Why Trafficking Discourse Should Shift Away from Sex and the "Perfect Victim" Paradigm' (2011) 26 *Berkeley Journal of Gender, Law & Justice* 204, 210.

¹³ Interview n 7.

¹⁴ Interviews n 1, 4 and 7.

¹⁵ Interviews n 1 and 7.

3.1.2. The United Kingdom: Identification procedures and practice

Concerns voiced by NGOs staff and lawyers in Italy have been echoed by interviewees in the United Kingdom, particularly with respect to the existence of a ‘stereotypical victim’ and to the lack of services for trafficked males. Although the asylum screening interview only includes one question relating to trafficking, and officers systematically fail to spot indicators of exploitation and trafficking during the screening interviews,¹⁶ most cases referred to the NRM by the United Kingdom Visas and Immigration (UKVI) come out of the asylum procedure. According to the Competent Authority Guidelines, once a person has been referred to the NRM, the decision-making process of the Home Office with respect to the asylum claim is suspended until a Conclusive Grounds decision is reached. The justification given is that the Conclusive Grounds decision might have a bearing on the whole asylum claim. Although NRM processes and asylum decisions are distinct, an asylum interview may provide information that is of relevance to the NRM decision. This is the case where trafficking issues are investigated as part of the asylum process, and the NRM decision making can be informed through the asylum process. Concerns about this relationship between the asylum and the anti-trafficking protection systems were raised in interviews by practitioners and NGO staff. Interviewees noted that “the systems kind of work in silos or parallel to each other, and sometimes even oppositionally.”¹⁷ In parallel, interviewees referred to the

¹⁶ 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 the United Kingdom’ (7 October 2016) para 155.

¹⁷ Interview n 3.

increasing difficulty in receiving a positive decision by the Competent Authority, as there is:

[A] sort of need to be the perfect victim and [to] build up this evidence during your recovery period to actually get a positive trafficking decision ... which I would say is pushed, [and] the sort of default is a traumatized female victim who has been sexually abused and is in therapy and has medical reports and therapist reports.¹⁸

Another element that emerged from interviews is the striking difference in terms of outcome of cases where the potentially trafficked person is a United Kingdom national, compared to cases where they are a non-EU national. As one interviewee put it, “while some people were given negative decisions after years, ... if you have a British passport [you] straight away fl[y] through the system.”¹⁹ This comment is well supported by available data from the National Crime Agency and the Home Office. Indeed, the ratio between positive and negative conclusive decisions for UK nationals is substantially higher than that of non-EU nationals.²⁰

Between 2013 and 2019, the United Kingdom’s NRM received more than 23.000 referrals of potential ‘victims of modern slavery’, with the vast majority of cases reported in England.²¹ The number of referrals has been increasing each year,

¹⁸ *ibid.*

¹⁹ Interview n 2.

²⁰ National Crime Agency (NCA) *National Referral Mechanism Statistics—End of the Year Summary 2017* 88 (UK England and Wales NCA 2018); National Crime Agency (NCA) *National Referral Mechanism Statistics—End of the Year Summary 2018* (UK England and Wales NCA 2019); UK Home Office *National Referral Mechanism statistics UK: End of year summary 2019 second edition* (UK England and Wales 2020).

²¹ Between the period 2016-2019, the NRM received referrals that were subsequently sent to a police force for crime recording considerations in England in more than 90% of cases.

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from 1.746 in 2013 to 10.627 in 2019. The report that the Home Office publishes at the end of each year provides an insight into these numbers.²² Although there are several trends that can be identified, there are two patterns that are particularly relevant to the subject and scope of this thesis. These patterns concern two criteria – sex and type of exploitation, which appear to be strongly correlated both in the period between 2013 and 2019. According to the final reports of the NCA, and as of 2019 of the Home Office, since 2017 the number of referrals concerning males has exceeded the number of referrals concerning females. In 2018 alone, the NCA reported that males accounted for more than 60% of referrals, and that similarly more than 60% of referrals concerned labour exploitation.²³ With respect to the referral of adults, the first three countries of origin registered in the database have consistently been Albania, Vietnam, and China – followed by Nigeria, India, Poland, Romania, and Sudan.²⁴ An analysis of the nationality of those referrals, and types of exploitation, is also revealing. Sexual exploitation is the most common type of exploitation among Albanian and Nigerian nationals, while labour exploitation is predominant among Vietnamese and Romanian nationals. With

²² *National Referral Mechanism Statistics—End of the Year Summary 2017* (n 20); *National Referral Mechanism Statistics—End of the Year Summary 2018* (n 20); *National Referral Mechanism statistics UK: End of year summary 2019 second edition* (n 20).

²³ Although this might appear to be at odds with statements from interviewees and with respect to the broader arguments sustained in this research, namely that the identification process suffers from a gender bias, this data includes all *victims of modern slavery*, and not only trafficked persons. As the data is not disaggregated, reflections on the impact of gender will be discussed more in detail in the next section, where decisions of the United Kingdom's Upper Tribunal will be evaluated.

²⁴ Albania and Vietnam are also among the top three countries of origin in minor referrals. The first country of origin in these cases, however, is the United Kingdom.

respect to Vietnam, as Ofer has highlighted, trafficking of boys and young men for cannabis cultivation is prevalent in the United Kingdom, where:

[...] victims [are] recruited by organized crime networks, ... frequently deceived about work they will do, for example, falsely promised work in a restaurant or market, and are sometimes kidnapped or abducted.²⁵

3.1.3. Falling between the cracks: Beyond sexual exploitation

A factor that needs to be taken into account when assessing the discrepancies in terms of identification of trafficked persons is the difference in nature between the approach taken by State authorities in countering trafficking for the purpose of sexual exploitation, compared to that taken in countering trafficking for other forms of exploitation. State responses to trafficking for the purpose of sexual exploitation is now increasingly proactive, while State responses to labour or other forms of exploitation, such as forced criminality, remains reactive and *ad hoc*. In Italy, the majority of large scale anti-trafficking investigations targeted criminal networks engaged in trafficking for the purpose of sexual exploitation: *Operation Cults*, *Operation Nigeria*, *Operation Caronte* and *Operation Pesh* targeted Nigerian criminal groups trafficking women for sexual exploitation;²⁶ *Operation*

²⁵ Nogah Ofer, 'Implementation of the Non-Punishment Principle in England: Why Are Victims of Trafficking Not Benefiting from the Protection from Prosecution Provided by International Law?' (2019) 11 *Journal of Human Rights Practice* 486, 488.

²⁶ See Fondation Scelles, 'Sexual Exploitation: New Challenges, New Answers (5th Global Report)' (2019) Italy, 4. *Operation Cults* was "a three-year operation conducted with the assistance of the Republic of Togo, resulted in the arrests of 44 Nigerian mafia members scattered throughout Italy in 2016. Charges included the exploitation of 250 Nigerian women and girls." See also, 'Guardia di Finanza, smantellato traffico di esseri umani dalla Nigeria', *La Nazione* (11 July 2012)

Transilvania was carried out against a criminal association mainly composed of Romanian citizens who engaged in trafficking young Romanian women for exploitation in prostitution;²⁷ and, as part of *Operation BOGA*, a transnational criminal association operating between Nigeria, the Maghreb countries and Italy, dedicated to *inter alia* trafficking in human beings and exploitation of prostitution, was dismantled.²⁸ The only meaningful exceptions to this trend were *Operation Piana* and *Operation Demetra*. In the course of the former, eight individuals, Italian and Romanian, were arrested for having brought Romanian citizens, mostly female, to the province of Salerno to work in farms,²⁹ while in the course of the latter 60 individuals have been arrested and 14 farming companies seized.³⁰ In the United Kingdom, since the entry into force of the 2015 *Modern Slavery Act*, the

<<https://www.lanazione.it/cronaca/2012/07/11/742419-immigrazione-arresti-droga-prostituzione.shtml>> accessed 24 February 2021; ‘Operazione "Pesha", decapitata la mafia nigeriana nel Teramano: c'è pure una cellula agrigentina’, *Agrigento Notizie* (21 July 2020) <<https://www.agrigentonotizie.it/cronaca/arresti-operazione-pesha-teramo.html>> accessed 24 February 2021.

²⁷ See, *inter alia*, ‘Prostituzione: operazione 'Casa Transilvania', 22 in carcere’, *Ansa* (7 April 2014) <https://www.ansa.it/marche/notizie/2014/04/04/prostituzione-blitz-del-ros-26-arresti_85f17f27-97ea-4c4e-9ba8-1fdbab905a4d.html> accessed 24 February 2021.

²⁸ See, *inter alia*, ‘Riti voodoo e minacce per fare prostituire giovani nigeriane: due arresti’, *Palermo Today* (18 October 2016) <<https://www.palermotoday.it/cronaca/prostituzione-immigrazione-clandestina-nigeriane-operazione-boga-arresti.html>> accessed 24 February 2021.

²⁹ See Ministero dell’Interno, ‘Relazione del Ministro dell’interno al Parlamento sull’attività svolta e sui risultati conseguiti dalla Direzione Investigativa Antimafia’ (2016) 90.

³⁰ Alessia Candito, ‘Caporalato, Braccianti Sfruttati e Venduti a Giornata: 60 Misure Cautelari e 14 Aziende Agricole Sequestrate Tra Cosenza e Matera’, *La Repubblica* (10 June 2020) <https://www.repubblica.it/cronaca/2020/06/10/news/caporalato_60_misure_cautelari_e_14_aziende_agricole_sequestrate_tra_cosenza_e_matera-258847533/>. Following further investigations, previously seized companies have been returned to the owners. See Antonio Corrado, ‘Caporalato, il Riesame ridimensiona l’operazione «Demetra»’, *Il Quotidiano del Sud* (4 July 2020) <<https://www.quotidianodelsud.it/basilicata/matera/cronache/cronaca/2020/07/04/caporalato-il-riesame-ridimensiona-loperazione-demetra/>> accessed 24 February 2021.

introduction of the *modern slavery* category and the expansion of the mandate of the Gangmasters and Labour Abuse Authority (GLAA), referrals into the NRM for instances of labour exploitation has substantially increased. However, several concerns remain to be addressed in terms of access to services and protection for ‘victims’ of such forms of trafficking, in particular trafficked males. In both jurisdictions, the levels of prosecution for trafficking related offences that are not for the purpose of sexual exploitation remain low. The application of the non-punishment provision to individuals recognised as having been trafficked is inconsistent at best. The 2017 Independent Anti-Slavery Commissioner’s report on Vietnam stressed this particular concern, noting that:

[...] despite the existence of legislation and the availability of long standing Crown Prosecution Service (CPS) guidelines for discontinuance of cases, some Vietnamese individuals who are recognised victims of forced labour (predominantly cannabis cultivation) have been criminalised.³¹

Government Ministers in the United Kingdom have also been accused of prioritising immigration control over trafficked persons’ right to support by, *inter alia*, dismissing crucial evidence and holding trafficked persons in detention.³²

³¹ Independent Anti-Slavery Commissioner *Combating modern slavery experienced by Vietnamese nationals en route to, and within, the UK* 8 (UK 2017).

³² See inter alia May Bulman, ‘Home Office “Illegally” Put Trafficking Victims in Detention Centres, Report Finds’, *The Independent* (30 July 2019) <<https://www.independent.co.uk/news/uk/home-news/home-office-modern-slavery-victims-trafficking-immigration-detention-labour-exploitation-advisory-group-leag-report-a9019361.html>> accessed 16 December 2020; May Bulman, “‘Traumatised’ Vietnamese Man Detained in UK for Two Years despite Evidence He Was Trafficking Victim”, *The Independent* (4 November 2019) <<https://www.independent.co.uk/news/uk/home-news/human-trafficking-vietnam-uk->

3.2 Assessing vulnerability and victimhood: Recognition as trafficked person and access to support services

According to the data provided by the Italian DEO, there were 1.172 trafficked persons assisted in 2016, of which 954 were female (81.4%). 674 individuals assisted had been trafficked for the purpose of sexual exploitation, 92 for the purpose of labour exploitation, 72 for multiple exploitation, 15 for begging, and 319 for ‘other’ (including forced marriage, and ‘illegal economies for third parties’). 696 of the 1.172 trafficked persons assisted in these programmes were Nigerians, followed by Romanians (82), Moroccans (62), and Albanians (42). In 2017, DEO assisted 1.050 trafficked persons, of whom 85.6% were female; and 820 persons entered an assistance program in 2018, of whom 91.8% were female and 534 were trafficked for the purpose of sexual exploitation (89.4%).³³ In the first semester of 2019, there were 355 newly assisted trafficked persons, of which 298 were female (83.9%).³⁴ In parallel, according to data from the Ministry of Justice covering the period 2011-2016, there were 216 proceedings initiated where defendants were charged with the offence of trafficking in human beings (Article 601 of the Criminal Code). In the 168 proceedings that were concluded in the same period, 37 sentences have been handed down and 167 individuals were convicted. Although there are is no disaggregated data on the type of exploitation, the Ministry

[cannabis-farm-modern-slavery-esssex-lorry-deaths-a9184596.html](#)> accessed 26 November 2019.

³³ *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy* (n 5) paras 15–16; Dipartimento per le pari opportunità, ‘Dati Estratti Dal Sistema Informatizzato per La Raccolta Di Informazioni Sulla Tratta (SIRIT). Dati Riferiti Alle Persone Che Sono Emerse e Che Sono Risultate in Carico Al Sistema Antitratta Nell’anno 2018’ (2019).

³⁴ Dipartimento per le pari opportunità (n 6).

of Justice affirms that 75.2% of trafficked persons across the above-mentioned criminal proceedings are females.³⁵ Following the publication of GRETA's first evaluation report on Italy in 2014, where GRETA had urged the Italian authorities to strengthen the institutional framework for action against human trafficking and to strengthen action to combat trafficking for the purpose of labour exploitation,³⁶ the NAPAT introduced a number of innovations. It included provisions related to, *inter alia*, measures to improve the interaction between the anti-trafficking system and the National Labour Inspectorate with a view to combating trafficking for the purpose of labour exploitation, and the NAP on Business and Human Rights 2016-2021 specifically addressed *caporalato* and other forms of exploitation, forced labour, child labour and slavery, with particular focus on migrants and trafficked persons. Yet, the amendments to the institutional framework did not result in a substantial increase in the identification of persons trafficked for the purpose of labour exploitation, while trafficking for the purpose of labour exploitation has been on the rise.

In December 2019, the Tribunal of Catania issued the first judgment on trafficking for the purpose of labour exploitation, sentencing three *caporali* to, respectively, 20 years, 17 years and 8 months, and 10 years of imprisonment for trafficking for the purpose of labour exploitation. As the 2019 Report of the

³⁵ Ministero della Giustizia (Direzione Generale di Statistica e Analisi Organizzativa), 'La tratta degli esseri umani. Indagine statistica su un campione rappresentativo di fascicoli definiti con sentenza relativamente ai reati ex art. 600, 601 e 602 del codice penale' (2015).

³⁶ 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 Italy* Council of Europe Rep GRETA(2014)18, para 2 (Council of Europe Council of Europe 2014).

Laboratory on Labour Exploitation and the Protection of Victims Altro Diritto/FLAI CGIL highlighted, prosecutions of trafficking for the purpose of labour exploitation in the Italian context are significantly low, with Article 601 rarely used to prosecute conducts that would squarely fit into the trafficking definition. Indeed, the report notes that “the offence of trafficking could, in abstract, be used in various proceedings where instead Article 603-*bis* is used.”³⁷ Santoro and Stoppioni note that prosecutors seem to rely on Article 601 only when the recruitment of an individual leads to their subjection to slavery-like conditions, which has a particularly high standard of proof, or when it leads to sexual exploitation.³⁸ The problem does not lie within the law, but rather in its interpretation that leads to a dramatic under-reliance on Article 601 CC. The reliance on Article 603-*bis* for the majority of criminal proceedings, including those that could be successful under Article 601 CC, is worrying on two fronts. On the one hand, it means that sentences will, on average, be lighter.³⁹ On the other hand, it also means that individuals will be more likely to be identified within the criminal proceedings ‘only’ as ‘victims’ of labour exploitation, rather than as trafficked individuals. The most challenging aspect of the wrongful application of the provisions regarding trafficking for the purpose of labour exploitation is however the lack of referrals of persons trafficked for the purpose of labour exploitation into

³⁷ Emilio Santoro and Chiara Stoppioni, ‘Rapporto Sul 2019 Del Laboratorio Sullo Sfruttamento Lavorativo e La Protezione Delle Sue Vittime Altro Diritto/FLAI CGIL’ (2020) 5.

³⁸ Emilio Santoro and Chiara Stoppioni, ‘Il Contrasto Allo Sfruttamento Lavorativo: I Primi Dati Dell’applicazione Della Legge 199/2016’ (2019) 162 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 267, 275.

³⁹ Compared to prosecutions pursuant to Article. 603-*bis* of the Criminal Code, which carries sentences of up to six years of imprisonment, the crime of trafficking carries sentences of up to 20 years.

the social protection scheme provided for in Article 18 of the *Testo Unico sull'Immigrazione (TUI)*. This absence of referral occurs, “despite in the vast majority of instances that would have been possible,”⁴⁰ based on the available evidence and on the facts.

If, before the entry into force of Law 199/2016, the access to the social protection scheme for persons trafficked for labour exploitation was ambiguous at best,⁴¹ since 2016 the legislature clearly introduced such a possibility. Yet, in several cases – including in the context of proceedings initiated in three regions (Latium, Puglia and Veneto) – the *Procura* requested the application of Art. 22 comma 12-*quater TUI*, rather than referring trafficked persons into the Art. 18 *TUI* scheme. As discussed in detail in Chapter II, the residence permit pursuant to Art. 22 comma 12-*quater TUI* is conditional on cooperation in criminal proceedings and its duration is linked to such proceedings. There is neither further social assistance envisaged, nor a process of support for the trafficked person to access vocational training and the labour market. As the Altro Diritto/FLAI CGIL report notes, exploited workers and potentially trafficked persons are not willing to come forward under these circumstances.⁴² This pattern was further confirmed by an interviewee, who emphasised that, in the procedure to obtain a permit pursuant to Art. 18 *TUI*:

⁴⁰ Santoro and Stoppioni (n 37) 6; Santoro and Stoppioni (n 38) 282.

⁴¹ For a detailed analysis, see Diana Genovese and Emilio Santoro, ‘L’articolo 18 (t.u. Immigrazione) e Il Contrasto Allo Sfruttamento Lavorativo: La Fantasia Del Giurista Tra Libertà e Dignità’ (2018) 159 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 543.

⁴² Santoro and Stoppioni (n 37) 7.

[...] if you take to the *Questura* a Nigerian woman, who is young or even underage, the predisposition towards that person will be more favourable. In the context of labour exploitation that is not the case, maybe because it is socially accepted, maybe because it sustains the economic structure of the country, ... maybe because it is mostly men who are seen as 'big boys'.⁴³

Similar issues in terms of access to protection and prosecutorial discretion arose in a 2017 judgment of the Tribunal of Naples,⁴⁴ where five individuals were sentenced for, *inter alia*, labour exploitation pursuant to Art. 603-*bis*. The facts of the case involve a number of Bangladeshi citizens that had been recruited in their country of origin under the promise of a well-remunerated employment in Italy. According to the evidence presented in Court, the main defendant would provide the necessary documents for the workers to enter the country, for which they were made to pay a significant amount of money. Once arrived in Italy, the defendant would pick up the workers at the airport and confiscate their documents, before bringing them to different apartments. Working conditions were not those agreed upon pre-departure, as the Bangladeshi nationals were made to work 12-hours shifts, with no weekly break, for a monthly salary of €300. The Judges of the Tribunal of Naples decided to assess the conduct of the defendants as a sum of two processes, namely the recruitment and the facilitation of entry into the country, on the one hand, and the exploitation of the workers, on the other hand. In doing so, they qualified the first process as an issue of facilitation under Article 12 comma 3 *TUI*, and of

⁴³ Interview n 1.

⁴⁴ *Tribunale di Napoli, Sez Giudice per le indagini preliminari, 11 July 2017.*

abetting under Article 12 comma 5 *TUI*, and the second process as an issue of labour exploitation under Article 603-*bis* of the CC. Yet, as rightly argued by Stoppioni,

[Labour exploitation] only constitutes the epilogue of a more complex matter that presents all the elements of the offence of human trafficking as defined in Article 601 of the CC.⁴⁵

Instead of looking at the two processes as separate, the Tribunal could – and arguably should – have looked at the *continuum* from the first point of contact and recruitment to the situation of exploitation. The misidentification of these cases appears to be, as Genovese and Santoro argued:

[...] foremost a cultural problem of *visual gestalt*: it flows from the way in which juridical and social operators construct, ‘see’, some victims and not others as worthy of protection, rather than a problem linked to the text of Article 18 [*TUI*] or other Articles of the CC.⁴⁶

While data that is available in the Italian context immediately suggests that trafficking for purposes other than sexual exploitation is significantly under-recognised, and trafficked males are rarely identified, the same cannot be said about the United Kingdom. An evaluation of the number of referrals, however, is not sufficient to thoroughly assess the degree to which trafficked persons are recognised as such and are able to access protection and support mechanisms. Indeed, the cultural problem of *visual gestalt* is also evident in the case law of the United Kingdom’s Upper Tribunal, Immigration and Asylum Chamber. An

⁴⁵ Chiara Stoppioni, ‘Tratta, sfruttamento e smuggling: Un’ipotesi di finium regundorum a partire da una recente sentenza’ (2019) *Approfondimenti La Legislazione Penale*, 4.

⁴⁶ Genovese and Santoro (n 41) 568.

analysis of decisions involving potentially trafficked males highlights the difficulties they face in having their vulnerability and victimhood recognised by Competent Authorities and other State bodies. Shuman and Bohmer note that female applicants' stories are "evaluated not only on the events ... but also on [the] conformity to the officials' gendered expectations of women's practices."⁴⁷ This is conversely true for male applicants, whose stories are evaluated not only on the events they describe, but also on the conformity to the gendered expectations of men's practices. In both instances, the officials' "assumptions produce gendered hypervisibilities, expectations that, when unmet, make an applicant's claim less credible."⁴⁸

In *HV (Vietnam)*,⁴⁹ the Upper Tribunal judge highlighted that the credibility findings were made by the First-tier Tribunal in the light of the country materials which were general in content, and when they were specific, they addressed the position of trafficked women, in the absence of any report dealing with these issues from the appellant's perspective – that of a male. Several aspects of the appellant's story were ignored, including indicators that supported the allegations that he had been trafficked – he entered the United Kingdom as an unaccompanied minor, went missing from social services care and was found working in a nail bar, all evidence that is consistent with the experiences of identified trafficked Vietnamese males. In *LA (Kosovo)*,⁵⁰ the Competent Authority issued a positive Conclusive Grounds

⁴⁷ Amy Shuman and Carol Bohmer, 'Gender and Cultural Silences in the Political Asylum Process' (2014) 17 *Sexualities* 939, 948.

⁴⁸ *ibid.*

⁴⁹ *HV (Vietnam) PA/04278/2017 2017* (UKUT (IAC), 9 August 2017).

⁵⁰ *LA (Kosovo) PA/07171/2017 2017* (UKUT (IAC), 29 November 2017).

decision, but decided not to grant the appellant any leave as he had been convicted to a cumulative sentence of more than two years. The Secretary of State had in parallel refused his claim for protection. In the course of the proceedings before the First-tier Tribunal, the applicant had not been treated as trafficked person, despite the Competent Authority's positive decision. It was argued that it was significant that the appellant had not been granted leave to remain, and that, in addition, "on the findings it looked as if the appellant had come through the experience relatively unscathed."⁵¹ Furthermore, the First-tier Tribunal judge stated that the appellant had no recognised vulnerabilities, but "in reaching that conclusion [the judge] appears not have considered the positive finding that the appellant is a victim of trafficking."⁵² The Upper Tribunal found that these errors of law were material and went to the heart of the assessment of the evidence for the appellant. Indeed, the starting point for the judge's consideration ought to have been that the appellant, as a trafficked person, was a vulnerable witness. Similarly, in *CH (Ethiopia)*,⁵³ the First-tier Tribunal judge noted the information from the Competent Authority that the appellant had been trafficked, but decided that that issue had no bearing on his credibility findings and decided to not treat the appellant as a vulnerable witness. The judge of the Upper Tribunal found that this amounted to an error of law, because "the Appellant's vulnerability might have explained the discrepancies in his evidence relied upon by the judge to find him lacking in credibility."⁵⁴ In *TD*

⁵¹ *ibid*, para 4.

⁵² *ibid*, para 6.

⁵³ *CH (Ethiopia) PA/09243/2016 2018* (UKUT (IAC), 5 January 2018).

⁵⁴ *ibid*, para 7.

(Vietnam),⁵⁵ after the Secretary of State refused the appellant's asylum claim, the Competent Authority came to the conclusion that TD had been trafficked. By the time the appeal came before the First-tier Tribunal, the Competent Authority had already issued a positive Conclusive Grounds decision. In considering the appeal, the First-tier Tribunal judge acknowledged the decision of the Competent Authority, but found that:

The evidence upon which the Appellant claims he was trafficked is not made out, to the lower standard. ... I therefore, (*sic*) the Appellant may meet the technical definition of being 'trafficked' However, I do not find that he was recruited, transported, transferred, harboured or received person (*sic*), within the terms of the 2005 Convention. This is migration masquerading as 'trafficking'. I therefore find the Appellant is not entitled to a residence permit.⁵⁶

In reaching that decision, the First-tier Tribunal judge ignored the Home Office guidance in respect to the value to be attached to the decision of the Competent Authority, and did not take proper account of the fact that the appellant, as well as his parents, were threatened and their house was attacked due to his parents owing money to debt collectors, a typical *modus operandi* of traffickers. The credibility and the vulnerability of the appellant were also questioned in *YL (China)*,⁵⁷ where the First-tier Tribunal judge, in absence of a Competent Authority decision, was called upon to reach her own conclusions whether the trafficking claim was credible, which she found not to be. Little weight was attached to an expert report

⁵⁵ *TD (Vietnam) PA/13078/2016 2018* (UKUT (IAC), 11 May 2018).

⁵⁶ *ibid*, para 5.

⁵⁷ *YL (China) PA/07920/2017* (UKUT (IAC), 9 March 2018)..

outlining that YL had a history of torture and that, because of the violence he was subjected to, he had psychological symptoms including feeling ashamed, sad, and ‘dirty’.

3.3 Problematising asylum: Membership of a particular social group, sexual violence against men and the socio-economic dimension of labour exploitation

As explored in previous chapters, trafficked persons may be entitled to asylum and may be recognised as refugees. Access to asylum has been recorded for at least one trafficked person in the last five years in a significant number of State Parties to the Council of Europe Anti-Trafficking Convention, including Italy and the United Kingdom. In France, for example, the French National Court of Asylum (CNDA) had for a long time granted subsidiary protection to ‘victims of trafficking’ whose international protection claim was evaluated. More recently, however, the CNDA has been increasingly granting refugee status to trafficked persons. The Courts have developed a set of criteria for determining whether an applicant is a member of a Particular Social Group (PSG) and whether no alternatives to international protection (e.g., internal relocation) exist. In the case of *Mlle J.E. F*, which concerns a Nigerian national from Edo State who was forced into prostitution after being trafficked into France, the CNDA found that trafficked persons from Edo State do share a common background and distinct identity which falls within the definition of a PSG. The applicant was therefore granted refugee status.⁵⁸ In other

⁵⁸ Cour nationale du droit d’asile (France), 24 March 2015, 10012810, Case No.

jurisdictions, membership of a PSG has been recognised also for women from Albania, Kosovo and Ukraine who have been identified as trafficked.⁵⁹ In Austria and in Finland, there has been an increase in the number of trafficked persons, mostly Nigerian women, granted refugee status.⁶⁰

Despite recent developments expanding the reach of the protection under the Refugee Convention to trafficked persons – or at least certain categories within such group, they continue to face barriers in receiving the assistance and protection they need, particularly in accessing international protection. Indeed, in many countries the processes of refugee status determination and identification of trafficked persons run separately, and trafficked persons are faced with a choice as to which route to follow, with the latter choice often involving, if not in law at least in practice, cooperation in criminal proceedings. Numerous reports have highlighted how State authorities, particularly immigration and asylum authorities, often consider trafficked people as only being entitled to protection schemes and measures that are specific to ‘victims of trafficking’, resulting in the exclusion from the asylum route and the preclusion of access to other forms of protection such as subsidiary or humanitarian protection.⁶¹ In addition, it is often the case that asylum authorities lack not only the capacity to assess the nexus between asylum and

⁵⁹ Group of Experts on Action against Trafficking in Human Beings, ‘Evaluation Report: Austria. Access to Justice and Effective Remedies for Victims of Trafficking in Human Beings’ (2020) para 224.

⁶⁰ *ibid*; 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 Finland’ (2019).

⁶¹ The Inter-Agency Coordination Group against Trafficking in Persons, ‘Trafficking in Persons and Refugee Status’ (2017); European Migration Network and European Commission, ‘Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures’ (2014).

trafficking when it is proven that the applicant has been trafficked, but also the competence to spot indicators of human trafficking when assessing an asylum claim in which the applicant has not self-identified or made a claim relating to trafficking. Overall, there are significant gaps in the data available on how often asylum is granted where the persecution feared is linked to human trafficking. Meaningful insights into the functioning of the asylum system in dealing with instances of human trafficking are provided by, *inter alia*, Christensen, Stepnitz, Squillante and Jobe.⁶² However, the vast majority of studies in this area focus almost entirely on the experiences of women and girls. Jobe's analysis of asylum claims submitted by trafficked females in the United Kingdom highlights the recognition of trafficking for the purpose of sexual exploitation as a valid claim for refugee status in the United Kingdom's asylum system:

⁶² See *inter alia* Tyler Marie Christensen, 'Trafficking for Sexual Exploitation: Victim Protection in International and Domestic Asylum Law' (New Issues in Refugee Research, 2011); Abigail Stepnitz, 'A Lie More Disastrous than the Truth: Asylum and the Identification of Trafficked Women in the UK' (2012) 1 *Anti Trafficking Review* 104; Jane Freedman, 'Taking Gender Seriously in Asylum and Refugee Policies' in Kavita R Khory (ed), *Global Migration: Challenges in the Twenty-First Century* (Palgrave Macmillan US 2012); Diana Squillante, 'Single, Young Female - Seeking Asylum: The Struggles Victims of Sex Trafficking Face under Current United States Refugee Law Notes' (2014) 88 *St John's L Rev* 223; Kelsey M McGregor, 'Human Trafficking and U.S. Asylum: Embracing the Seventh Circuit's Approach' (2014) 88 *Southern California Law Review* 197; Shuman and Bohmer (n 47); Meghana Nayak, *Who Is Worthy of Protection?: Gender-Based Asylum and U.S. Immigration Politics* (Oxford University Press 2015); Moira Dustin, 'Designating "Vulnerability": The Asylum Claims of Women and Sexual Minorities' (*Security Praxis*, 3 June 2017) <<https://securitypraxis.eu/vulnerability-asylum-claims-women-minorities/>> accessed 27 February 2018; Nora Honkala, "'She, of Course, Holds No Political Opinions": Gendered Political Opinion Ground in Women's Forced Marriage Asylum Claims' (2017) 26 *Social & Legal Studies* 166; Alison Jobe, 'Telling the Right Story at the Right Time: Women Seeking Asylum with Stories of Trafficking into the Sex Industry' (2020) 54 *Sociology* 936.

[...] which reflects a broader trend of the early 21st century where trafficking into the sex industry became an increasingly high-profile issue both in the United Kingdom and internationally.⁶³

Jobe's research also emphasises that:

[...] the Home Office considered women to be victims of trafficking into the sex industry where a story of sexual innocence, extreme violence and imprisonment was recounted [while] in some cases, the Home Office concluded that an account was not credible because the applicant had exercised too much independent agency to be considered a victim of trafficking and therefore was believed to have chosen the circumstances.⁶⁴

This correlation between the degree of (perceived or real) agency and the recognition of an applicant's credibility is consistent with the findings from research on cases before the Upper Tribunal (see section 3.2) where the applicant was a male. Indeed, it is true that trafficked persons, regardless of their gender and of the type of exploitation they were subjected to, face obstacles in accessing recognition and protection, especially with regard to issues of disproportionate weight given to their credibility, which results in small inconsistencies used to justify negative decisions. At the same time, available data and the analysis of selected case-law in Italy and in the United Kingdom suggest that trafficked men face an additional hurdle in being recognised as members of a PSG and in accessing asylum on the basis of their well-founded fear of persecution on such ground.

⁶³ Jobe (n 62) 941.

⁶⁴ *ibid* 943.

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Interviews with social workers, NGOs staff and lawyers in Italy show that men have rarely, if not exceptionally, obtained recognition as refugees on the basis of their trafficking experience.⁶⁵ Although there is no official data available, an interviewee working for an international organisation affirmed that they had no knowledge of a case where a trafficked man was recognised as a refugee on the basis of his trafficking experience, nor of a case where a person trafficked for labour exploitation obtained asylum on such ground, although they indicated that Territorial Commissions expressed the wish to be provided with guidance on the matter.⁶⁶ Since the interviews were conducted, a 2019 report on the evaluation of international protection claims in front of the Tribunal of Bologna highlighted the case of a trafficked man from Nigeria who was granted refugee status,⁶⁷ which will be discussed in section 3.3.2. In the United Kingdom, the Upper Tribunal has set aside decisions by the Secretary of State, confirmed by the First-tier Tribunal, and granted asylum in a more significant number of instances, compared to the Italian context. However, as section 3.3.2 will show, these cases remain exceptional and the reasoning of the Upper Tribunal has not (yet) been applied consistently and systematically to asylum claims submitted by trafficked males, and that it generally remains anchored to stereotypical assumptions of vulnerability and victimhood.

⁶⁵ Interview n 4.

⁶⁶ Interview n 6. The willingness of the Territorial Commission to be trained on trafficking for the purpose of labour exploitation was also raised in Interview n 4.

⁶⁷ Alessandro Fiorini, 'La protezione internazionale davanti al giudice: Uno studio sui decreti del Tribunale di Bologna' (2019) 36–37.

3.3.1 Well-founded fear of persecution and the causal link to a Convention ground

In evaluating an asylum claim, the first key element to be established is that of well-founded fear of persecution, which can be considered to involve serious human rights violations, including, e.g., a threat to life or freedom, as well as other kinds of serious harm or intolerable predicament, as assessed in the light of the opinions, feelings and psychological make-up of the asylum applicant, bearing in mind that:

Inherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment [all of which] constitute serious violations of human rights which will generally amount to persecution.⁶⁸

The well-founded fear, however, does not necessarily have to be strictly linked to the trafficking experience. It can also refer to the fear of reprisal or possible re-trafficking, which would amount to persecution, if the person was to be returned to the territory in which the trafficking happened or which they have previously fled.⁶⁹ This has proven to be the case in several instances, e.g., due to the cooperation of the trafficked person in criminal proceedings and/or with the asylum authorities. The severe ostracism, discrimination or punishment by the family, the local community or even the authorities upon return may also rise to the level of

⁶⁸ 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) para 15.

⁶⁹ *ibid* para 17.

persecution.⁷⁰ Although persecution is often perpetrated by the authorities of a country, there is room in the refugee definition to recognise non-State agents of persecution, particularly when individuals perpetrate acts that are “knowingly tolerated by the authorities or if the authorities refuse, or prove unable to offer effective protection.”⁷¹ In the case of trafficking in human beings, in most situations the persecutory act will indeed emanate from individuals (e.g., traffickers, criminal organisations, community members). The evaluation of whether a State is willing and able to protect will depend on the legislative and administrative mechanisms put in place, which are nonetheless required by Part II of the UN Trafficking Protocol, although in a way that is not exhaustive and that shall be read in light of other relevant binding and non-binding human rights instruments and guidelines.⁷² At the same time, there might be situations where human trafficking is *de facto* tolerated by State authorities, or even actively facilitated by law enforcement and other State officials, so that:

⁷⁰ *ibid* para 18; The Inter-Agency Coordination Group against Trafficking in Persons (n 61).

⁷¹ UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (United Nations 2011) para 65; UNHCR, ‘Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees’ (2001) para 19; 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) para 19.

⁷² Office of the High Commissioner for Human Rights (OHCHR), ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (2002) which states in Principle No. 2: ‘States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.’

[...] the agent of persecution may well be the State itself, which becomes responsible, whether directly or as a result of inaction, for a failure to protect those within its jurisdiction.⁷³

Once a well-founded fear has been established, the refugee definition requires that such fear be related to one – or more – of the Convention grounds. In other words, it must be for reasons of race, religion, nationality, membership of a particular social group or political opinion. Importantly, it is sufficient that any of the Convention grounds be a *relevant* factor, rather than the dominant one, contributing to the persecution,⁷⁴ and that, “where the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link.”⁷⁵ In cases involving trafficking in human beings, establishing the link between the well-founded fear of persecution and a Convention ground tends to be the most problematic aspect. One of the reasons is that trafficking is conceived as crime in which the “prime motivation ... is likely to be profit rather than persecution on a Convention ground,”⁷⁶ as individuals are, “likely to be targeted above all because of their perceived or potential commercial value to the traffickers.”⁷⁷ However, this does not exclude the possibility of a Convention-related ground in how traffickers target their ‘victims’. An analysis of refugee status determination processes in a number of jurisdictions, among which Italy, the United Kingdom and France, shows that, in the vast majority of instances, trafficked persons will seek to

⁷³ UNHCR, ‘Guidelines on International Protection and Trafficking’ (n 68) para 24.

⁷⁴ In many jurisdictions, the causal link (“for reasons of”) must be explicitly established, while in other States, causation is not treated as a separate question for analysis but is subsumed within the holistic analysis of the refugee definition.

⁷⁵ UNHCR, ‘Guidelines on International Protection and Trafficking’ (n 68) para 29.

⁷⁶ *ibid* para 31.

⁷⁷ *ibid*.

avail themselves of international protection on the basis of their membership of a PSG.

3.3.2 Membership of a particular social group

In 2002, UNHCR issued specific Guidelines providing legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, clarifying the meaning of ‘membership of a particular social group’ within the context of the 1951 Convention and its 1967 Protocol.⁷⁸ UNHCR considered that there is no exhaustive or closed list of specific groups that may constitute a PSG, but that the concept should “rather ... be read in an evolutionary manner.”⁷⁹ By looking at judicial decisions, regulations, policies, and practices, the organisation concluded that common law jurisdictions had followed two main approaches in order to decide what constitutes a PSG. The first approach was defined as the ‘protected characteristics’, or ‘immutability’ approach, which examines whether a group is united by an immutable or unalterable characteristic. Applying such an approach, UNHCR recognises that courts and administrative bodies in a number of jurisdictions have determined that, e.g., women, homosexuals, and families can constitute a PSG. In this regard, the UNHCR Guidelines observe that:

A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its

⁷⁸ UNHCR, “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees’ (2002).

⁷⁹ *ibid* para 3.

historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it. Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A(2).⁸⁰

The second approach, the ‘social perception’ approach, examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. According to UNHCR, “given the varying approaches, and the protection gaps which can result, ... the two approaches ought to be reconciled.”⁸¹ The new test formulated by UNHCR has been described as follows:

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.⁸²

In order to be recognised as members of a PSG, it is not necessary that the group has a minimum size or that members know each other, or associate with each other as a group in any shape or form.⁸³ According to the UNHCR Guidelines, women “are a clear example of a social subset defined by innate and immutable

⁸⁰ *ibid* para 6.

⁸¹ *ibid* para 10.

⁸² *ibid* para 11 (emphasis added).

⁸³ *ibid* paras 15–17.

characteristics, and who are frequently treated differently to men,”⁸⁴ therefore they may constitute a particular social group. Still, it is recognised that “men ... or certain social subsets of [this group] may also be considered as particular social groups.”⁸⁵ It is further acknowledged, going beyond a gender component of the assessment, that:

[...] former victims of trafficking may also be considered as constituting a social group based on the unchangeable, common and historic characteristic of having been trafficked.⁸⁶

As noted by Christensen:

[...] further support for this supposition can be found in ... the decision of the Canadian Supreme Court in *Ward*, acknowledging that past experience may qualify as a characteristic of a particular social group where the characteristic is unalterable.⁸⁷

More broadly, the new test indicated by UNHCR was built with the expectation that both national and supranational systems would adopt a more flexible definition for the protection of members of PSGs. However, the development in both EU and domestic legislation in Italy and in the United Kingdom has gone, to a certain extent, in a different direction. In 2004, when the European Union adopted the Qualification Directive to determine, among other things, the minimum standards for eligibility for refugee status to be applied by Member States, the text of the

⁸⁴ *ibid* para 12.

⁸⁵ UNHCR, ‘Guidelines on International Protection and Trafficking’ (n 68) para 38.

⁸⁶ *ibid* para 39.

⁸⁷ Christensen (n 62) 18.

Directive used the conjunctive ‘and’ rather than the disjunctive ‘or’ between the two approaches.⁸⁸ This formulation was replicated in the 2011 Qualification Directive *recast*,⁸⁹ and it was also transposed in Member States’ domestic legislation. The main consequence of such a choice has been that refugee protection on the basis of membership to a PSG is particularly limited. As Juss argued, an “unnecessary tension ... has been created between the [approaches], not least because the social perception standard may sometimes lead to the recognition of a PSG that the protected characteristics approach does not.”⁹⁰ Indeed, “having to satisfy both standards in a two-test approach is patently hazardous for a potential refugee who wants to lay claim to being a member of a PSG.”⁹¹

3.3.2/A Italy: The recognition of (some) trafficked persons as members of a Particular Social Group

In the Italian context, the vast majority of instances in which refugee status has been granted trafficked persons relates to cases of Nigerian women and girls who have been trafficked for the purpose of sexual exploitation. Positive decisions have been issued both by Territorial Commissions and Tribunals on appeal. In October of

⁸⁸ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (European Union 2004) Article 10.

⁸⁹ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (European Union 2011) Article 10.

⁹⁰ Satvinder S Juss, ‘Recognizing Refugee Status for Victims of Trafficking and the Myth of Progress’ (2015) 34 Refugee Survey Quarterly 107, 115.

⁹¹ *ibid* 116.

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2015, the Territorial Commission of Salerno granted refugee status to a Nigerian national who was subject to human trafficking, citing in particular paragraph 17 of the UNHCR Guidelines and recognising that she would potentially face reprisals amounting to persecution if she was to be returned to Nigeria, due to her membership of a PSG.⁹² In February of 2017, the Tribunal of Salerno overturned a negative decision of the Territorial Commission that had denied refugee status, subsidiary protection and humanitarian protection to a Nigerian woman who had been trafficked.⁹³ The Tribunal recognised that, as a woman, she was a member of a PSG and that, as a trafficked person, she would be exposed to persecution if she was to return to Nigeria. Therefore, the Tribunal decided to grant her refugee status. In May of 2018, the Tribunal of L'Aquila overturned a negative decision of the Territorial Commission with respect to a Nigerian national.⁹⁴ The Tribunal considered the grave violations of human rights to which the appellant was subject as amounting to persecution and also recognised that a return to Nigeria would expose her to further violations of her rights in the light of the inability of the State to protect her. The Tribunal therefore concluded that the appellant should be granted refugee status. Other instances in which a Tribunal has overturned a

⁹² *Commissione Territoriale di Salerno, 29 October 2015* <https://www.meltingpot.org/IMG/pdf/comm._salerno_tratta_asilo_status_2016.pdf> accessed 12 November 2020.

⁹³ *Tribunale di Salerno, 2 February 2017* <https://www.meltingpot.org/IMG/pdf/tribunale_di_salerno_2_febbraio_2017.pdf> accessed 12 November 2020.

⁹⁴ *Tribunale dell'Aquila, 10 May 2018* <https://www.meltingpot.org/IMG/pdf/tribunale_di_1_aquila_ordinanza_del_10_maggio_2018.pdf> accessed 14 November 2020.

negative decision of the Territorial Commission were registered, *inter alia*, in Venice and in Bari.⁹⁵

A 2019 study on international protection determinations before the Tribunal of Bologna reports a case where an adult man was granted refugee status on the basis of his trafficking experience.⁹⁶ Although the application was filed on the basis of the general situation of instability in Nigeria, in the course of the proceedings a number of elements emerged to suggest that the applicant was indeed trafficked for the purpose of labour exploitation – and arguably of forced criminality. The applicant was able to demonstrate that he was forced to work as a dealer in a situation of debt bondage. The Tribunal of Bologna found the applicant to be credible, justifying some inconsistencies as symptoms – or consequences – of the trauma associated with the trafficking situation, rather than perceiving them as an attempt to deceive the authorities. The judge accepted that the applicant had a well-founded fear of persecution, stressing the risk that he could be subjected to retaliation by those who trafficked him in Nigeria, in addition to the risk that he would be exposed to re-trafficking. The well-founded fear of persecution was then linked by the judge to the applicant’s membership of a PSG, namely trafficked men “lacking significant family networks, uneducated, unemployed and homeless, who are easy prey for criminal groups.”⁹⁷ This case, however, represents an exception

⁹⁵ *Tribunale di Venezia*, 27 July 2018 <https://www.meltingpot.org/IMG/pdf/tribunale_di_venezia_ordinanza_del_27_luglio_2018.pdf> accessed 14 November 2020; *Tribunale di Bari*, 10 November 2018 <https://www.meltingpot.org/IMG/pdf/decreto_tratta_rifugiata.pdf> accessed 12 November 2020.

⁹⁶ Fiorini (n 67) 36–37.

⁹⁷ *ibid.*

rather than the rule, and qualitative interviews with professionals working in the asylum and anti-trafficking fields confirmed the scarcity of case-law on access to asylum for trafficked adult men. In parallel, when the causal link between the well-founded fear and the Convention ground was not established, other forms of protection were granted to a number of applicants. In April of 2016, the Tribunal of Milan decided to grant subsidiary protection to a Nigerian national who had been trafficked, overturning the Territorial Commission's decision to reject the applicant's claim for international protection.⁹⁸ The Territorial Commission justified its decision arguing that the strictly personal character of the story told by the applicant excluded the existence of a *fumus persecutionis*. The Tribunal of Milan nonetheless rejected the reasoning of the Territorial Commission, highlighting how, according to the jurisprudence of the Italian Supreme Court:

[...] in subsidiary protection cases there is a mitigation of the causal link between the individual situation and the risk represented, so that, ... the alien's exposure to the risk of death or to inhuman or degrading treatment, although having to take on a certain degree of individualization, must not have the stricter characters than the *fumus persecutionis*.⁹⁹

In December of 2017, the Tribunal of Palermo overturned a negative decision of the Territorial Commission with respect to a Nigerian trafficked person.¹⁰⁰ In order to grant subsidiary protection, the Tribunal relied on Article 19 of Law Decree

⁹⁸ *Tribunal of Milan, 29 April 2016* <https://www.asgi.it/wp-content/uploads/2016/06/206_tribunale_Milano_29_4_ordinanza_tratta.pdf> accessed 18 December 2020.

⁹⁹ *Corte di Cassazione, 20 March 2014*.

¹⁰⁰ *Tribunale di Palermo, 11 December 2017* <https://www.meltingpot.org/IMG/pdf/ordinanza_sussidiaria_donna_nigeria_art19.pdf> accessed 20 December 2020.

251/2007, according to which considerations to grant subsidiary protection shall be given:

[...] on the basis of an individual assessment, [to] the specific situation of vulnerable persons, such as minors, the disabled, the elderly, pregnant women, single parents with minor children, unaccompanied minors, *victims of trafficking in human beings*, people with mental disorders, people who have been tortured, raped or suffered other severe forms of psychological, physical or sexual violence.¹⁰¹

3.3.2/B The United Kingdom: Trafficked males as members of a Particular Social Group

In the United Kingdom, trafficked persons have been at times recognised as members of a PSG and have therefore been entitled to refugee status in certain circumstances. As far as the general recognition of *any* PSG, the 2006 landmark judgment in the *Fornah* case recognised that, when evaluating membership of a PSG, there was a single test with two separate limbs. Commenting on the meaning of membership of a PSG, and relying heavily on the 2002 UNHCR Guidelines, Lord Bingham argued in fact that:

If [Article 10 of the Qualification Directive] were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of subparagraphs

¹⁰¹ *Attuazione della direttiva 2004/83/CE recante norme minime sull'attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta of 2007 251/2007 (Italy 2007) available at <http://www.gazzettaufficiale.it/eli/id/2008/01/04/007G0259/sg> (emphasis added).*

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(i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority.¹⁰²

The same approach was then followed in *MK* in 2009, where the Immigration Tribunal explicitly referred to the reasoning adopted in *Fornah*.¹⁰³ Although the approach has not been consistent, in *SB* – where *Fornah* was not followed – the Asylum and Immigration Tribunal accepted that former ‘victims of trafficking’ are capable of being members of a PSG, because of their shared common background or past experience of having been trafficked.¹⁰⁴ The same reasoning and conclusion were also adopted in *AZ* in 2010.¹⁰⁵ The Tribunal however also emphasised, in *SB*, that the group must have a distinct identity in the society in question. In the specific case of *SB*, it was recognised that in the context of the Moldovan society, a woman who has been trafficked for the purposes of sexual exploitation is a member of a PSG, the PSG in question being “former victims of trafficking for sexual exploitation.”¹⁰⁶ In *SB*, it was also argued that if the two approaches, namely the ‘protected characteristics’ and the ‘social perception’:

[...] are alternatives, then it may be said that it is possible to identify a particular social group without reference to evidence relating to any particular country.¹⁰⁷

¹⁰² *Secretary of State for the Home Department (Respondent) v K (FC) (Appellant) Fornah (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* (House of Lords, [2006] UKHL 46, 18 October 2006).

¹⁰³ *MK (Lesbians) Albania CG* ([2009] UKAIT 00036, 9 September 2009).

¹⁰⁴ *SB v The Secretary of State for the Home Department* (UKUT (IAC), [2008] UKAIT 00002, 26 November 2007).

¹⁰⁵ *AZ (Trafficked women) Thailand CG* (UKUT (IAC), [2010] UKUT 118, 23 April 2010).

¹⁰⁶ *SB Moldova CG* (n 104).

¹⁰⁷ *ibid.*

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If that was the case, then it could be said that ‘former victims of trafficking’ are, per se, members of a PSG, “without the need to consider the evidence relating to the society in question.”¹⁰⁸

If recognition of membership of a PSG for trafficked persons has become more consistent in claims involving women and girls, the same cannot be said for cases where trafficked males filed an asylum application – with some exceptions, including *SSHD v TAN (Albania)*, *JFK (China)*, *HVT (Vietnam)*, *SSHD v TSN (Vietnam)* and *ED (Albania)*.¹⁰⁹

In *SSHD v TAN (Albania)*,¹¹⁰ the Secretary of State appealed a decision of the First-tier Tribunal allowing the appeal of TAN against the decisions of the Secretary of State to reject his asylum claim and to issue a deportation order. TAN submitted that he left Vietnam aged 13 in 2005 with the aid of other people, and that he travelled to Russia where he was made to work for seven years before travelling to Germany, France, and the United Kingdom in 2016. In July 2017, he pleaded guilty to one offence of production of cannabis and was detained. His asylum application was initially refused and, although it was reconsidered following a finding by the Secretary of State that the appellant had been trafficked, the outcome was still a negative one. The First-tier Tribunal significantly found that the appellant qualified as a refugee under the 1951 Convention due to the fact that there was no sufficiency

¹⁰⁸ *ibid.*

¹⁰⁹ *HVT (Vietnam) PA/03104/2017* (UKUT (IAC), 8 October 2018); *SSHD v TSN (Vietnam) PA/07665/2017* (UKUT (IAC), PA/13347/2018, 19 February 2019); *ED (Albania) PA/13347/2018* (UKUT (IAC), PA/13347/2018, 27 June 2019).

¹¹⁰ *SSHD v TAN (Vietnam) PA/04075/2017 2018* (UKUT (IAC), 31 January 2018).

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of protection and no internal relocation alternative in Vietnam. In considering the former, the Judge found, based on *Nguyen*,¹¹¹ that factors to be taken into account included, *inter alia*, and similarly to the case before the Tribunal of Bologna discussed in section 3.3.2/A:

An outstanding debt due to the traffickers, the absence of any supportive family willing to take the victim back into the family unit, no other support network, mental health conditions, financial deprivation or little education or vocational skills.¹¹²

The Secretary of State challenged the decision on the ground, *inter alia*, that the First-tier Tribunal judge materially misdirected herself in respect of the vulnerability factors she took into account. Notably, the Secretary of State challenged the First-tier Tribunal judge's finding that the appellant's lack of education was a factor likely to increase his risk of re-trafficking, arguing that, "the appellant has significant experience of working in a textiles factory ... one of the single, biggest employers [in Vietnam]."¹¹³ The Upper Tribunal did not accept that having worked in conditions described as conditions akin to slavery, "would necessarily give him sufficient or relevant experience to obtain employment ... in the textile industry,"¹¹⁴ and upheld the decision.

¹¹¹ *Nguyen (Anti-Trafficking Convention: respondent's duties)* (UKUT (IAC), [2015] UKUT 00170 (IAC), 2015).

¹¹² *ibid*, para 5.

¹¹³ *ibid*, para 17.

¹¹⁴ *ibid*.

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In *JFK (China)*,¹¹⁵ the appeal was allowed on both asylum and human rights grounds. While the First-tier Tribunal judge concluded that there was no risk to the appellant on return because he had not been trafficked in the first place, having considered the case of JFK as “the case of a voluntary economic migrant for whom something went wrong thereafter,”¹¹⁶ the Upper Tribunal judge found that the First-tier Tribunal judge has erred in her failure to have proper regard to the report of the expert and in the lack of engagement with:

[...] the evidence of the other means used by the traffickers relating to the Appellant’s *position of vulnerability*, abduction, threats of serious harm and coercion.¹¹⁷

The Upper Tribunal judge set the decision aside and proceeded with the remaking of the same, finding that the appellant had indeed been trafficked to the United Kingdom and that, although he had consented to the journey, such consent was taken through one of the means recognised in the definition of trafficking, and therefore was not valid. In addition, the judge found that the appellant would not be able to relocate and that there was no sufficiency of protection, given the appellant’s vulnerability on the basis that he was in debt bondage.

In *HVT (Vietnam)*,¹¹⁸ it was accepted that the appellant had been trafficked for the purpose of sexual exploitation. The Home Office argued that ‘former victims of trafficking’ are not perceived as different and do not have a distinct identity in

¹¹⁵ *JFK (China) PA/06854/2016 2018* (UKUT (IAC), 8 February 2018).

¹¹⁶ *ibid*, para 7.

¹¹⁷ *ibid*, para 22 (emphasis added).

¹¹⁸ *HVT (Vietnam) PA/03104/2017* (n 109).

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Vietnamese society. This argument was accepted by the First-tier Tribunal. The judge of the Upper Tribunal instead, relying on precedents including *SB* and *AZ*,¹¹⁹ found that the shared experience of having been trafficking for the purpose of sexual exploitation amounted to a common immutable characteristic. Referring to the UNHCR Guidelines, the judge argued that it is the past trafficking experience, rather than the future persecution now feared, that would constitute one of the elements defining the group. The negative decision of the First-tier Tribunal was set aside and re-made by allowing the appeal on asylum grounds. Interestingly, the same reasoning was not applied in a labour exploitation case, *TVP (Vietnam)*,¹²⁰ that was heard by the Upper Tribunal only a month after *HVT (Vietnam)*. In considering the issue of membership of a PSG, the judges in *TVP (Vietnam)* accepted that a person who has been trafficked can be said to have an immutable characteristic, namely having been trafficked. However, they found that some difficulty arose in the specific case, if there is indeed a requirement that a PSG must be recognised, seen or identified as such as a distinct group within society. In an attempt to explain the negative decision, as well as the inconsistency with *HVT (Vietnam)*, the judges held that though certain sexual activities, such as prostitution, may have a stigma attached to them, it is difficult to consider that same situation to arise in terms of employment.¹²¹

¹¹⁹ *SB Moldova CG* (n 104); *AZ (Trafficked women) Thailand CG* (n 105).

¹²⁰ *TVP (Vietnam) PA/02997/2018* (UKUT (IAC), 12 November 2018).

¹²¹ This distinction between exploitation types was nonetheless partially reconciled in *ED (Albania)*, where the Upper Tribunal confirmed that the appellant, as a victim of trafficking, was indeed a member of a PSG and remitted the case to the First-tier Tribunal for a de novo hearing. See *ED (Albania) PA/13347/2018* (n 109).

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If in these cases the Upper Tribunal recognised that the applicants were members of a PSG on the basis of their trafficking experience, in *TVP (Vietnam)*¹²² it reached a different conclusion. The judge was called upon to assess the issue of risk on return, as the First-tier Tribunal concluded that the appellant could safely return to Vietnam. The Upper Tribunal immediately recognised “the vulnerability of the appellant, both emotionally and mentally arising from his [trafficking experience].”¹²³ In doing so, it had regard to a psychological report indicating that the appellant was:

[...] a vulnerable young man meeting the criteria for mild-moderate PTSD [that] had arisen because of the serious sexual and physical attacks that he had experienced in the past and his general experience at the hands of the traffickers.¹²⁴

It was further recognised that his vulnerabilities were associated with stigma and shame, heightened levels of anxiety symptoms and depressive conditions. Notably, and alongside the psychological report, a specialist adviser on human trafficking had produced another report recognising that:

A further obstacle in [the] path [of being recognised in Vietnam as a victim of trafficking] is that although the authorities recognise female trafficking, particularly for the purposes of sexual exploitation there is less recognition for the exploitation of young males for the purposes of working. Though there

¹²² *TVP (Vietnam) PA/02997/2018 2018* (UKUT (IAC), 12 November 2018).

¹²³ *ibid*, para 13.

¹²⁴ *ibid*, para 14.

was sheltered accommodation for females, ... no such facilities [were] available for male or child victims.¹²⁵

It was also highlighted that:

Even when victims manage to return to Vietnam they face tremendous difficulty in reintegrating in their communities, stigmatised by society and traumatised by their experience [and] because of the lack of resources there was no specialised long-term support services for male victims of trafficking returned to Vietnam.¹²⁶

In the light of the reports, the Upper Tribunal judge was to consider whether the appellant fell within the scope of the Refugee Convention by reason of being a member of a PSG. In conducting this assessment, the judge found that the case for membership of a PSG was not made out, but that the return of the appellant to Vietnam would expose him to such risk of harm at the hands of third parties that would potentially engage Article 3 of the ECHR. The appeal was therefore allowed on humanitarian grounds, as well as on the Immigration Rules and human rights grounds.

In other instances, including in *AN (Albania)* and *AB (Albania)*,¹²⁷ the Upper Tribunal also departed from *Fornah*. In *AN (Albania)*, the protection claim submitted by a person who had been trafficked for the purpose of labour exploitation was refused by the Home Office. In evaluating the appeal, the First-

¹²⁵ *ibid*, para 24.

¹²⁶ *ibid*, para 43.

¹²⁷ *AN (Albania) PA/04137/2016* (UKUT (IAC), 17 August 2017); *AB (Albania) AA/10878/2015* (UKUT (IAC), 14 March 2018).

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tier Tribunal judge found that it was not accepted that the appellant, together with others in similar positions, had a distinct identity in Albanian society that is perceived as being different to that of the surrounding society, and that therefore the appellant was not a member of a PSG and was not entitled to refugee status. The finding was stayed by the Upper Tribunal. In *AB (Albania)*, the First-tier Tribunal accepted that the appellant had been trafficked, but it concluded that the appellant was not at risk on this account and was not a member of a PSG. While the Upper Tribunal found that women forced into prostitution can readily be seen to form a distinct group who would be viewed as different by other parts of society, in the case of forced criminality it found that it could not be accepted that the appellant was a member of a PSG in the absence of evidence of discrimination against such a group.

In order to understand the reasons behind the lack of, or at least the inconsistent and uncertain, recognition of trafficked adult men as members of a PSG, both an historical and a sociological perspective should be adopted. From an historical perspective, the anti-trafficking movement has for a long time focussed almost entirely on the experiences of women and girls, repeatedly emphasising their vulnerability to human rights violations as well as their victimhood, and at the same time excluding males – and in particular adult men – from the narrative. Similarly, trafficking for the purpose of sexual exploitation has been, throughout the XX century, the only type of trafficking to be acknowledged in international law. Both the international anti-trafficking structures and domestic protection mechanisms have construed an ideal ‘victim’:

[Falling into] the known patriarchal trap that portrays women as helpless and passive victims who need to be rescued by others, and men as strong and active agents who can survive on their own.¹²⁸

By doing so, law and policy have contributed to defining the vulnerability of adult males as exceptional, and that of women – at least of those who fit the stereotype of the helpless victim – as *ordinary*. In parallel, institutions have upheld an understanding of trafficking for the purpose of sexual exploitation as a greater harm compared to other types of trafficking, among which trafficking for labour exploitation and forced criminality. As the former tends to affect women and girls disproportionately, it follows that men and boys have been afforded less attention in anti-trafficking actions.

3.3.3 Re-gendering the trafficking-asylum nexus

In Italy as well as in the United Kingdom, major gaps have been identified, for example, in country of origin information (COI) and in training and guidance that are available to, or directly compiled by, decision makers. In Italy, most training on the referral mechanism between the asylum and the anti-trafficking systems remains focussed on trafficking for the purpose of sexual exploitation. In the United Kingdom, the Upper Tribunal country guidance for the nationalities most commonly referred into the domestic anti-trafficking NRM, Albania and Vietnam, focus on women and girls – *TD and AD (Trafficked Women)* and *AM and BM (Trafficked Women)* for Albania, and *Nguyen (Anti-Trafficking Convention:*

¹²⁸ Daphna Hacker and others, ‘Ungendering and Regendering Shelters for Survivors of Human Trafficking’ (2015) 3 *Social Inclusion* 35, 39.

respondent's duties) for Vietnam.¹²⁹ A 2019 report by Asylos precisely highlighted this issue with respect to COI and guidance on Albania,¹³⁰ stressing the lack of country guidance with respect to men and boys, and more broadly to labour exploitation. Davis and others identified eight key vulnerability themes in their research on trafficked men's reintegration in Cambodia, including emotional violence, physical violence, violent behaviour and poverty.¹³¹ Emotional violence in particular was defined as encompassing a broad range of elements, including forms of psychological abuse, discrimination, disconnect/isolation, lack of trust and feelings of shame. Among the group surveyed by Davis and others, discrimination was predominantly based upon economic class, ethnic heritage, and perceived gender identity, while feelings of shame were associated with humiliation due to "membership with a certain group or social identity," in many cases associated with previous experiences of exploitation.¹³² The study acknowledges that:

[...] poverty seems to be an underlying issue within most of the vulnerabilities described ... as respondents cite inability to pay debts and ... feeling pressured to find work and earn money to support their families.¹³³

This is inextricably linked with gender norms according to which there is, for males, a "powerful expectation to be strong, and navigate poverty to be able to support

¹²⁹ *TD and AD (Trafficked women) CG [2016] UKUT 00092 (IAC)* (UKUT (IAC), 23 February 2016); *AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC)* (UKUT (IAC), 18 February 2010); *Nguyen (Anti-Trafficking Convention: respondent's duties)* (n 111).

¹³⁰ Asylos and ARC Foundation, 'Albania: Trafficked Boys and Young Men' (2019).

¹³¹ Jarrett Davis and others, 'The Forgotten Cohort: An Exploration of Themes and Patterns Among Male Survivors of Sexual Exploitation & Trafficking' (2016) 8–9.

¹³² *ibid* 8.

¹³³ *ibid* 15.

their families.”¹³⁴ When such expectation is not met, including for reasons related to the trafficking experience, the individual is likely to suffer the consequences of this ‘failure’. He is likely to be subjected to emotional and physical violence, including from families and community members, and to be returned to loose social connections and little emotional support from peers and family members. He is also likely to be at higher risk of poverty and substance abuse.¹³⁵

While early criticism of international refugee law highlighted the portrayal as universal of what is in fact a male paradigm,¹³⁶ and the “systematic neglect of gender as a critical consideration in every facet of the refugee situation,”¹³⁷ gender has increasingly become an element upon which asylum claims – especially those relating to trafficking situations – are decided. Acknowledging the relevance of Honkala’s observations on how the (almost) systematic categorisation of women’s gender-based persecution claims under the membership of a PSG ground, instead of *inter alia* the political opinion ground, demonstrates an underlying gendered politics,¹³⁸ this section critically examines the role that gender plays in the adjudication of asylum claims.

In the Council of Europe context, including in the selected jurisdictions of Italy and the United Kingdom, the vast majority of refugees who have been

¹³⁴ *ibid* 27.

¹³⁵ *ibid* 13, 23.

¹³⁶ Jacqueline Greatbatch, ‘The Gender Difference: Feminist Critiques of Refugee Discourse’ (1989) 1 *International Journal of Refugee Law* 518, 518.

¹³⁷ Doreen Indra, ‘Gender: A Key Dimension of the Refugee Experience’ (1987) 6 *Refugee: Canada’s Journal on Refugees* 3, 3.

¹³⁸ Honkala (n 62).

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recognised as such on the basis of their trafficking experience are women and girls who have been trafficked for the purpose of sexual exploitation,¹³⁹ with limited recognition of trafficking for other purposes and of violations of socio-economic rights as a ground for asylum. Despite, historically, the refugee definition has been interpreted through the lens of male experiences, when trafficking is a central component of an asylum claim such narrative shifts. Trafficked women, in particular those trafficked for the purpose of sexual exploitation, have been increasingly recognised as members of a PSG and as entitled to international protection, both in the asylum system and by judges – although it shall be noted that a number of decisions and appeals in recent years shows an increased reliance on the use of the ‘social perception’ test to exclude women and girls as well from accessing protection. Still, trafficked females have been more likely to be recognised as refugees on the basis of their trafficking experience, compared to males. The hardships faced by adult men are partly attributable to the gender stereotyping operationalised by decision making bodies, who have consistently failed to recognise the gender dimension of trafficking with respect to men and boys, focussing almost entirely on the experiences of women and girls. Indeed, the historical *special relationship* between human trafficking and sexual exploitation has been widely replicated in the asylum context, where gender is made visible only in relation to women and girls, and where a presumption of invulnerability exists with respect to trafficked adult men.

¹³⁹ See GRETA 10th general report (forthcoming).

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By way of example, in the cases of *TAN (Vietnam)* and *Gerald A (Albania)*, gender – conflated with sex – was used as a tool of exclusion from international protection, through a process of essentialisation and stereotyping of male characteristics. In *TAN (Vietnam)*,¹⁴⁰ the appellant sustained that he was trafficked as a minor for the purpose of domestic servitude, and that he was imprisoned and ill-treated in Vietnam, France, and then in the United Kingdom. The Home Office rejected his claim, and the First-tier Tribunal dismissed his appeal. At the hearing before the First-tier Tribunal, it was submitted that the appellant's account was inconsistent, implausible and lacking in detail. Therefore, the judge was not satisfied that the appellant had been trafficked. The appellant appealed on several grounds, relying in particular on the fact that the First-tier Tribunal judge failed to consider in any detail whether he met the profile of a child who had been trafficked from Vietnam in order to be exploited in the United Kingdom. Nonetheless, according to the Upper Tribunal, the alleged omission on part of the First-tier Tribunal judge was not material, despite the fact that the appellant arrived in this country as an unaccompanied asylum-seeking child in a manner that fits the profile of a trafficked minor from Vietnam in light of the country background material. Indeed, it was argued that:

Even if [the judge] should have found that the Appellant has the profile of someone who was trafficked as a child, that is no longer the case [as] the Appellant is no longer a child [but] a healthy adult who, by his own evidence, has been working since he arrived in this country.¹⁴¹

¹⁴⁰ *TAN (Vietnam) PA/06313/2016 2017* (UKUT (IAC), 8 December 2017).

¹⁴¹ *ibid*, para 10.

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The Upper Tribunal judge further stated that he found it difficult to see why the appellant would be at risk of serious harm if returned to Vietnam as:

The only potential harm that he might face would be re-trafficking, but in the absence of any particular vulnerability – I reiterate that he is a *healthy adult male* – I can see no reason why he cannot get a job and support himself in Vietnam, just as he has done here[:]. If the Appellant has already been trafficked in those circumstances he can avoid re-trafficking by not seeking work abroad, but instead taking a job in Vietnam.¹⁴²

In conclusion, the judge found no error of law and upheld the decision of the First-tier Tribunal. Similar issues were also raised in *Gerald A (Albania)*,¹⁴³ where it was argued that, as a trafficked male, the appellant would face “less problems than a woman victim of trafficking where patriarchal values remains widespread,”¹⁴⁴ and that the appellant could therefore relocate within Albania. However, as the Upper Tribunal judge highlighted, it was not considered that anyone relocating within Albania, regardless of gender, must transfer their civil registration to the new area, and that therefore the same corrupt police officers that participated in the appellant’s trafficking would have had the ability to inform the criminal gang about his whereabouts.

Many scholars have argued that the discourse and policies regarding trafficking for sexual exploitation are used and reframed by States as a security

¹⁴² Ibid (emphasis added).

¹⁴³ *Gerald A (Albania) PA/06047/2018 2018* (UKUT (IAC), 29 October 2018).

¹⁴⁴ *ibid*, para 6.

issue and a way of regulating women's sexuality and of regulating prostitution.¹⁴⁵ In the Italian context, the attention within the asylum system to the issue of trafficking of Nigerian women and girls for the purpose of sexual exploitation has been defined as an 'obsession'.¹⁴⁶ This dominant interest seems to reflect what FitzGerald describes as, "the State's concern with securitisation intersecting with the biopolitics of protecting the female trafficked migrant."¹⁴⁷ In parallel, the discourse and policies regarding human trafficking have been instrumentalised to, on the one hand, avoid addressing other forms of harm, including gender-based violence and systemic discrimination against certain groups of individuals, and, on the other hand, to restrict access to international and other forms of protection, increasingly relying on the asylum system as a new form of policing. As seeking asylum has become one of the few accessible paths to pursue entry and regularisation of one's legal status, the asylum process has become a tool of border control. Asylum determination bodies – as well as state bodies responsible for anti-trafficking action – maintain a tendency to apply a much higher standard to claims

¹⁴⁵ See inter alia Vanessa E Munro, 'Stopping Traffic? A Comparative Study of Responses to the Trafficking in Women for Prostitution' (2006) 46 Br J Criminol 318; Jennifer K Lobasz, 'Beyond Border Security: Feminist Approaches to Human Trafficking' (2009) 18 Security Studies 319; Sharron A FitzGerald, 'Biopolitics and the Regulation of Vulnerability: The Case of the Female Trafficked Migrant' (2010) 6 International Journal of Law in Context 277; Sharron A FitzGerald, 'Vulnerable Geographies: Human Trafficking, Immigration and Border Control in the UK and Beyond' (2016) 23 Gender, Place & Culture 181; Thema Bryant-Davis and Pratyusha Tummala-Narra, 'Cultural Oppression and Human Trafficking: Exploring the Role of Racism and Ethnic Bias' (2017) 40 Women & Therapy 152; Giorgia Serughetti, 'Smuggled or Trafficked? Refugee or Job Seeker? Deconstructing Rigid Classifications by Rethinking Women's Vulnerability' (2018) 11 Anti-Trafficking Review 11; Francesca De Masi and Fabrizio Coresi, 'Mondi connessi: La migrazione femminile dalla Nigeria all'Italia e la sorte delle donne rimpatriate' (2018).

¹⁴⁶ 'Oltre gli scenari consueti della tratta di esseri umani.' (*On The Road Onlus*, 15 January 2019) <<http://www.ontheroadonlus.it/news/articoli/oltre-gli-scenari-consueti-della-tratta-di-esseri-umani/>> accessed 9 February 2019.

¹⁴⁷ FitzGerald (n 145) 277.

involving economic and social rights, including cases of trafficking for the purpose of labour exploitation and forced criminality. This is based on the idea that, since they are not recognised per se as grounds for legitimate asylum,¹⁴⁸ economic and social rights are of lesser value and that, therefore, the level of violation necessary to establish persecution must be much higher.¹⁴⁹

Not only are violations of socio-economic rights consistently dismissed by asylum determination bodies, but so are considerations on gender beyond women and girls. Although it is true that gender-related protection claims are more commonly brought by women, it does not necessarily mean that gender is irrelevant in claims brought by men. The 2006 UNHCR Guidelines contain a specific section dedicated to women and children ‘victims of trafficking’, focussing in particular on trafficking for the purposes of sexual exploitation – categorised as a form of gender-based violence – and irregular adoption.¹⁵⁰ The Guidelines further indicate that:

[Women] may feel ashamed of what has happened to them or may suffer from trauma caused by sexual abuse and violence, as well as by the circumstances surrounding their escape from their traffickers [or] may fear rejection and/or reprisals by their family and/or community which should be taken into account when considering their claims.¹⁵¹

¹⁴⁸ Seyla Benhabib, ‘The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights’ (2020) 2 *Jus Cogens* 75, 86.

¹⁴⁹ See the discussion on socio-economic rights violations and access to asylum in Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge studies in international and comparative law, Cambridge University Press 2009).

¹⁵⁰ UNHCR, ‘Guidelines on International Protection and Trafficking’ (n 68) 19–20.

¹⁵¹ *ibid* 48.

However, as noted by Hamilton, “single male refugees and asylum seekers are systematically absent from much of the material covering vulnerability under UNHCR’s mandate and may face a presumption of *capacity*.”¹⁵² Although research on sexual violence against men and on trafficked males shows that shame, trauma, rejection and reprisals are common consequences of human trafficking and sexual violence across the gender *spectrum*,¹⁵³ these are only exceptionally taken into account by authorities when evaluating claims submitted by trafficked men. The lack of knowledge, or of engagement with the above-described elements, is partially attributable to gaps in the data on trafficked males, which is “often unforthcoming and often lack[s] detailed information.”¹⁵⁴ The evaluation of trafficked men’s claims focusses largely on elements of agency and resilience, and the assessment of risk on return rarely takes into significant factors, including the

¹⁵² Luke Hamilton, ‘(Re)Conceptualising Vulnerability in International Refugee Law and Practice: An Exploration of the Value of a More Dynamic Approach to Vulnerability in Refugee Status Determination’ (NUI Galway 2020) 73.

¹⁵³ See inter alia Eric Stener Carlson, ‘The Hidden Prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals’ (2006) 46 *The British Journal of Criminology* 16; Hilmi Zawati, ‘Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity’ (2007) 17 *Journal on Rehabilitation of Torture Victims and Prevention of Torture* 27; Dustin A Lewis, ‘Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law’ (2009) 27 *Wisconsin International Law Journal*; Lara Stemple, ‘Male Rape and Human Rights’ (2009) 60 *Hastings Law Journal* 605; Dubravka Zarkov, ‘The Body of the Other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity in Croatian Media’ in Caroline Moser and Fiona Clark (eds), *Victims, Perpetrators or Actors? Gender, Armed Conflict, and Political Violence* (Zed Books 2001); Solange Mouthaan, ‘Sexual Violence against Men and International Law – Criminalising the Unmentionable’ (2013) 13 *International Criminal Law Review* 665; Janine Natalya Clark, ‘Masculinity and Male Survivors of Wartime Sexual Violence: A Bosnian Case Study’ (2017) 17 *Conflict, Security & Development* 287; Rosemary Grey and others, ‘Evidence of Sexual Violence against Men and Boys Rejected in Ongwen’ (*Human Rights in International Justice*, 10 April 2018) <<https://hrij.amnesty.nl/evidence-sexual-violence-men-boys-rejected-ongwen/>>; Thomas Charman, ‘A Story that Can(Not) Be Told: Sexual Violence against Men in ICTR and ICTY Jurisprudence’ in Sofia Stolk and Renske Vos (eds), *International Law’s Collected Stories* (Palgrave Studies in International Relations, Springer International Publishing 2020).

¹⁵⁴ Davis and others (n 131) 5.

widespread lack of services available to men who have been trafficked – or sexually abused – in their countries of origin.

3.4 Concluding remarks

If the analysis in Chapter II highlights that domestic mechanisms to access international or other types of protection are not by law gendered nor exclusionary, Chapter III explored how access to protection is conditional on the correct and timely identification of trafficked persons, which is negatively impacted in practice by structural gender and racial biases. Chapter III also problematised the interconnections between human trafficking and asylum. The analysis of case-law highlighted that trafficked persons in the asylum system tend to rely on their identification as members of a PSG to be recognised as refugees. The analysis of case-law, as well as insights from qualitative interviews, highlighted how the recognition of individuals as members of a PSG is negatively affected by gendered and colonial stereotypes on agency, vulnerability and victimhood, as well as by the lack of recognition of violations of socio-economic rights as grounds on which to seek asylum. This Chapter challenged the concept of vulnerability that, alongside – and arguably as a product of – a particular, restrictive understanding of gender, has increasingly been relied upon in determining whether an individual will have access to protection. The use of gender, conflated with sex, to impose a presumption of exclusion from the vulnerable, and therefore ‘protectable’, category is recognised as a pattern in both Italy and the United Kingdom, and represents the main hardship faced by trafficked adult men in accessing protection.

Chapter III

In both jurisdictions, there have been substantial policy innovations on the part of the State, yet at the same time there have been significant gaps and fragmentation in practice. These gaps impact in particular on trafficked males, who frequently fall through the cracks in identification procedures and referral mechanisms, and in national anti-trafficking policies and plans. In Italy, the conceptualisation of anti-trafficking policies suffers from the absence of a uniform identification system, which contributes to the creation and the maintenance of a perception bias with respect to the phenomenon of trafficking, and which prevents the State from making informed decisions about their anti-trafficking priorities. In the United Kingdom, while the data collection system is arguably among the most comprehensive in the Council of Europe framework, the monopoly exercised by the Home Office in decision making - both in the anti-trafficking and in the asylum field - raises concerns around transparency, fairness and decision-making quality. In Italy, NGOs are overwhelmed by the responsibilities allocated to them in the framework of the NAP and the NRM, while in the United Kingdom they criticise the lack of possibility to engage with the Home Office, as well as their limited role in anti-trafficking decision making, beyond a referral into the NRM. The elements that Italy and the United Kingdom have in common remain the (unofficial) construction and perpetuation of a hierarchy of victimhood – and of forms of exploitation - and the lack of sufficient services, including with respect to accommodation, available for trafficked males. Chapter IV will evaluate the reasons behind the failure to design and implement inclusive anti-trafficking laws and policies, with a particular attention on the role of the State in *creating* vulnerability.

Chapter III

Chapter IV – The gendered nature of trafficking in human beings: A model of inclusion or a tool of exclusion?

Chapter III analysed the implementation of anti-trafficking legislation, highlighting the structural gender bias of protection processes, and the conceptual and procedural obstacles faced by trafficked adult males in obtaining recognition. In order to better understand the practical implications of the current structure of anti-trafficking action, it is necessary to discuss how gendered assumptions of vulnerability interact with protection systems, and how they are understood and operationalised by decision-making bodies.

Chapter IV examines the nature of anti-trafficking action and its role (in practice) as a mechanism of border control, and of exclusion – flexible and selective – of ‘unwanted’ individuals from the protection of the State. It engages with reflections around risk factors and root causes of trafficking, shifting the focus towards the actions of the State, rather than to the actions of individuals. It argues that a State’s immigration policies and laws produce, or enhance, vulnerability to exploitation in a way that, together with the global unequal economic order, heavily contributes to the so-called ‘root causes’ of trafficking. This explains both why anti-trafficking actions have been unsuccessful, if not detrimental, to the protection of trafficked individuals, and how for a meaningful change to happen, States would need to shift their attention to their own behaviour, in particular with respect to

immigration laws and policies and to their role in maintaining the structural inequalities between countries. Chapter IV also argues that the current laws and policies on human trafficking are particularly punitive towards adult men, whose masculinity is perceived to be challenging the masculinity of the State as an entity, and whose vulnerability and victimhood are rarely acknowledged. Although the legal concept of vulnerability, and vulnerability assessments, have been presented as a tool of inclusion, I argue that it has been used as a tool of exclusion, aimed at restricting access to protection to those individuals deemed to be ‘protectable’.

4.1 Trafficking and gender

Since its inception, as Chapter I has shown, trafficking has been considered a gendered phenomenon. Yet, gender has been highlighted mostly, if not exclusively, with respect to women and girls. The reduction of gender to sex, or conflation of the two, has allowed for a reductionist approach to the complex power dynamics behind trafficking. As Bacchi argues, “this determination is not without practical consequence, as public policy is ultimately influenced by the discursive representation of social issues.”¹ Gender has been strategically understood and deployed as a concept and a process affecting only women and girls, thus rendering women and girls the only subjects of a gender analysis – of their risks of being trafficked, their vulnerability, and their victimhood. As noted by Uy:

¹ Carol Bacchi, *Women, Policy and Politics: The Construction of Policy Problems* (SAGE 1999).

Chapter IV

[...] feminists have sought to address human trafficking because it represents patriarchy, male oppression, and the exploitation of women, and the feminist movement's interest in the abolition of sex trafficking as an extension of the need to prevent the exploitation of women has often left other trafficking victims out in the cold. While unintended, this emphasis on gender and on the interplay between male domination and female oppression has led them to de-emphasize forced labor and other types of non-sexual slavery.²

This has also contributed to the creation of a body of literature focussing on gender inequalities as one of the root causes of trafficking in human beings, which has however failed to include gender dynamics between men, and more broadly gender dynamics between the masculine State and the (foreign) masculine population under its jurisdiction, from the discourse. Masculinities as a term did not emerge until the 1980s, and when literature on masculinities and the interplay between hegemonic masculinity, subalternate masculinities, and racialised masculinity emerged, it was predominantly situated in the discipline of sociology. Although:

[...] the idea of a hierarchy of masculinities grew directly out of homosexual men's experience with violence and prejudice from straight men ... empirical social research ... confirmed the plurality of masculinities and the complexities of gender construction for men, and gave evidence of the active struggle for dominance that is implicit in the Gramscian concept of hegemony.³

² Robert Uy, 'Blinded by Red Lights: Why Trafficking Discourse Should Shift Away from Sex and the "Perfect Victim" Paradigm' (2011) 26 *Berkeley Journal of Gender, Law & Justice* 204, 208.

³ Raewyn W Connell and James W Messerschmidt, 'Hegemonic Masculinity: Rethinking the Concept' (2005) 19 *Gender & Society* 829, 831–32.

Chapter IV

The concept of hegemonic masculinity emerged as the pattern of practice, rather than an identity, that allowed for the perpetuation of men's dominance over women. It was distinguished from other masculinities, in particular from subordinated masculinities, and it was understood, although not as statistically predominant among men, as normative. Despite criticism towards the concept of masculinity as a tool to essentialise the character of men or to impose a fictional unity on a complex reality, masculinity studies have flourished in the last decade of the XXI century and have transcended gender boundaries, exploring also masculinities enacted by individuals with female bodies.⁴ As Connell and Messerschmidt emphasise:

[...] masculinity is not a fixed entity embedded in the body or personality traits of individuals [but rather] masculinities are configurations of practice that are accomplished in social action and, therefore, can differ according to the gender relations in a particular social setting.⁵

As Holter noted, it is wrong to limit the exercise of deducing relations among masculinities from the exercise of power by men over women, as other factors ought to be considered – including the institutionalisation of gender inequalities, the role of cultural constructions, and the interplay of gender dynamics with race, class, and region.⁶ When the concept of hegemonic masculinity is used and understood as part of a constantly redefined, and at times abstract, social process,

⁴ See for example Jack Halberstam, *Female Masculinity* (Duke University Press 1998); James W Messerschmidt, *Flesh and Blood: Adolescent Gender Diversity and Violence* (Rowman & Littlefield International Ltd 2004).

⁵ Connell and Messerschmidt (n 3) 836.

⁶ Øystein Gullvåg Holter, 'Gender, Patriarchy and Capitalism: A Social Forms Analysis' (University of Oslo 1997); Øystein Gullvåg Holter, *Can Men Do It?: Men and Gender Equality - the Nordic Experience* (Nordic Council of Ministers 2003).

which is contextual and relational rather than universal, it follows that hegemonic masculinity is an ideal. This ideal may or may not be embodied by males who retain power within a specific context, but it will serve as the standard to judge ‘other’ masculinities. As hegemonic masculinity, or its construction in a particular space and time, is both subject to challenges and to a constant process of negotiation and reconfiguration, Demetriou argues that it is manifested in two forms, an external and an internal one.⁷ While the external form refers to the institutionalisation of men’s dominance over women, the internal form refers to the social ascendancy of one group of men over all other men. Although Demetriou has argued that subordinate and marginalised masculinities are not seen as having an impact on the construction of hegemonic masculinity, their mere existence could be perceived as a threat that should therefore be regulated, or at least distanced and controlled, as “the concept of hegemonic masculinity presumes the subordination of non-hegemonic masculinities.”⁸

These findings, however, have rarely been engaged with and deployed in the construction of the anti-trafficking framework. Instead, both States and other stakeholders have decided to include in their discussions references to gender only with respect to the female body and to female experiences. The preeminent treaty on gender inequality’s, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁹ continued focus on women despite the

⁷ Demetrakis Z Demetriou, ‘Connell’s Concept of Hegemonic Masculinity: A Critique’ (2001) 30 *Theory and Society* 337.

⁸ Connell and Messerschmidt (n 3) 846.

⁹ ‘Convention on the Elimination of All Forms of Discrimination Against Women’ (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

recent shift of international law toward a focus on gender and sexuality, is a symptom of the persistence of the male/female binary at the core of the (institutionalised) international law.¹⁰ CEDAW's General Recommendation No. 38 on trafficking in women and girls in the context of global migration,¹¹ missed the opportunity to engage in a meaningful way with the gendered nature of trafficking, perpetuating a narrative of tension between women and men, and reinforcing the conflation of sex and gender.¹² The General Recommendation recognises that, in the context of contemporary global migration:

[...] additional push factors include persisting norms and stereotypes regarding male domination, the need to assert male control or power and enforce gender roles, male sexual entitlement, coercion and control which drive the demand for the gender-stereotyped exploitation of trafficking victims.¹³

However, the General Recommendation fails to assess the impact of such elements across the gender *spectrum*. Although it could be argued that, given the remit of CEDAW, a focus on women and girls is only logical, the consequences of the

¹⁰ Darren Rosenblum, 'Unsex CEDAW, or What's Wrong With Women's Rights' (2011) 20 *Columbia Journal of Gender and Law* 98.

¹¹ UN Committee on the Elimination of Discrimination against Women, 'General recommendation on Trafficking in Women and Girls in the Context of Global Migration' (2020).

¹² For a critique of CEDAW's General Recommendation, see, inter alia, IWRAW-AP et al, 'Joint Response to the Draft CEDAW General Recommendation on TWGCGM' (2020); IWRAW-AP, 'A Feminist Analysis of CEDAW General Recommendation No. 38 on Trafficking in Women & Girls in the Context of Global Migration' (16 December 2020); Global Alliance Against Trafficking in Women (GAATW), 'Comments on the Draft CEDAW General Recommendation on Trafficking in Women and Girls in the Context of Global Migration' (2020).

¹³ *ibid*, para 22.

narrative deployed within CEDAW is problematic.¹⁴ Indeed, its call for the adoption and implementation of comprehensive gender-sensitive anti-trafficking legislation seems to be limited to the *gendered female subject*. More broadly, this approach of States and key stakeholders to gender has contributed, on the one hand, to the silencing of men and men's experiences, and, on the other hand, to the idealised and stereotyped construction of a specific image of women and girls. This construction has in turn *forced* women and girls to have to adhere to such an image in order to be considered part of the 'gendered population'. As Vijayarasa put it, "this mainstream picture has been deemed an accurate description of the trafficking phenomenon, resulting in a clichéd image of victimhood."¹⁵

When gender is made invisible with respect to men, or visible only with reference to hegemonic masculinity, trafficked males are subjected to a process of de-victimisation, as victimisation is deemed to be incompatible with (hegemonic) masculinity. As Steele noted, for example:

When the international media reported that the Spanish authorities had arrested two groups of men for trafficking other men into Spain for sexual exploitation ... despite the clear evidence that these men were lied to, drugged, and forced and coerced into performing sex acts, many American news accounts and news blogs adopted non-trafficking terminology to

¹⁴ See, inter alia, Dianne Otto, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006); Dianne Otto, 'Women's Rights' (2010) U of Melbourne Legal Studies Research Paper No. 459; Rosenblum (n 10); J Resnik, 'Comparative (in)Equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production' (2012) 10 *International Journal of Constitutional Law* 531.

¹⁵ Ramona Vijayarasa, *Sex, Slavery and the Trafficked Woman* (Routledge 2016) xv.

describe the men, labeling them as ‘prostitutes’, ‘gigolos’, and ‘workers’. ... The effect of such coverage was to obscure these men’s status as victims, instead emphasizing that they were illegal sex workers.¹⁶

This same depiction of trafficked males as ‘exploited workers’, ‘irregular workers’, or ‘smuggled migrants’, has been widely used in Italy and in the United Kingdom – not only within asylum claims and in courts and tribunals, as highlighted in Chapter III, but also in the media discourse and in policy making.¹⁷ Indeed, the “quintessential victim [is] presented as young women and girls, recruited or abducted by male traffickers,”¹⁸ sustaining a (fictional) ‘gender’ dichotomy that only serves the purpose of restricting access to protection. For instance, in

¹⁶ Sarah L Steele, “‘Combating the Scourge’: Constructing the Masculine “Other” Through U.S. Government Anti-Trafficking Campaigns’ (2011) 9 *Journal of Hate Studies* 33, 33–34.

¹⁷ See inter alia Redazione, ‘Azienda Degli Orrore: Operai Picchiati e Senza Paga, Pochi Minuti per Mangiare’, *Brescia Today* (18 November 2020) <<https://www.bresciatoday.it/cronaca/monza-usmate-pellet-rumeni.html>> accessed 10 December 2020; Ebe Pierini, ‘Caporalato, Braccianti Agricoli Trattati Come Schiavi: Arresti e Denunce’, *Il Mattino* (21 November 2020) <https://www.ilmattino.it/primopiano/cronaca/sabaudia_finanza_caporalato_braccianti_agricoli_trattati_come_schiavi_arresti_e_denunce-5599488.html?fbclid=IwAR3hGEU-sGeeDtFRU6Ir2MJksP_wxnEJqIzO2BiBTvxi7Oulfqe7SE44vo> accessed 10 December 2020; Alessia Candito, ‘Caporalato, Braccianti Sfruttati e Venduti a Giornata: 60 Misure Cautelari e 14 Aziende Agricole Sequestrate Tra Cosenza e Matera’, *La Repubblica* (10 June 2020) <https://www.repubblica.it/cronaca/2020/06/10/news/caporalato_60_misure_cautelari_e_14_aziende_agricole_sequestrate_tra_cosenza_e_matera-258847533/> accessed 10 December 2020; Telegraph Reporters, ‘97 Nail Bar Workers Arrested in Crackdown on “barbaric” Modern Slavery’, *The Telegraph* (28 December 2016) <<https://www.telegraph.co.uk/news/2016/12/28/97-nail-bar-workers-arrested-incrackdown-barbaric-modern-slavery/>> accessed 10 January 2021; Jay Akbar, ‘Brits Working as Bar Touts in Magaluf Are Forced to Work Long Hours for Little Pay by Bosses Who Seize Their Passports, Foreign Office Warns’, *The Sun* (26 May 2018) <<https://www.thesun.co.uk/news/6385180/british-bar-touts-magaluf-wages-passports-seized-foreign-office-warning/>> accessed 10 January 2021.

¹⁸ Vijayarasa (n 15) 3.

addressing the issue of migrant women workers, the United Nations General Assembly stated in 1994 that:

[It was] aware of the moral obligation of receiving or host countries to ensure the human rights and fundamental freedoms of all persons within their boundaries, including migrant workers and in particular women migrant workers, who are *doubly vulnerable because of their gender and because they are foreigners*.¹⁹

Although it may well be the case that women are more vulnerable to trafficking, or at least to trafficking for sexual exploitation, than men, the extremely low number of identified trafficked males raises the suspicion that their vulnerability and their exploitation is not appropriately addressed under the prevailing legal and policy responses to human trafficking. As research by Hoyle and others found:

[...] where victim identification is based on idealised conceptions of victimisation, frontline victim services may be restricted to a minority of victims who meet the strict criteria.²⁰

Similarly, a study by Segrave showed that discretion for ‘victim’ identification relies upon highly gendered discourses of ideal victimisation.²¹ In such a process, “many elements of conventional wisdom in the understanding of female

¹⁹ United Nations General Assembly, ‘Violence against women migrant workers’ (A/RES/48/110, 28 February 1994) 2. See for example Global Alliance Against Trafficking in Women (GAATW) (ed), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (GAATW 2007); Thérèse Blanchet, ‘Beyond Boundaries: A Critical Look at Women Labour Migration and the Trafficking Within’ (2002) 5.

²⁰ Carolyn Hoyle and others, ‘Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality’ (2011) 20 *Social & Legal Studies* 313.

²¹ Marie Segrave, ‘Order at the Border: The Repatriation of Victims of Trafficking’ (2009) 32 *Women’s Studies International Forum* 251.

[trafficking] become contentious when it is attempted to apply these to men.”²² This is particularly true with respect to trauma and other serious harms, which tend to be accepted as consequences of the trafficking experience for most women, but are highly contested in relation to men – just as male victimhood, “is frequently interpreted as at odds with or incongruous to female victimhood.”²³

In so-called destination countries in the Council of Europe context, masculinity is made synonymous with white manhood, a version of manhood that dominates state institutions.²⁴ Such an understanding of manhood prevents state institutions, both the judicial ones and those engaged in protection processes, from acknowledging different types of masculinities – including black, marginalised, and subalternate masculinities. It also prevents those institutions from understanding vulnerability within manhood, as vulnerability is deemed *incompatible* with white manhood – which is expected of all men who enter the institutional space. It follows that males are perceived and recognised as ‘victims’ only when the trafficking experience contributes to their *feminisation*, be that through sexual violence or through a display of absence of agency.²⁵ Some scholars have engaged with the matter of male/male or female/male rape, and its considerations both within

²² Claire Cohen, *Male Rape is a Feminist Issue. Feminism, Governmentality and Male Rape* (Critical Criminological Perspectives, Palgrave Macmillan UK 2014) 13.

²³ *ibid.*

²⁴ Cynthia Enloe, *Maneuvers: The International Politics of Militarizing Women’s Lives* (University of California Press 2000) 23–26.

²⁵ See e.g., *SSHD v TAN (Vietnam) PA/04075/2017* (UKUT (IAC), 31 January 2018); *HVT (Vietnam) PA/03104/2017* (UKUT (IAC), 8 October 2018); *TVP (Vietnam) PA/02997/2018* (UKUT (IAC), 12 November 2018).

feminist literature and in considerations on vulnerability.²⁶ In his work on male/male rape, Sivakumaran argued that, although at first sight it may be considered that the issue of male/male rape falls outside the ambit of the agenda of the women's movement:

[...] a perfunctory consideration of the issue, ... reveals that the topic of male/male rape is well within the scope of the feminist movement [as] notions of power, dominance, and gender, all of which play key roles in feminist analyses of male/female rape, also feature heavily in an analysis of male/male rape.²⁷

Masculinity is usually associated with the idea of (patriarchal) power, in particular in instances involving sexual violence. MacKinnon, among others, argued that:

[...] rape is an act of dominance over women that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression.²⁸

²⁶ Sandesh Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality' (2005) 27 *Human Rights Quarterly* 1274; Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict' (2007) 18 *European Journal of International Law* 253; Dustin A Lewis, 'Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law' (2009) 27 *Wisconsin International Law Journal*; Sandesh Sivakumaran, 'Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict' (2010) 92 *International Review of the Red Cross* 259; Jarrett Davis and others, 'The Forgotten Cohort: An Exploration of Themes and Patterns Among Male Survivors of Sexual Exploitation & Trafficking' (2016); Janine Natalya Clark, 'Masculinity and Male Survivors of Wartime Sexual Violence: A Bosnian Case Study' (2017) 17 *Conflict, Security & Development* 287; Thomas Charman, 'A Story that Can(Not) Be Told: Sexual Violence against Men in ICTR and ICTY Jurisprudence' in Sofia Stolk and Renske Vos (eds), *International Law's Collected Stories* (Palgrave Studies in International Relations, Springer International Publishing 2020).

²⁷ Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality' (n 26) 1281.

²⁸ Catharine A MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 *The Yale Law Journal* 1281.

Yet, it is only accepting that:

[...] the concepts of masculinity and femininity [are] non-uniform in nature, [that] the gradations within them would explain the power hierarchy within masculinity and within femininity, and not just between them.²⁹

Similar dynamics of power, dominance, and gender are at play in the trafficking context, and ought to make the trafficking of males fall within the remit of feminist literature and the agenda of the women's movement. The mainstream discourse, however, appears to be unwilling to engage in such a discussion beyond binaries. In parallel, State authorities appears to be able and willing to protect only those individuals that are – or present themselves – as utterly passive and in need of being rescued. At the same time, they appear to be unable, or at least unwilling, to protect individuals who display socially defined and specific (perceived) *masculine* traits, who resist, who challenge through their lived experiences the inviolable image of manhood. The man only deserves protection when:

[...] his inabilities and powerlessness reaffirm not only his subordination, but also his inability to perform the idealized hegemonic masculinity. Because he is violated and unable to defend himself ... the state's intervention is necessary both to save him and to restore the normal gender order.³⁰

Only by adhering to the image of the stereotypical 'idealised victim', an individual is able to access protection. The battle over male vulnerability and male victimhood in the trafficking field has become, "a political and politicised issue, set up in

²⁹ Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality' (n 26) 1282.

³⁰ Steele (n 16) 40.

relation to the normative female – and by extension the champion of the female ... victim: feminism.”³¹ This clearly has implications for females, too. According to FitzGerald, policies intended to protect female trafficked migrants, asylum seekers and refugees are intertwined with normative social and cultural mores around prostitution, backed up by the mainstream conflation of female migrant's activity of prostitution with human trafficking and assuming that all female trafficked migrants are coerced into the sex industry and in need of State's protection.³² Such a form of biopolitics is not only undertaken through law enforcement and prosecution, but also through the quasi-imposition of protection and assistance to ‘vulnerable trafficked victims’, which can correspond to a subtle form of cultural racism.³³ In her analysis of the limits of a human rights-based anti-trafficking response, Shamir acknowledges that:

[...] the particular kind of rehabilitative assistance the current anti-trafficking regime offers raises questions about its gender and cultural assumptions regarding trafficked persons [which have] resulted in emphasis on the alleged rehabilitative needs of female victims of sex trafficking and has infused the anti-trafficking campaign with gendered suppositions about women’s lives, preferences, and capabilities.³⁴

³¹ Cohen (n 22) 12.

³² Sharron A FitzGerald, ‘Biopolitics and the Regulation of Vulnerability: The Case of the Female Trafficked Migrant’ (2010) 6 *International Journal of Law in Context* 277, 279.

³³ Sharron A FitzGerald, ‘The Female Diaspora: Interrogating the Female Trafficked Migrant’ in *Decolonisation of Legal Knowledge* (Routledge 2009) 133.

³⁴ Hila Shamir, ‘A Labor Paradigm for Human Trafficking’ (2012) 60 *UCLA Law Review*, 103.

Agustín further argues that the very idea of the feminisation of migration is the product of gender stereotyping that, during the XX century, consisted in:

[...] ignoring women's movement while reinforcing the myth of the tough, lone male migrant. When female migration is visible, it is often in sexualised or exploited scenarios, like trafficking, which reinforce messages about the vulnerability of female migrants.³⁵

While the implications of gender stereotyping for trafficked females have been widely analysed,³⁶ the parallel discussion on trafficked males has not received similar levels of attention. Considered the focus that has been placed on trafficking for the purpose of sexual exploitation and gender – or, if one was to analyse such attention critically, to women and girls – in the sphere of anti-trafficking, higher protection standards have been elaborated with respect to women trafficked for the purpose of sexual exploitation. It is therefore harder – although the attempt is not rare – to circumvent, or to bend, these standards to allow for a wide discretion in decision making. With respect to trafficked males, however, such standards show their weaknesses, in that they are less stringent and less protective. For example, it is significant that while ‘women victims of trafficking’ form a Particular Social Group (PSG) for the purpose of the 1951 Refugee Convention, the ungendered

³⁵ Amy M Russell, “‘Victims of Trafficking’: The Feminisation of Poverty and Migration in the Gendered Narratives of Human Trafficking’ (2014) 4 *Societies* 532, 536.

³⁶ See, inter alia, Russell (n 35); Giorgia Serughetti, ‘Smuggled or Trafficked? Refugee or Job Seeker? Deconstructing Rigid Classifications by Rethinking Women’s Vulnerability’ (2018) 11 *Anti-Trafficking Review* 11; Alison Jobe, ‘Telling the Right Story at the Right Time: Women Seeking Asylum with Stories of Trafficking into the Sex Industry’ (2020) 54 *Sociology* 936.

group of ‘victims of trafficking’ has not obtained such recognition – or, at least, it has not obtained it consistently. As Gauci highlighted:

The gender breakdown is relevant to trafficking-based asylum claims. ... This gendered view is prejudicial to the identification of trafficked men and fails to fully address the spectrum of abuse that is human trafficking. [It] has permeated into various aspects of counter-trafficking policy not least at the intersection with refugee law. It is also reflected in much of the literature written about the issue which has often focused on women trafficked for sexual exploitation.³⁷

Much has been written on gender and asylum, highlighting how women seeking asylum are disadvantaged due to a lack of understanding of issues affecting women in countries of origin or a lack of awareness of structural gender inequality in certain contexts.³⁸ A less profound reflection has been performed with respect to males and their experiences in seeking asylum on the ground of their trafficking experience. With respect to the trafficking-asylum nexus in particular:

[...] there is a risk in the gendered way that trafficking continues to be perceived, and that risk comes from its possible ripple effect, especially on

³⁷ Jean-Pierre Gauci, ‘Trafficked Persons as Refugees’ (Ph.D., King’s College London 2014) 46–47.

³⁸ See inter alia Abigail Stepnitz, ‘A Lie More Disastrous than the Truth: Asylum and the Identification of Trafficked Women in the UK’ (2012) 1 *Anti Trafficking Review* 104; Moira Dustin, ‘Designating “Vulnerability”: The Asylum Claims of Women and Sexual Minorities’ (*Security Praxis*, 3 June 2017) <<https://securitypraxis.eu/vulnerability-asylum-claims-women-minorities/>> accessed 27 February 2018; Nora Honkala, ‘“She, of Course, Holds No Political Opinions”: Gendered Political Opinion Ground in Women’s Forced Marriage Asylum Claims’ (2017) 26 *Social & Legal Studies* 166; Serughetti (n 36).

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male victims of trafficking, or even women, who do not fully subscribe to their victim role.³⁹

As Chapter I demonstrated, the anti-trafficking movement has, for the entirety of the 20th century, focussed on the experiences of women and girls subjected to sexual exploitation. The narrative deployed in the formative years of the anti-trafficking structure was one that saw ‘victims’ as passive, vulnerable subjects to be rescued by the State, and placed the responsibility of the *criminal act* almost solely on other private physical (or legal) persons. Despite the inclusion of purposes other than sexual exploitation in the Palermo Protocol, trafficking for the purpose of sexual exploitation continues to be perceived and presented as a greater harm compared to other types of trafficking. This has been justified deploying several narratives, including issues of morality, which are evident in the continued effort of some States, including those adhering to and implementing the so-called Nordic Model, as well as some scholars,⁴⁰ to conflate trafficking and prostitution. This particular strand rejects the idea that individuals can voluntarily choose to become sex workers, or argues that all sex work is forced – so that “women in prostitution are observed to be prostituted through choices precluded, options restricted, possibilities denied.”⁴¹

The idea that bodily harm and violence are unique to sexual exploitation must certainly be rejected. Indeed, there is ample evidence that coercion methods

³⁹ Gauci (n 37) 258–59.

⁴⁰ MacKinnon (n 28); Catharine A MacKinnon, ‘Trafficking, Prostitution, and Inequality’ (2011) 46 *Harvard Civil Rights-Civil Liberties Law Review* 271.

⁴¹ MacKinnon (n 40) 274.

employed to sustain dynamics of exploitation are common to all types of exploitation, including forced criminality.⁴² However, when we factor the gender component in the anti-trafficking equation, it is quite unsurprising to see that States have been – and still are – less prone to respond to violence being exercised on a male, and more prone to tolerate or to exercise violence themselves on a male body.⁴³ In his research on ‘deportees’ from the United Kingdom to Jamaica, for example, de Noronha argued that:

[...] to justify deportation, normative ideas about gender, sexuality and ‘the family’ are enforced in profoundly restrictive ways [and that] racism in the criminal justice system ... has particularly weighty consequences for young black men.⁴⁴

Parallels can be drawn between the justification of deportation and that of protection from human trafficking, which very often involves live immigration matters or deportation proceedings against a potentially trafficked person. While the early anti-trafficking structure might have contributed to the strengthening of a gender-biased approach, it is surely not the main cause. On the contrary, it represents a symptom of the underlying bias of a *masculine* State and of the

⁴² See inter alia Carolina Villacampa and Núria Torres, ‘Human Trafficking for Criminal Exploitation: The Failure to Identify Victims’ (2017) 23 *European Journal on Criminal Policy and Research* 393; Neil Howard, ‘Of Coyotes and Caporali: How Anti-Trafficking Discourses of Criminality Depoliticise Mobility and Exploitation’ in *Routledge Handbook of Human Trafficking* (Routledge 2018); Carolina Villacampa and Katherine Flórez, ‘Human Trafficking for Criminal Exploitation and Participation in Armed Conflicts: The Colombian Case’ (2018) 69 *Crime, Law and Social Change* 421.

⁴³ Eric Stener Carlson, ‘The Hidden Prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals’ (2006) 46 *The British Journal of Criminology* 16; Clark (n 26).

⁴⁴ Luke de Noronha, *Deporting Black Britons: Portraits of Deportation to Jamaica* (Manchester University Press 2020).

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understanding of violence as masculine *per se*, which cannot therefore be exercised on a(nother) masculine entity. In the American context, Steele noted that not only policies “create and reinforce divides in masculinities based on regimes of racial domination, but [they] also ... further the domination of white American masculinity.”⁴⁵ Her observations with respect to the United States are also widely applicable in the European context, where trafficking policies are heavily influenced by – and heavily influence – the dominant European masculinity. It is also unsurprising to see that States, through their decision-making bodies, have projected onto trafficking survivors an image of an ‘ideal victim’ that reflects standards and ideas of victimhood (and rationality) of the destination State, rather than acknowledging that different cultures might express trauma, as well as perceive stigma, differently. For example, de Noronha found that, since British ‘deportees’ are often stereotyped and described as individuals who had a ‘golden opportunity’ and wasted it, they struggle to reconnect with estranged relatives and are prone to social isolation, homelessness, and poverty.⁴⁶ In such a context, which is typical of the ‘deportee’ experience, individuals are often exposed to serious violence on return, which is rarely acknowledged by decision makers in so-called countries of destination.

⁴⁵ Steele (n 16) 35.

⁴⁶ de Noronha (n 44).

4.2 Trafficking and the human rights discourse

Throughout the XX century, States and stakeholders have created a narrative of trafficking around the need of (innocent) ‘victims’ to be rescued by the State. The use of certain images and discourses to promote awareness around a cause, and to justify the adoption of instruments and policies to tackle it, influences the ways in which the cause is perceived. The use of the notion of *rescue* from the State towards *feminised* subjects is not unique to the trafficking field. In her work on the gendered representations of Salvadoran refugees in the 1980s, De La Cruz noted how, despite evidence that the majority of the victims of the civil war in El Salvador were single men:

[...] the public discourse put forth by U.S. activist groups ... rarely refer[red] to victimized men [and how] humanitarian publications [were] composed primarily of images and stories of victimized Salvadoran women and children.⁴⁷

In the attempt to understand the rationale behind such choice, she argues that:

U.S. activists portrayed Salvadorans as feminized civilian victims in need of rescue by the paternalistic United States to change public opinion regarding the Salvadoran Civil War and its refugees.⁴⁸

⁴⁷ Rachael De La Cruz, ‘No Asylum for the Innocent: Gendered Representations of Salvadoran Refugees in the 1980s’ (2017) 61 *American Behavioral Scientist* 1103, 1103–04.

⁴⁸ *ibid* 1104.

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She contends that U.S. activists felt compelled to perform such a *feminisation* and infantilization of ‘victims’, as the ‘single male victim’ would not have fit within the racially charged category of ‘the innocent’ in the West, where the “construction of innocence overlaps with Whiteness, which prevents [some] Black and Brown bodies from accessing this category,”⁴⁹ and consequently from accessing protection.⁵⁰ Individuals therefore had to be reframed to be fit for protection, and that process of reframing had to be both gendered and aged.⁵¹ In an attempt to appeal to notions of White American paternalism:

[As] fear of immigrants is most often directed towards immigrant men ... humanitarian publications avoided the image of the stigmatized *soltero* when raising awareness about the plight of Salvadoran refugees [and] instead ... focused on the stories of women and children.⁵²

What De La Cruz identifies in the context of Salvadoran migration to the U.S. in the 1980’s is also applicable to the 2010s migration context in Europe, both with respect to the existence, or creation, of a generalised fear of the single man, their black or brown body, and assumptions around their sexuality, as well as with

⁴⁹ *ibid* 1105.

⁵⁰ See, inter alia, Susan Sontag, *Regarding the Pain of Others* (Penguin 2004); Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2006); Judith Butler, *Frames of War: When is Life Grievable?* (Verso 2009); Susie Linfield, *The Cruel Radiance: The Cruel Radiance Photography and Political Violence* (University of Chicago Press 2010).

⁵¹ Dianne Otto criticised the instrumentalisation of Afghan women to justify military intervention, using the dichotomy ‘Afghan women to be rescued’ v. ‘Taliban forced (Muslim men) to be fought’. See Dianne Otto, ‘Remapping Crisis Through a Feminist Lens’ (2011) 5 University of Melbourne Law School Research Series.

⁵² De La Cruz (n 47) 1106.

respect to the use of certain images by activists and NGOs.⁵³ Just as scholars have criticised the (strategic) use of stereotyped narratives and images of malnourished women and children within the development cooperation sector,⁵⁴ in the trafficking field it has certainly been more *impactful* to present images of traumatised women and girls to shake the public's conscience. While surely “genuinely and altruistically committed to their values and the core principle of humanity,”⁵⁵ international and non-governmental organisations alike have ‘hyped’ around human trafficking and have been “largely able to define and give meaning to the crisis event, decide on policy and its effects and allocate resources,”⁵⁶ and have done so in a highly gendered way. In a vicious cycle, then, the heightened attention to the female body in the anti-trafficking discourse led to the under-identification of male ‘victims’, which in turn led to the underrating of the existence of trafficked males, and to the justification for the need of increased actions focussed on tackling the trafficking of women and girls.

⁵³ See inter alia Denis Kennedy, ‘Selling the Distant Other: Humanitarianism and Imagery—Ethical Dilemmas of Humanitarian Action’ (*The Journal of Humanitarian Assistance*, 28 February 2009) <<https://sites.tufts.edu/jha/archives/411>> accessed 10 January 2021; Encarnación Gutiérrez Rodríguez, ‘The Coloniality of Migration and the “Refugee Crisis”’: On the Asylum-Migration Nexus, the Transatlantic White European Settler Colonialism-Migration and Racial Capitalism’ (2018) 34 *Canada’s Journal on Refugees*; Sylwia Miazga, ‘Stereotypes of Refugees as Presented in the Media and the Reality of Problems Linked with Cultural Adaptation and Social Integration of the Immigrant Children’ (2018) *Special Issue Social Communication* 30; Lesley Pruitt and others, ‘Gender and Age in the Construction of Male Youth in the European Migration “Crisis”’ (2018) 43 *Signs: Journal of Women in Culture and Society* 687; Mara Mattoscio and Megan C MacDonald, ‘Gender, Migration, and the Media’ (2018) 18 *Feminist Media Studies* 1117.

⁵⁴ Dorothea Hilhorst, ‘Classical Humanitarianism and Resilience Humanitarianism: Making Sense of Two Brands of Humanitarian Action’ (2018) 3 *Journal of International Humanitarian Action*.

⁵⁵ *ibid* 3.

⁵⁶ *ibid*.

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Yet, this is not the only element that has prevented stakeholders from – or that stakeholders have consciously used to avoid – focussing on trafficked males. Indeed, as gender and international relations historian Emily Rosenberg argued, the gendered rescue discourse comes from two imaginaries, one based on “nationalism, maternalist assumptions, claims of Western cultural superiority, and masculine display”⁵⁷ – and the other from international women’s networks dedicated to “human welfare and empowerment.”⁵⁸ Flowing from the former, as stressed by Carpenter, the image of innocent civilians in need of protection is a gendered construction associated with womanhood and childhood.⁵⁹ In her work on immigration and the politics of humanitarianism in France, tracing the history of humanitarianism since the 1980s, Ticktin further noted that only the ‘passive’ and ‘suffering’ victim is ultimately permitted to remain in the country in the name of a moral imperative rather than on the basis of (existing) political rights.⁶⁰ Morality becomes significant when it is linked to victimhood, and it becomes even more significant when it deprives rights of their universal applicability and of their justiciability, both narratively and in practice. When the morality paradigm becomes dominant over the political rights paradigm, as it entails a subjective dimension that is, by nature, dependent on the subject’s perception, protection and

⁵⁷ Emily S Rosenberg, ‘Rescuing Women and Children’ (2002) 89 *The Journal of American History* 456, 465.

⁵⁸ *ibid.*

⁵⁹ Charli R Carpenter, *‘Innocent Women and Children’: Gender, Norms and the Protection of Civilians* (Routledge 2006).

⁶⁰ Miriam Ticktin, *Casualties of Care: Immigration and the Politics of Humanitarianism in France* (California University Press 2011).

inclusion become not only discretionary, but also perceived as concessions,⁶¹ rather than obligations flowing from applicable law.⁶²

The tension between the legitimacy of the suffering body and the illegitimacy of the racialised body, which Fassin named the ‘biopolitics of otherness’,⁶³ is precisely one of the consequences of the morality discourse, which has excluded certain categories from accessing the sphere of the ‘protectable’. The progressive reduction, based on humanitarian or moralistic dilution of migrants’ political entities, of the migration discourse to a dichotomy opposing ‘unwanted’ and ‘rescuable’ bodies, has contributed to the de-humanisation of the individual’s experience. It has also contributed to a lack of engagement with structural factors and systems that allow for the traumatising and victimisation of individuals. The construction of victimhood as exceptional has side-lined reflections on the banality of exploitation, with States that have attempted – and partially succeeded – to shift the focus from their own (in)actions to the actions of individual evils, such as traffickers, and to link issues of exploitation and protection to a paradigm of exceptionalism. However, as noted by Hilhorst:

[...] crises are not self-evident. There are always multiple ways in which crises can be understood and acted upon. This means that humanitarian crises

⁶¹ Susan Bibler Coutin, ‘The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence’ (2001) 26 *Law & Social Inquiry* 63.

⁶² Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (OUP Oxford 2012); Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).

⁶³ Didier Fassin, ‘The Biopolitics of Otherness: Undocumented Foreigners and Racial Discrimination in French Public Debate’ (2001) 17 *Anthropology Today* 3.

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attain their specific realities through the language and practices in which actors negotiate the meaning of crisis.⁶⁴

Although a separation between crisis and normality is entrenched in both legal and cultural norms around the world, humanitarian aid inevitably belongs to the sphere of crisis and exceptionality, and is therefore characterised by a tendency to seek boundaries between normality and exceptionalism. Exceptionalism is also important, “to alert political actors and the international community to take responsibility to protect and garner the resources required to provide protection.”⁶⁵ It has surely contributed to, and to a certain extent boosted, the adoption of new anti-trafficking legislation. However, similarly to the deployment of the narrative of slavery, the use of the exceptionalism paradigm has also reinforced bias and stereotypes, contributing to the persistence of an understanding of certain phenomena, including human trafficking and exploitation, as extra-ordinary, and at the same trivialising experiences of ‘lesser’ exploitation. It has also contributed to the grouping of certain categories of people, for example Nigerian women and girls in Italy or Albanian women in the United Kingdom, as groups with a monolithic experience, in which individual experiences cannot be distinct from the stereotyped experience without running the risk of being deemed untrustworthy or not credible, and in which individuals cannot express their own autonomy and agency. This reduces all experiences across the gender *spectrum* to profiles in which a person has to fit to be deemed ‘protectable’.

⁶⁴ Hilhorst (n 54) 2.

⁶⁵ *ibid* 8.

4.3 State-sponsored vulnerability and borders

Discussions around trafficking in human beings has often been centred on risk factors and so-called root causes. Over the last three decades, the United Nations and other international and regional human rights and anti-trafficking bodies have identified several root causes – gender inequality, gender-based violence, humanitarian crises, poverty – and linked them to the phenomenon of trafficking. It was only in recent years, and in a peripheral or subordinate manner, that reflections around border control have been explored. At the time of the evolution of the international anti-trafficking law, the experiences of trafficking were – at least considered to be – linked with involuntary movement of individuals between countries (or, to a certain extent, within countries), in stark contrast with the experiences of smuggling. Yet, the changing global context has progressively contradicted such idealised, and rigidly divided, construction of the phenomena. As Bhabha and Zard, among others, have highlighted, the increased availability of movement opportunities, coupled with increasing restrictive immigration policies adopted by destination countries, have contributed to a blurring of the boundaries between the smuggling and trafficking experiences.⁶⁶ Instead of being construed as opposites, they argue, smuggling and trafficking ought to be discussed as extremes of a *continuum*. While the discussions on root causes have often involved an evaluation of the contexts of the country of origin and of countries of transit, where

⁶⁶ Jacqueline Bhabha and Monette Zard, ‘Smuggled or Trafficked?’ [2006] Forced Migration Review 6.

applicable, the role of the country of destination's migration laws and policies has received marginal, yet critical, attention.

As noted by Thiemann:

[...] counter-trafficking policies can be particularly problematic, as they not only obscure structural issues but sometimes actively contribute to measures which render certain groups more vulnerable.⁶⁷

In the current political debate, it is often argued that increased border control, more restrictive visa regulations, and more extensive police investigations, will deter trafficking and help combating the phenomenon. This approach not only serves the purpose of legitimising government agencies' focus on border control and strict immigration regimes, but it also ignores that "traffickers merely exploit ... structural problem[s] such as limitations imposed by State authorities to the free, legal movement of people."⁶⁸

While risks of being trafficked and vulnerability to human trafficking are surely to be found in the individual's distinct identity and in their personal characteristics, structural vulnerabilities ought not to be ignored. The limitations of regular migration channels have undeniably contributed to the emergence and rise of human trafficking,⁶⁹ but so have laws and policies that tolerate exploitation and

⁶⁷ Inga Thiemann, 'Villains and Victims, but No Workers: Why a Prosecution-Focussed Approach to Human Trafficking Fails Trafficked Persons' (2016) 6 *Anti-Trafficking Review*.

⁶⁸ *ibid.*

⁶⁹ See inter alia Bhabha and Zard (n 66); Sharron A FitzGerald, 'Vulnerable Bodies, Vulnerable Borders: Extraterritoriality and Human Trafficking' (2012) 20 *Feminist Legal*

that prevent the regularisation of migration status. The combination of restrictive migration policies, combined with State's tolerance of 'legal black holes',⁷⁰ ought to be considered as tools of State-sponsored vulnerability, for which States not only should be held accountable, but that should also be(come) the focus of inquiry within the anti-trafficking movement. In order to better understand the thinking behind the notion of State-sponsored vulnerability, it is necessary to place the concept in context. It has been argued that States took for themselves the right to exclude aliens from their territories, although international law provides for some exceptions to the general rules with respect to migration and sovereignty.⁷¹ This power to include and exclude individuals has perpetuated and increased structural inequalities between States, preventing at the same time both wealth redistribution and what Achiume has conceptualised as, "migration as decolonisation."⁷² By disallowing the possibility to migrate regularly, States have created a set of – more or less physical – barriers to protect their territories, bringing forward both political and economic justifications to this exclusion. By curbing the possibilities of regular migration, States have imposed a state of *immobility* onto individuals. Not all individuals, however, have been equally impacted by these policies. While individuals from countries with a similar (or higher) level of development have remained free(er) to move through borders, individuals born in countries with a

Studies 227; UNHCR, 'Desperate Journeys: Refugees and Migrants Arriving in Europe and at Europe's Borders' (2019).

⁷⁰ Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29 *European Journal of International Law* 347. Borrowing the concept of 'legal black holes' from Itamar Mann's work on human rights violations at sea, as it applies squarely to this debate.

⁷¹ Joseph H Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *The Review of Politics* 251.

⁷² E Tendayi Achiume, 'Migration as Decolonization' (2019) 71 *Stanford Law Review* 66.

lower level of development – in particular if they are considered to be ‘unskilled’ – have seen their possibilities of mobility consistently reduced.

Without an accessible, regular pathway to mobility, individuals have increasingly had to rely on irregular mobility channels, regardless of their migration motive. Indeed, both ‘economic migrants’ and ‘protection seekers’ have been compelled to use irregular channels to leave their countries. As ‘economic migrants’ and ‘protection seekers’ found themselves sharing the same (irregular) routes, countries of destination became concerned with the myth of the ‘bogus asylum seeker’ – an individual that, despite having no well-founded fear of persecution in their country of origin, puts forward a claim for protection in order to obtain a permission, although temporary, to remain in a given country. This narrative has been heavily exploited both in Italy and in the United Kingdom, where the 21st century’s witch-hunt turned into a ‘bogus asylum seeker’-hunt. Delays in decision-making were attributed to the increasing number of migrants that would put forward unfounded claims. Even more restrictive immigration policies were presented as a response to the higher number of protection seekers, ignoring that (part of) the root causes of such irregular movements lied in the adoption of restrictive immigration policies in the first place. As the perception of this irregular movement was that of a crime being committed against the State, it is not surprising that parallels were drawn between such movements and the definition of smuggling. This perspective can only be understood if States’ priorities are also understood. Had the States’ priority been the protection of individuals fleeing persecution, or of individuals whose human rights had – or could have been – violated more broadly, a substantially different approach would have been adopted. Yet, being the priority

of States to protect the State itself, it is evident that the ‘solution’ to migration would have been a more restrictive approach. These restrictions at macro-level not only create communities of ‘outsiders’, for whom the inability to cross a border acts as an enhancer of vulnerability, but it also creates a hostile environment where exploitation at micro-level is made possible, or more likely to happen.

Just as migration from the outside has been substantially shrunk, opportunities for individuals that have irregularly crossed the border to regularise their migration status – or for individuals with precarious migration status to gain access to longer residence permits – have been made less and less accessible. States have advanced many arguments around their decisions not to provide for accessible regularisation mechanisms, despite the wealth of scholarship that recognise how “migrants may tolerate exploitative work in the context of longer-term goals, fear of job loss or limited alternative options – with or without deception.”⁷³ States have argued that regularisation would have represented a pull-factor for other individuals to migrate, or that it would have been a prize for individuals that had broken the law. Yet, the underlying rationale is once again to be found in the understanding of States’ priorities. On the one hand, the regularisation of irregular or precarious migrants already present within the country would benefit migrants and make them less likely to be exposed to exploitation, being able to enjoy (almost) full civil and

⁷³ Jon Davies, ‘From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry’ (2018) 19 *Criminology & Criminal Justice*, 9; See also, e.g., Gary Craig and others (eds), *Vulnerability, Exploitation and Migrants. Insecure Work in a Globalised Economy* (Palgrave Macmillan UK 2015); Francesco Carchedi, ‘Legge n. 199/2016. Riflessioni Valutative Sullo Stato Di Attuazione’ in *Agromafie e caporalato Quarto rapporto* (2018); Jeremy S Norwood, ‘Labor Exploitation of Migrant Farmworkers: Risks for Human Trafficking’ (2020) 6 *Journal of Human Trafficking* 209.

political rights, as well socio-economic rights. On the other hand, the continued presence of irregular workforce within a country benefits, in the short-term, the economy, by providing certain sectors with cheap, exploitable workers. In applying this reasoning, States consistently ignore the social, moral, and economic costs of irregularity – which also contributes to the problem of exploitation that States have increasingly been, at least in a declaratory manner, denouncing.⁷⁴ The only, rare exception to the general reluctance of States to regularise irregular or precarious migrants is linked to economic reasons (e.g., Italy’s regularisation campaign during the COVID-19 pandemic, framed as a mechanism to ‘free’ migrants from *caporalato*, while it was, in practice, a tool to secure workforce in the agricultural sector that would have otherwise collapsed).

The widespread acceptance, or tolerance, of exploitation – particularly of labour exploitation – is manifest when we look at the (in)action of the State, its reactive rather than proactive approach to tackle it. As noted by Davies, “routine, banal, everyday labour exploitation ... tends to become embedded and normalized as part of legitimate business and supply chain practices.”⁷⁵ It is only instances of extreme exploitation that act as a catalyst for States’ action, while exploitation that does not meet that threshold is not only tolerated, but also normalised. This is where one of the main concerns with respect to trafficking and its progressive conflation with slavery, as highlighted in Chapters I and II, can be found. As Chuang argued:

⁷⁴ See, inter alia, Howard (n 42); Albert Kraler, ‘Regularization of Irregular Migrants and Social Policies: Comparative Perspectives’ (2019) 17 *Journal of Immigrant & Refugee Studies* 94.

⁷⁵ Davies (n 73) 1.

[While] branding certain practices as ‘slavery’ has proved to be a powerful tool of condemnation ... characterizing the targeted practices as anything less emotive than ‘slavery’ deploys euphemisms that justify lesser responses—especially in a world where exploitation, particularly of migrants, has become normalized.⁷⁶

Many critical scholars, including Shamir, have criticised the human rights based approach in the trafficking field as, “inadequate for contending with the phenomenon’s underlying cause,”⁷⁷ arguing that it is an “individualistic, victim-centred approach that treats trafficking as an exceptional crime [but] fails to deal with the economic, social, and legal conditions that create workers’ vulnerability to exploitation.”⁷⁸ Shamir proposes a labour approach to trafficking, which is distinguished from the human rights approach as it targets different *spheres of power*, tending to be oriented towards the collective and to move beyond a focus on the most severe cases of exploitation and on post-exploitation support.⁷⁹ Indeed, the labour framework is conceived as:

[...] premised on the understanding that the trafficked individual is a worker who is exploited in a market context [and whose] vulnerability to exploitation and trafficking is determined by a combination of some or all of the following factors: belonging to an ethnic, racial, or national minority; undocumented status and the legal consequences of being undocumented in a particular system, including lack of access to the legal system; limited market mobility because of visa restrictions or contractual or social constraints, such as

⁷⁶ Janie Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) 108 *The American Journal of International Law* 609, 628–29.

⁷⁷ Shamir (n 34) 102.

⁷⁸ *ibid* 80.

⁷⁹ *ibid* 95.

binding arrangements or caste systems; debts to be repaid, including debts to the employer, a middleman, or a recruitment agency; employment in a labor sector characterized by de jure or de facto exclusion from protective employment and labor law; lack of alternative income sources because of welfare ineligibility or the absence of family or community resources; and isolation from one's social network.⁸⁰

By focussing on the structural nature of some of these factors, the labour approach highlights the power disparities within the system as the root of vulnerability to human trafficking and exploitation, going beyond the individual 'rescue' narrative. In fact, the labour approach that Shamir proposes is one that not only seeks to assist trafficked persons once they exit the exploitative environment, "but also to transform the structure of labor markets ... in [an] attempt to remedy the unequal power relations in labor sectors susceptible to trafficking."⁸¹

More recently, the human rights movement has shifted from a focus on civil and political rights to the inclusion of social and economic rights, and the labour movement has in time adopted the language of human rights in the attempt to find new sources of legitimacy. Although the developments of the human rights and the labour approach led to a partial overlapping, Shamir argues that the two approaches cannot simply supplement each other, but rather that the labour approach ought to be incorporated into the current anti-trafficking structure through "a retooling and renegotiation of some of the regime's basic tenets."⁸² When the focus is shifted from the individual trafficked person to the environment in which people are

⁸⁰ *ibid* 106.

⁸¹ *ibid* 81.

⁸² *ibid* 82.

trafficked and exploited, it ought to be recognised that “workers are not necessarily passive ‘victims’ of exploitation, but that they make decisions within limited options, which may involve tolerating some degree of mistreatment.”⁸³ The recognition of the ‘omnipresence of exploitation’ would mean, on the part of the State, a recognition of the failure of the economic system, or at least of its intrinsic colonialism and racism.

4.4 Trafficking and access to protection in light of migration control

The normalisation of exploitation has also had an impact on access to protection. Indeed, instances of exploitation that do not reach a certain threshold are often dismissed and/or misidentified as ‘mere’ exploitation, rather than as human trafficking, despite neither the Palermo Protocol nor the Council of Europe Anti-Trafficking Convention set a threshold for exploitation to constitute trafficking as such. The discretion available to state authorities, and potential for arbitrariness, in assessing situations of exploitation is even more evident when claims of labour exploitation, or forced criminality, are compared to claims of sexual exploitation. As the responsibility for the protection of trafficked persons has been placed on the State, as the main actor in human rights protection more broadly, it follows that the State is in the position to allow individuals to access protection, retaining the power to decide, within certain parameters, whether they fall inside or outside the definition of a ‘victim’. Although standards have been developed as explored in

⁸³ Davies (n 73) 13.

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Chapter II, States retain a wide margin of appreciation, whether that is substantial or procedural. In many of the instances highlighted in Chapter III, States have attempted to either circumvent or to bend the law, being more or less careful not to break it, in order to expand their policing powers and to exclude ‘unwanted’ individuals from protection mechanisms. The strategy of the State, conscious that illegal decisions cannot be taken, has been one that aimed at exploiting the questionability and the fragmentation of international and domestic standards, creating exceptions to the norm and progressively narrowing down the interpretation of certain eligibility requirements and/or certain concepts, including vulnerability, which are hardly definable as objective. The institutionalisation of anti-trafficking protection mechanisms, particularly where the system was built to cohabit with the asylum system, has provided the State with yet another tool that, while *de jure* aimed at protecting individuals from persecution, has been *de facto* used as a mechanism to scrutinise lived experiences, and to cherry-pick the ‘protectable’ individual. In a nutshell, anti-trafficking action has turned into a border control mechanism. Such a border control mechanism, which is presented as an advancement in the human rights protection of individuals and is masked as such, allows States to pay lip service to international human rights bodies and institutions, while it really has served to expand and enhance the State’s policing powers.

As Koskenniemi aptly points out, “once one knows which institution will deal with an issue, one already knows how it will be disposed of.”⁸⁴ Immigration

⁸⁴ Martti Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70 *The Modern Law Review* 1, 23.

decisions, especially first instance decisions, tend to be taken by States in a way that is positive (protective) only when there are absolutely no grounds to use to reject it, rather than being taken in a way that is negative only where there are absolutely no grounds to accept it. There is, in other words, a systematic attempt to exclude, rather than an honest attempt to include individuals who seek protection. Conscious that protection in a so-called country of destination ought to be the *extrema ratio* when there is a real fear of persecution and no other protection mechanisms exist in the country of origin, protection needs ought nonetheless to be evaluated transparently and in light of the purpose of the sources of international (or regional) law that established them. When the purpose is protection, an individual ought to receive protection not so much as a ‘gift’ or as a matter of worthiness, but rather as a recognition and as a matter of eligibility.

The narrative that has been deployed in the last decade towards migrants and asylum seekers in Europe has inevitably influenced the perception of the population, as well as of decision-making bodies. The images that have been presented to describe the migration ‘crisis’ have consistently used pictures of able-bodied black men, particularly when discussing the negative aspects of the ‘crisis’, while pictures of women and children have been used to praise the humanitarian action of non-governmental and international organisations, as well as of States. This has created a double effect. On the one hand, it has minimised/relegated the migratory experiences of females – whose experiences in Italy, for example, have all been conflated with the phenomenon of trafficking, ignoring other forms of persecution linked to systemic gender inequality and discrimination. On the other hand, it has exasperated the image of the ‘economic male migrant’ attempting to

‘exploit the protection system’, while in reality the only exploitation had likely happened on that person’s body. Just like “the possibility of a women simultaneously being a victim of trafficking and an agent seeking economic or social betterment is ignored,”⁸⁵ the possibility of a man simultaneously being an agent seeking economic or social betterment and trafficked is ignored. The construction of the notion of the foreign man as inherently threatening has been analysed in the fields of criminology, hate studies, and international relations.⁸⁶ In the context of migration control, some scholars have noted that, through a discursive practice, “the foreign man is increasingly being formed as a ‘threat’ through the ever-expanding process of ‘securitisation’.”⁸⁷ In addition:

[...] current anti-trafficking regimes embody and restate xenophobic reactions directed against illegal migrant men, while often disguising the role domestic actors have in trafficking.⁸⁸

⁸⁵ Vijayarasa (n 15) 8.

⁸⁶ See inter alia Gwendolyn Mink, ‘The Lady and the Tramp: Gender, Race, and the Origins of the Amer-Ican Welfare State’ in *Women, the state, and welfare* (University of Wisconsin Press 1990); David Cole, ‘The New Know-Nothingism: Five Myths about Immigration’ [1994] *The Nation* 155; Frank Dikötter, *Imperfect Conceptions: Medical Knowledge, Birth Defects, and Eugenics in China* (Columbia University Press 1998); Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Harvard University Press 1999); Desmond King, *In The Name of Liberalism: Illiberal Social Policy in the USA and Britain* (Oxford University Press 1999); Randall Hansen and Desmond King, ‘Eugenic Ideas, Political Interests, and Policy Variance: Immigration and Sterilization Policy in Britain and the U.S.’ (2001) 53 *World Politics* 237; David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (The New Press 2003); Claudia Aradau, ‘The Perverse Politics of Four-Letter Words: Risk and Pity in the Securitisation of Human Trafficking’ (2004) 33 *Millennium: Journal of International Studies* 2, 251; Kitty Calavita, ‘Immigration, Social Control, and Punishment in the Industrial Era’ in *Race, gender, & punishment: From colonialism to the War on Terror* (Rutgers University Press 2007).

⁸⁷ Steele (n 16) 36; citing Ole Wæver, ‘Aberystwyth, Paris, Copenhagen: New “Schools” in Security Theory and Their Origins between Core and Periphery’ (Montreal, 2004).

⁸⁸ Steele (n 16) 34.

Chapter IV

The stereotype of the foreign – often non-white – man, is represented as “beyond local and state control and therefore a national security threat.”⁸⁹ The ‘bogus asylum seeker’, the ‘untrustworthy claimant’, and the ‘economic migrant’,⁹⁰ are all constructions built with and through a racialised and a gendered dimension,⁹¹ which is detrimental across the gender *spectrum*. For example, the EU and the Italian policy of targeting Nigerian women as ‘potential victims of trafficking’ for sexual exploitation – overlooking possible other forms of exploitation as also stressed by Palumbo⁹² – has informed both asylum procedures, such as the referral system, and advocacy on human trafficking. It has reduced many women to “suffering bodies in need of protection by the law and the State,”⁹³ thus promoting racialised and gendered interpretations of migrant women's vulnerability in the attempt to regulate the mobility of the target population both domestically and internationally.⁹⁴

4.5 Concluding remarks

Chapter IV shed a light on how the anti-trafficking system has been built around the idea of an idealised ‘victim’, which has been reinforced by the dominant

⁸⁹ Jo Goodey, ‘Sex Trafficking in Women from Central and East European Countries: Promoting a “Victim-Centred” and “Woman-Centred” Approach to Criminal Justice Intervention’ (2004) 76 *Feminist Review* 26.

⁹⁰ Melanie Griffiths, “‘Here, Man Is Nothing!’: Gender and Policy in an Asylum Context” (2015) 18 *Men and Masculinities* 468.

⁹¹ Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glass House Press 2005).

⁹² Letizia Palumbo, ‘The Need for a Gendered Approach to Exploitation and Trafficking’ (*OpenDemocracy*, 2015).

⁹³ FitzGerald, ‘Biopolitics and the regulation of vulnerability’ (n 32) 278.

⁹⁴ *ibid* 279.

Chapter IV

narrative in the humanitarian discourse. This image, although flexible and subject to changes, has been construed both through demographics, such as age and sex, and behaviours, such as passivity and innocence. I argue that the reduction of gender to sex, or conflation of the two, has allowed for the reduction of more complex power dynamics behind trafficking. When gender is made invisible with respect to men, or only to hegemonic masculinity, trafficked males are subjected to a process of de-victimisation, as victimisation is deemed to be incompatible with (hegemonic) masculinity. I argue that the current system is particularly punitive towards adult men, whose masculinity is perceived to be challenging the masculinity of the State as an entity, and whose vulnerability and victimhood are rarely acknowledged.

Engaging with reflections around risk factors and root causes of trafficking, Chapter IV called for a shift of focus in anti-trafficking action from the actions of individuals to the actions of the State. I introduced the concept of State-sponsored vulnerability, exploring the role of restrictive immigration policies and laws, on the one hand, and of the normalisation of exploitation through the exceptionalisation of trafficking and the tolerance towards exploitative situations, on the other hand, in the production, or enhancement of vulnerability to exploitation. The concept of State-sponsored vulnerability is also useful in explaining both why anti-trafficking actions have been unsuccessful, if not detrimental, to the protection of trafficked persons, and how for a meaningful change to happen, States would need to shift their attention to their own behaviour.

Chapter IV

Chapter IV further unpacked the role of anti-trafficking action in practice as a mechanism of border control and of exclusion of ‘unwanted’ individuals from the protection of the State. I argue that the institutionalisation of anti-trafficking protection processes, particularly where the system was built to cohabit with the asylum system, has provided the State with yet another tool that, while *de jure* aimed at protecting individuals from persecution, has *de facto* been used as a mechanism to scrutinise lived experiences, and to cherry-pick the ‘protectable’ individual. In this context, gender is once again operationalised as an exclusion mechanism, promoting racialised and gendered interpretations of women and men’s vulnerability in the attempt to regulate the mobility the migrant population, both domestically and internationally. Alongside, and arguably as a product of, a restrictive understanding of gender, protection as increasingly been linked with the concept of vulnerability – which will be discussed in Chapter V. Although vulnerability has been presented as a tool of inclusion, I argue that it has been used as a tool of exclusion, aimed at restricting access to protection to those individuals deemed to be ‘protectable’.

Chapter V – Rethinking vulnerability as a tool of inclusion: Moving away from a gender-biased understanding of the concept

Chapter V explores the history of the concept of vulnerability, its interactions with gender and victimhood, and the selective, albeit extensive use of the concept by States and stakeholders in the protection system. Despite having a relatively long history in the fields of sociology and psychology, vulnerability as a legal concept has been deployed and heavily relied upon in the European context only in more recent times. It is argued that, although vulnerability has been presented as a tool of inclusion, it has been used as a tool of exclusion aimed at restricting access to protection to those individuals deemed to be ‘protectable’. The Chapter further provides a reconceptualization of the notion of vulnerability that, alongside – and arguably as a product of – a particular, restrictive understanding of gender, has increasingly been relied upon in determining whether an individual will have access to systems of protection.

5.1 Vulnerability, agency and victimhood: The (in)visibility of gender

The concept of vulnerability has been at the centre of recent debates around and beyond immigration law and policy. The meaning of the concept is complex and contested, and it is used in a range of fields of knowledge and practice such as

medical and health sciences, sociology, economics, engineering and psychology.¹ In each of these fields, it has been and still is defined, measured, and assessed in different ways and through different methods.² When discussing and theorising vulnerability in the field of legal studies and migration, some core questions ought to be addressed: What is vulnerability? Who is vulnerable? To whom? Who has responsibility to protect? The answers to these questions are not set and can lead to substantially different approaches to the concept, its meaning and the consequent implementation of policies targeting vulnerability. In fact, responses in literature as to what vulnerability is, tend to reflect a dichotomy which sees the concept being conceived either as an ontological condition of human beings,³ or as a particular condition of *some* human beings. The dichotomy, which could be framed as ‘universal versus particular’ vulnerability, is an unresolved one. Martha Fineman, one of the most influential theorists of vulnerability, proposes an interesting approach, as she understands vulnerability as “not focused only on discrimination against defined groups, but concerned with privilege and favor conferred on limited

¹ See, inter alia, Martha Albertson Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1; Florencia Luna, ‘Elucidating the Concept of Vulnerability: Layers Not Labels’ (2009) 2 *International Journal of Feminist Approaches to Bioethics* 121 world; Catriona Mackenzie, ‘The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability’ [2014] *Vulnerability: new essays in ethics and feminist philosophy*.

² See, inter alia, Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11 *International Journal of Constitutional Law* 1056; Alexander Betts, ‘Towards a “Soft Law” Framework for the Protection of Vulnerable Irregular Migrants’ (2010) 22 *Int J Refugee Law* 209; Julie Lima de Pérez, ‘A Criminological Reading of the Concept of Vulnerability: A Case Study of Brazilian Trafficking Victims’ (2016) 25 *Social & Legal Studies* 23; Ingrid Nifosi-Sutton author, *The Protection of Vulnerable Groups under International Human Rights Law* (Routledge research in human rights law, Routledge, Taylor & Francis Group 2017); Erlend Paasche and others, ‘Vulnerable Here or There? Examining the Vulnerability of Victims of Human Trafficking before and after Return’ [2018] 1.

³ See Alasdair C MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Open Court Publishing 1999); Fineman (n 1).

segments of the population by the state and broader society through their institutions.”⁴ In doing so, she shifts the focus of inquiry to the ‘vulnerable subject’, addressing what she describes as the unrealistic myths of autonomy and independency of liberal theory. Fineman argues that the vulnerable subject shall be placed at the centre of social policy in order to address inequalities arising from social and structural exclusion. Indeed, even if she sustains that vulnerability should initially “be understood as arising from our embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune,”⁵ she does not ignore that:

[...] because we are positioned differently within a web of economic and institutional relationships, our vulnerabilities range in magnitude and potential at the individual level.⁶

When vulnerability is understood as a relational concept, then it needs to be assessed, “by placing [the individual subject] in social context.”⁷ Here, it seems that an opportunity arises for compatibility with that literature that understands vulnerability as particular, to the point that Fineman herself argues that:

[Although] undeniably universal, human vulnerability is also particular: it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command.⁸

⁴ Fineman (n 1) 1.

⁵ *ibid* 9.

⁶ *ibid* 10.

⁷ Fineman (n 1); Luna (n 1).

⁸ Fineman (n 1) 10.

Feminist legal theorists have been among the pioneers of the analysis of vulnerability (and dependency), highlighting in particular its normative significance.⁹ The appropriation of the vulnerability discourse by feminist theorists, however, has for a long time side-lined discourses on not only multiple, but also and foremost vulnerable masculinities. As Dowd has critically convened, “feminist theory has examined men, patriarchy, and masculine characteristics predominantly as sources of power, domination, inequality, and subordination,”¹⁰ for a long time ignoring that there are also complex relationships *between* men, which are not to be presumed an undifferentiated or universal group. Such group, Dowd argued, shall be addressed through intersectionality and anti-essentialism:

[...] just as intersectionality and anti-essentialism in analysis of women revealed not only the differences in positions and circumstances and issues among women but also exposed the subordination of some women by others.¹¹

In addition, since vulnerability ought to be understood as relational not only with respect to subjects but also with respect to contexts, geographical research has engaged with the interaction of gender, race and mobility in relation to, among others, securitisation, the politics of migration and citizenship. However, it has been noted that, “a less frequent conversation ... is how discourses of sexuality, gender

⁹ Robert E Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (University of Chicago Press 1985); Virginia Held, ‘Non-Contractual Society: A Feminist View’ (1987) 17 *Canadian Journal of Philosophy* 111; Eva Feder Kittay, *Love’s Labor: Essays on Women, Equality, and Dependency* (Routledge 1999); MacIntyre (n 3).

¹⁰ Nancy E Dowd, ‘Masculinities and Feminist Legal Theory’ (2008) 23 *Wisconsin Journal of Law, Gender & Society* 201, 201.

¹¹ *ibid* 205.

and vulnerability interact with neoliberal systems of border and immigration control.”¹² This is particularly relevant as vulnerability has progressively become of standard use in the discourse around international protection and immigration in Europe, at least in law, policy, and courtrooms.

On the one hand, the European Union’s asylum legislation has recognised that a number of categories of asylum seekers require special procedures and protection given their particular vulnerability, including:

[...] minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, *victims of human trafficking*, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.¹³

On the other hand, the European Court of Human Rights (ECtHR) has applied the language of vulnerability in cases closely linked with asylum and immigration. Interestingly, the Court has done so in two different ways, a specific and a broad one. In *O.M. v Hungary*, the Court agreed that the applicant was a “member of a vulnerable group by virtue of belonging to a sexual minority in Iran,”¹⁴ therefore understanding a specific characteristic of the individuals as the *source* of vulnerability. In *M.S.S v Belgium and Greece*, the Court found the applicant to be

¹² Sharron A FitzGerald, ‘Vulnerable Geographies: Human Trafficking, Immigration and Border Control in the UK and Beyond’ (2016) 23 *Gender, Place & Culture* 181, 182.

¹³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (European Union 2013) Article 22 (emphasis added).

¹⁴ *OM v Hungary* No. 9912/15, para 53 (European Court of Human Rights 5 July 2016).

vulnerable on the basis of his belonging to the category of asylum seekers, a broad and heterogeneous group, which was nonetheless found to be “a particularly underprivileged and vulnerable population group in need of special protection.”¹⁵ Even if Peroni and Timmer argued that the emergence of the concept of vulnerability in the ECtHR case-law is a positive development, as it “allows the Court to address different aspects of inequality in a more substantive manner,”¹⁶ the concern that, “the concept ... risks sustaining the very exclusion and inequality it aims to redress”¹⁷ is not absent in their analysis. They report that, when asked about the reconciliation between the universality and particularity of vulnerability in the ECtHR reasoning, a Strasbourg judge replied that “[a]ll applicants are vulnerable, but some are more vulnerable than others,”¹⁸ a response of Orwellian memory which highlights the tensions, but also the merging potential, of the above-mentioned concepts of universal and particular vulnerability.

Although an in-depth analysis of the two approaches adopted by the Court extends beyond the scope of this research, the acknowledgement of this development is essential in a broader assessment of the use of the concept of vulnerability. Indeed, it is indicative of the inconsistency with which the concept has been applied, an inconsistency which is mostly due to the fact that vulnerability as a concept is grossly under-theorised, and therefore ambiguous. It is also indicative of the increasing reliance by the ECtHR on the concept of vulnerability

¹⁵ *MSS v Belgium and Greece* No. 30696/09, para 251 (European Court of Human Rights 21 January 2011).

¹⁶ Peroni and Timmer (n 2) 1057.

¹⁷ *ibid.*

¹⁸ *ibid* 1060–61.

to decide to which extent protection should be afforded.¹⁹ As Celik noted, while vulnerability is used in the international human rights discourse to emphasise particular disadvantages of specific groups generally regarded as needing particular or special support, there is no single definition of the concept nor of the criteria to be used to identify a group or person as vulnerable.²⁰ The language used in the law, in policy, and in court converges towards a common narrative and construction of the vulnerable subject, particularly with respect to its use in the field of asylum and immigration, which is typically associated with victimhood, dependency, or deprivation. In contrast with Fineman's idea of 'vulnerable subject', the vulnerable subject of the State and of courts is not the inherently vulnerable human, but rather the member of a particular group. The choice of judges and policy makers of adopting a vulnerability approach based on discrete categories has been hardly criticised within and beyond the legal sector. In discussing the construct of vulnerable populations and vulnerable geographies, Philo argued that:

One problem with [such] a construct ... is that it potentially closes the focus of attention around those peoples and places reckoned to *be* vulnerable. It is

¹⁹ See, e.g., Ciara Smyth, 'The Jurisprudence of the European Court of Human Rights Relevant to Child Migrants' in Jacqueline Bhabha and others (eds), *Research Handbook on Child Migration* (Edward Elgar Publishing 2018) 143. Smyth criticises, from a child-rights perspective, the vulnerability assessment conducted by the ECtHR in the case of *Tarakhel v Switzerland*, suggesting that the Court could have come to the same conclusion (namely that reception conditions may reach a violation of Article 3 ECHR where they are not adapted to the special needs of the asylum seeker child) through the application of relevant human rights norms, such as those contained in the Convention on the Rights of the Child (CRC). In particular, she argues that, by adopting a vulnerability-centred focus, the Court created a situation where the child does not receive protection on account of the rights they should be afforded under child-specific international human rights law, but rather as a result of their inherent vulnerability. This focus, she argues, may become critical if the Court was called upon to assess, e.g., the case of 'an older unaccompanied minor who rationally navigates States' border controls to get to his/her country of choice'.

²⁰ Elif Celik, 'The Role of CRPD in Rethinking the Subject of Human Rights' (2017) 21 *The International Journal of Human Rights* 933, 943.

something about them, about their intrinsic characteristics or properties There is a danger that our eyes are drawn away from the larger context, the situation, the chains of influence, within which their vulnerability is *created*, we might even say produced, maybe perpetuated.²¹

The argument is reiterated, and strengthened with a particularisation with respect to exploitation and trafficking, by Palumbo, who argues that:

[...] the categorisation of vulnerable people into discrete groups overlooks the complex interaction of different factors in contemporary forms of exploitation, such as economic, legal, social, gendered and racial dynamics, which contribute to render diverse people vulnerable to trafficking and exploitation.²²

Indeed, a number of crucial questions derive from the adoption of this specific vulnerability approach, not only on the most basic question of what vulnerability means, but also and foremost on questions regarding who is considered vulnerable, to what and to whom, and who has the onus and the responsibility to decide who falls in or out of the vulnerable *group*. As noted by Fineman, the “most insidious effect [of the vulnerable group approach is that] those who stand outside of the constructed vulnerability subpopulations are thus fabricated as invulnerable.”²³

²¹ Chris Philo, ‘The Geographies that Wound’ (2005) 11 Popul Space Place 441, 443 (emphasis added).

²² Letizia Palumbo, ‘The Need for a Gendered Approach to Exploitation and Trafficking’ (*OpenDemocracy*, 2015).

²³ Martha Albertson Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013) 16.

In addressing the issue of groups, and more specifically who falls in and out of the same and how those who are part of the group engage with each other taking into account their similarities but also and foremost in their differences, Cunniff Gibson noted that group-based approaches to vulnerability create a misleading presumption of homogeneity, which “masks significant differences among individuals.”²⁴ There is also, as noted by Griffiths:

[...] a tendency for migration scholars either to side-line men or to present them as oppressors, fanatics, or criminals [and] there is a paucity of research challenging such portrayals or acknowledging other, sometimes complex or contradictory aspects of male migrants’ identities and lives.²⁵

This tendency is part of the broader issue of misidentification, or non-identification of ‘potential victims of trafficking’ among the ‘non-ideal victims’, falling into:

[...] the known patriarchal trap that portrays women as helpless and passive victims who need to be rescued by others, and men as strong and active agents who can survive on their own.²⁶

Nearly all datasets related to ‘victims of trafficking’ affirm that women constitute the majority of trafficked persons, and that sexual exploitation is the most common type of exploitation in trafficking cases. However, “the attempts to quantify the extent of trafficking ... rely on the minority of observable cases detected by law

²⁴ Erinn Cunniff Gilson, ‘Vulnerability and Victimization: Rethinking Key Concepts in Feminist Discourses on Sexual Violence’ (2016) 42 *Signs: Journal of Women in Culture and Society* 71, 74.

²⁵ Melanie Griffiths, “‘Here, Man Is Nothing!’: Gender and Policy in an Asylum Context’ (2015) 18 *Men and Masculinities* 468, 469.

²⁶ Daphna Hacker and others, ‘Ungendering and Regendering Shelters for Survivors of Human Trafficking’ (2015) 3 *Social Inclusion* 35, 39.

enforcement [and] likely suffer from severe selection biases.”²⁷ Similarly, the obtainment of a legal status as a ‘victim of trafficking’ seems to depend on a wide variety of factors, among which gender. Indeed:

[The] traditional narrative posits that women and girls are more vulnerable to human trafficking and thus are in greater need of legal protection, whereas males, conversely, are resistant to human trafficking and thus less in need of legal protection.²⁸

Trafficking in human beings appears to be situated:

[In] a territory that’s profoundly gendered and aged because adult men are regarded as almost by definition authors of their own destinies, whereas women and children’s grip on their own wills is understood to be already fragile and tenuous.²⁹

This clearly influences the individual claim’s assessment, because the ideal ‘victim’ is operationalised through demographics such as sex, age, and perceived culpability,³⁰ to the extent to which only a narrowly defined ‘victim’ – which is

²⁷ Michael Wilson and Erin O’Brien, ‘Constructing the Ideal Victim in the United States of America’s Annual Trafficking in Persons Reports’ (2016) 65 *Crime, Law & Social Change* 29, 33.

²⁸ Samuel Vincent Jones, ‘The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking’ (2010) 4 *Utah Law Review* 1143, 1146.

²⁹ Julia O’Connell Davidson, ‘Gender, Migration, “Trafficking” and the Troublesome Relationship between Agency and Force’ (*Gender and Migration*, 2015) <<http://www.compas.ox.ac.uk/2015/gender-migration-trafficking-and-the-troublesome-relationship-between-agency-and-force/>> accessed 23 May 2019.

³⁰ Wilson and O’Brien (n 27) 30; See also Nils Christie, ‘The Ideal Victim’ in *From Crime Policy to Victim Policy* (Palgrave Macmillan, London 1986); Jayashri Srikantiah, ‘Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law’ (2007) 87 *Boston University Law Review* 157; Carolyn Hoyle and others, ‘Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality’ (2011) 20 *Social & Legal Studies* 313; Erin O’Brien, ‘Ideal Victims in Trafficking

young, female, passive and trafficked for the purpose of sexual exploitation – appears to be protected in practice by government interventions.³¹ Not only women do tend to be more easily identified as ‘victims of trafficking’ because in conceptual terms there is a rooted tendency to perceive women as ‘victims’ subject to external control, but also, as seeking help is perceived in conflict with masculine expectations,³² men are less likely to define themselves as ‘victims of trafficking’.³³

In challenging a number of misconceptions that dominate the mainstream trafficking discourse, namely that the trafficked person is coerced, uneducated, poor and female, Vijayarasa unpacks constructions of autonomy and victimhood, highlighting how “trafficking often begins with a non-coerced decision on the part of a voluntary migrant [and how] victimhood ... is one dimension of a multi-dimensional experience of migration and exploitation.”³⁴ The current international and national legal frameworks perpetuate this ‘special relationship’ between trafficking, women, and sexual exploitation.³⁵ Although the legal definition of trafficking in the Palermo Protocol and in the Council of Europe Anti-Trafficking

Awareness Campaigns’ in *Crime, Justice and Social Democracy* (Critical Criminological Perspectives, Palgrave Macmillan, London 2013).

³¹ Jane Scoular, ‘What’s Law Got To Do With It? How and Why Law Matters in the Regulation of Sex Work’ (2010) 37 *Journal of Law and Society* 12; See also Marie Segrave, ‘Order at the Border: The Repatriation of Victims of Trafficking’ (2009) 32 *Women’s Studies International Forum* 251.

³² Omar Yousaf and others, ‘An Investigation of Masculinity, Attitudes, Gender and Attitudes towards Psychological Help-Seeking’ (2014) 16 *Psychology of men and masculinity* 234.

³³ Alexis A Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (Praeger 2009).

³⁴ Ramona Vijayarasa, *Sex, Slavery and the Trafficked Woman* (Routledge 2016) 15.

³⁵ Vanessa Munro, ‘Exploring Exploitation: Trafficking in Sex, Work and Sex Work’ in M Della Giusta and Vanessa Munro (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Ashgate Publishers 2008).

Convention, as well as in the 1998 *Testo Unico sull'Immigrazione* and in the 2015 *Modern Slavery Act*, is gender-neutral – meaning that it is not explicitly exclusionary – their international and domestic implementation seems unlikely to equally protect trafficked male and females. Indeed, the implementation is shaped by the gendered text of the Palermo Protocol, which specifically addresses women and children, and the Council of Europe Anti-Trafficking Convention, which explicitly engages with gender, including in its Explanatory Report, with a focus on gender as being about discrimination against women and girls.³⁶ The implementation is gendered also because human trafficking is largely shaped, characterised and interpreted as a phenomenon which primarily affects women and girls for the purpose of sexual exploitation. The discourse around human trafficking has become at the same time a gendered and a racialized one, stereotyping women and men alike,³⁷ although with different aims and outcomes. Women, on the one hand, tend to be conceived, perceived and represented as ‘ideal victims’, deprived of agency and in need to be rescued. Men, on the other hand, tend to be conceived, perceived and represented as non-vulnerable, agents of their own migration trajectories, undeserving of protection, or even as national security threats. While surely any approach to human trafficking ought to be gender-sensitive, the thin line which separates sensitiveness and bias is one that has often times been crossed,

³⁶ See, for example, Council of Europe, ‘Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings’ (2005) paras 54, 104 and 212. In addition, the first evaluation round focussed on prevention of trafficking and on the need to adopt a comprehensive approach, with GRETA emphasising the need to take into account gender-specific types of exploitation, with a focus on the sexual exploitation of women and girls.

³⁷ Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glass House Press 2005) 120, 166.

particularly through the perpetuation of a narrative of ‘victims of trafficking’ as entirely passive objects, which not only lack rational agency, but which also need to be rescued. In such a narrative, States have set themselves up as protectors of the innocent, and in doing so they have managed to expand their policing powers, both the internal and the external ones.³⁸ Only when we understand vulnerability as a tool of exclusion – not in its very own nature, but rather in the way in which it has been used by States – we can see biases in its application, whether conscious or subconscious. In order to make the use of vulnerability equally and fairly across the gender *spectrum*, a gendered analysis of males is of utmost importance. This is where the literature on masculinities becomes particularly important, as it allows us to see the man as a gendered subject, and to draw on research on men and masculinities to understand the trafficked male and not to ignore his gendered dimensions, and the significance of such for law and practice on human trafficking.

5.2 Understanding vulnerability and victimhood through a masculinity lens

When masculinity is defined and understood as “the widespread social norms and expectations of what it means to be a man, or the multiple ways of ‘doing male’”,³⁹ men’s silence needs to be analysed within such boundaries. In particular, it has to be understood in the framework of hegemonic masculinity, whereby:

³⁸ Moshoula Desyllas, ‘A Critique of the Global Trafficking Discourse and U.S. Policy’ (2007) 34 *The Journal of Sociology & Social Welfare* 57.

³⁹ Brandon Hamber, ‘Masculinity and Transitional Justice: An Exploratory Essay’ (2007) 1 *International Journal of Transitional Justice* 375, 379.

[...] socially constructed ideas of what it means to be a ‘real’ man leave little scope for men to acknowledge and to talk about their own vulnerability, and in particular the vulnerability of their manhood.⁴⁰

Masculinity can be used to explore how these norms and expectations are operationalised, and it can be used to examine how they shape the experiences of trafficked men, their coping strategies and their protection needs. It can also contribute to the analysis of the use of ‘avoiding narratives’,⁴¹ which not only create silences within the data,⁴² but which also prevent decision makers and stakeholders to fully understand and engage with the gendered dimensions of the male subject.

A first aspect to take into account is how expectations around victimhood conflict with expectations flowing from masculinity. Acknowledging that, “the process of claiming a place in the juridical realm involves evoking compassion, being exceptional, and inhabiting the subject position of victim,”⁴³ and that “the claim to victimhood is ultimately not about the wretched position of actual victims but about moral purity,”⁴⁴ victimhood can therefore be understood as – at least partially – performative.⁴⁵ The expectations linked to victimhood, however, are

⁴⁰ Janine Natalya Clark, ‘Masculinity and Male Survivors of Wartime Sexual Violence: A Bosnian Case Study’ (2017) 17 *Conflict, Security & Development* 287, 13.

⁴¹ Teresa Puvimanasinghe and others, ‘Narrative and Silence: How Former Refugees Talk about Loss and Past Trauma’ (2015) 28 *Journal of Refugee Studies* 69, 76.

⁴² Clark (n 40) 2.

⁴³ Miriam Ticktin, ‘Policing and Humanitarianism in France: Immigration and the Turn to Law as State of Exception’ (2005) 7 *International Journal of Postcolonial Studies* 346, 366.

⁴⁴ Elissa Helms, *Innocence and Victimhood: Gender, Nation, and Women’s Activism in Postwar Bosnia-Herzegovina* (University of Wisconsin Press 2013) 11.

⁴⁵ A parallel can be drawn here between Butler’s theory of performativity as it relates to gender. Butler argued that gender is an act which emanates from, reinforces, and is reinforced by, societal norms and creates the illusion of binary sex. See, inter alia, Judith Butler, ‘Performative Acts and Gender Constitution: An Essay in Phenomenology and

both informed by the stereotype of the ‘ideal victim’ as well as in stark contrast with what is expected of ‘real men’, who are more likely to perform “their masculinity by shielding and remaining strongly in control of their emotions,”⁴⁶ so that the two performative elements remain divergent, rather than following a converging trajectory. Indeed, and “due to destructive stereotypes of femininity and masculinity, ... feminine attributes can be, and often are, conceived as weakness.”⁴⁷

Research on sexual violence against men highlight that:

[...] the male victim perceives an incompatibility with his masculinity and his victimization [and] he may also perceive his inability to protect himself and his broader community as a confidence-shattering personal failing.⁴⁸

The gap that is created by the clash of opposite expectations, which ought to be understood through a masculinity lens, is left unaddressed, and it often leads to the under-recognition of men’s vulnerability and of their trauma, and ultimately of their victimhood and protection needs. In anti-trafficking action, the onus of identification falls often times on the trafficked person, who should be able to self-identify and to prove the chain of events that led to their exploitation. Among the male cohort, the lack of self-identification and the extensive use of ‘avoiding narratives’ contribute to hindering the – already weak efforts of State authorities to

Feminist Theory’ (1988) 40 *Theatre Journal* 519; Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 2011).

⁴⁶ Clark (n 40) 15.

⁴⁷ Dustin A Lewis, ‘Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law’ (2009) 27 *Wisconsin International Law Journal*, 8.

⁴⁸ *ibid.*

perform a – timely and correct identification. This is, however, unsurprising.

According to Lewis:

[Underreporting] results from the shame, confusion, guilt, fear, and stigma that flow from imputing a ... feminine identity onto a man [and from] a tendency for men to associate their victimization as incompatible with their masculinity.⁴⁹

Underreporting may also be linked with a lack of, or a lack of awareness of available support services. As Seelinger and Freccero highlight in their study on ‘Accountability for Sexual Violence in Conflict and Post-Conflict Settings’, “even if [survivors] had wished to come forward, it is unclear whether any services or programs would have been available to support them during the conflict periods; this was especially true for male survivors.”⁵⁰

As Clark further emphasises, “men’s silence ... can be viewed as similarly strategic and linked to self-preservation,”⁵¹ and yet it conveys “a broad range of social meanings that ... can only be understood in its proper social context.”⁵² In her research in Bosnia-Herzegovina, Clark found striking that “the men ... offered few insights into their emotions and feelings [while] female interviewees were far more forthcoming in this regard [and] were emotionally demonstrative.”⁵³ She

⁴⁹ *ibid* 9; See also Kim Thuy Seelinger and Julie Freccero, ‘Accountability for Sexual Violence in Conflict and Post-Conflict Settings’ (2015) 29.

⁵⁰ Seelinger and Freccero (n 49) 28.

⁵¹ Clark (n 40) 13.

⁵² Marita Eastmond and Johanna Mannergren Selimovic, ‘Silence as Possibility in Postwar Everyday Life’ (2012) 6 *Int J Transit Justice* 502, 506.

⁵³ Clark (n 40) 14.

further notes that although the men she interviewed acknowledged the deep psychological imprints left by the crimes committed against them, “they also subscribed to the notion that, as men, they needed to be strong, to support their families and to move forward,” but that this avoidant coping “carries a greater risk of depression and mental health issues.”⁵⁴

According to a Women’s Refugee Commission’s study on sexual violence against men and boys *en route* to Italy, “a UN officer guesstimated that 90 percent of male refugees and migrants being hosted in the Italian reception system experienced sexual violence during their journey.”⁵⁵ The study also notes that, although men are generally trafficked within Libya for labour, and not for sexual purposes, “sexual violence and exploitation may be perpetrated within the context of labor trafficking.”⁵⁶ These experiences are rarely disclosed in the context of the asylum system, also because of a general lack of attention on the part of asylum authorities and Tribunals to issues of sexual abuse when the claimant is a man, and because of a general lack of specialised NGOs working with trafficked men. This raises two significant issues.

On the one hand, the under-recognition and the lack of disclosure of sexual violence against men precludes access to specific services, in particular

⁵⁴ *ibid* 18.

⁵⁵ Women’s Refugee Commission (WRC), “‘More Than One Million Pains’: Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy’ (March 2019) 14.

⁵⁶ *ibid* 28.

psychological and medical, from which men who have experienced sexual violence could benefit in light of the fact that:

[...] emotionally, male victims of sexual violence may suffer long-term trauma such as anxiety, depression, increased feelings of anger and vulnerability, loss of self-image, emotional distancing or desensitization, self-blame, and self-harming behaviours.⁵⁷

On the other hand, the lack of attention and awareness precludes asylum authorities and anti-trafficking competent authorities from evaluating asylum and trafficking claims on the basis of all the evidence, including reflections on risk on return and risk of discrimination and reprisals. Indeed:

[...] depending on the prevailing cultural norms, male victims of sexual violence ... may ... face isolation, abandonment by family members (including wife and children), shame, and stigmatization.⁵⁸

Even when sexual violence is not an element of a protection claim, trafficked men may experience emotional and physical violence if returned to their country of origin. In particular, they may experience rejection from their family members and from their community, as previous experiences of exploitation may contribute to feelings of shame and to social stigma.⁵⁹ While their return in a condition of poverty, and often times in debt bondage, could expose them to the risk of re-trafficking and reprisals from traffickers, it could also expose them to ostracism

⁵⁷ Lewis (n 47) 15–16.

⁵⁸ *ibid* 16.

⁵⁹ Jarrett Davis and others, ‘The Forgotten Cohort: An Exploration of Themes and Patterns Among Male Survivors of Sexual Exploitation & Trafficking’ (2016) 8.

from their community, as they would be perceived as ‘failed migrants’, and their manhood questioned.⁶⁰ The inability to provide for families and unaddressed consequences of traumatic exploitative experiences tend to contribute to the risk of falling into substance abuse,⁶¹ which is likely to increase marginalisation and discrimination.

A second parallel that can be drawn between the anti-trafficking field and research on sexual violence against men focussing on external perceptions and labelling of phenomena, rather than on the internal understanding of the same, revolves around reflections on gender and visibility. In her research on the International Criminal Tribunal for the Former Yugoslavia, Campbell, for example, notes the underrepresentation of cases where sexual violence against male ‘victims’ forms the sole basis of the charges. She further notes that, “in this gendered pattern of cases, women are visible victims of sexual violence, while men remain the invisible victim.”⁶² For example, Duško Tadić was found guilty of forcing a male detainee to perform oral sex on another detainee, but:

⁶⁰ Karen Carpio, ‘Coming Home Can Be Harder than Leaving: The Psychosocial Challenges of Being a Returnee’ (*On the Move*, 2017); See also International Organisation for Migration, ‘Reintegration: Effective Approaches’ (2015); International Organisation for Migration, ‘Towards an Integrated Approach to Reintegration in the Context of Return’ (2017).

⁶¹ Davis and others (n 59) 23.

⁶² Kirsten Campbell, ‘The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia’ (2007) 1 *Int J Transit Justice* 411, 427.

[...] neither the indictment nor the judgment acknowledges the sexual nature of the offences ... rather identif[ying] them variously as cruel treatment, an inhumane act, or inhuman act.⁶³

Similarly, Kapur and Muddell's work on sexual violence against men in transitional contexts emphasises how international tribunals as well as the International Criminal Court failed, with the notable exceptions of the Češić and the Ntaganda case:⁶⁴

[...] to explicitly recognize the sexual dimension of various forms of violence committed against men, instead opting to characterize such acts exclusively as torture or cruel or inhumane treatment.⁶⁵

In general, and despite a progressively gender-neutral language permitting prosecutions of sexual violence against males, international tribunals still tend to mis-label sexual violence against men as a form of physical, rather than sexual, violence. Once again, parallels can be drawn between the characterisation of sexual violence against men as physical violence, or as 'lesser' violence, and the characterisation of trafficking of men as mere exploitation, or as 'lesser' exploitation. As Lewis argued:

To provide men with enhanced protection against sexual violence in armed conflict, treaty drafters, jurists, prosecutors, and scholars ... should recognize how existing international law may reify and reinforce certain stereotypes and

⁶³ Amrita Kapur and Kelli Muddell, 'When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys in Transitional Contexts' (December 2016) 17.

⁶⁴ *Prosecutor v Ranko Češić* IT-95-10/1-S, trialchamber (11 March 2004); *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Bosco Ntaganda* ICC-01/04-02/06, trialchamber (8 July 2019).

⁶⁵ Kapur and Muddell (n 63) 2.

norms that may both fuel such violence in the first place and lead to its underreporting. As demonstrated previously, international instruments tend to conceptualize sexual violence as something perpetrated primarily against women and children. These conceptions flow from harmful stereotypes of femininity and masculinity and from pernicious cultural norms regarding sexuality.⁶⁶

The same holds true in the anti-trafficking field as well. In recent years, just as “sexual violence against men and boys is slowly becoming a part of the discussion about justice and accountability for crimes,”⁶⁷ trafficked men are slowly becoming a part of the discussion about the phenomenon, although not always in gendered terms. Indeed, when men are included in the anti-trafficking sphere, they are usually considered non-gendered subjects, and the evaluation of their claims rarely takes into account the impact of masculinities and of cultural norms and gender. As in other fields, men are the focus of research and practice “as a normative referent for behavior rather than as gendered human beings.”⁶⁸ Although vulnerability theory is increasingly understood as comprising social, legal and economic vulnerability,⁶⁹ its application in practice still fails to acknowledge the gendered dimension of vulnerability as it applies to men. Indeed, when men are considered as gendered subjects, their gender is associated with presumptions around hegemonic masculinity, save for those claims that include a sexual orientation component. Yet, hegemonic masculinity is a “specific form of masculinity in a given historical and

⁶⁶ Lewis (n 47) 48.

⁶⁷ Kapur and Muddell (n 63) 26.

⁶⁸ American Psychological Association, ‘APA Guidelines for Psychological Practice with Boys and Men’ (2018) 3.

⁶⁹ *Tribunale di Palmi, R.G.N.R.DDA 1171/2012*, 30 June 2014.

society-wide social setting,” and it “legitimises unequal gender relations [also] among masculinities,”⁷⁰ including with subordinate and marginalised masculinities. In this context, “men are ... not only harmed when their masculinity as gender identity is violated, they are also harmed by masculinity as imposed gender role.”⁷¹

5.3 Competitive vs inclusive vulnerability and victimhood theory

The recent academic and activist attention to men’s vulnerability and victimhood has been at times labelled as a process of ‘male competitive victimhood logic’, and deemed to be “enmeshed with a much broader conservative backlash against the rise of feminism.”⁷² Ullrich criticises what she dubs the ‘feminization theory’ because:

[...] the notion that male victims are wronged by [sexual and gender-based violence (SGBV)] because it ‘lowers’ their social status to that of a woman is problematic [as] not only ... it legitimizes men’s superior status in society, but also because it normalizes the rape of women.⁷³

Engaging with what she defines the ‘gender neutrality’ paradigm, defined as the representation in gender-neutral terms of sexual violence, she argues that, it is “not

⁷⁰ James W Messerschmidt, ‘The Salience of “Hegemonic Masculinity”’ (2019) 22 *Men and Masculinities* 85, 86.

⁷¹ Valerie Oosterveld, ‘Gender at the Intersection of International Refugee Law and International Criminal Law’ (2014) 12 *J Int Criminal Justice* 953, 127.

⁷² Leila Ullrich, “‘But What about Men?’” *Gender Disquiet in International Criminal Justice* [2019] *Theoretical Criminology*, 12–13.

⁷³ *ibid* 11.

good news for victims of SGBV [as] much sexual violence in conflict is barely intelligible and often invisible without a structural understanding of gender dynamics.”⁷⁴ Building on this latter critique, Ullrich argues that, rather than shying away from feminism, “[we should] double-down on feminism by rigorously applying an intersectional analysis of gendered, racial and class power relationships that does not reproduce patriarchal assumptions.”⁷⁵ Much of this reasoning and critique can be transposed into the anti-trafficking field. Vulnerability ought to be construed not as competitive, but rather as inclusive, meaning that gender shall be made visible across the *spectrum*, rather than eliminated from the discourse through the application of the ‘gender neutrality’ paradigm.

Far from suggesting a struggle between the sexes for the hegemony of victimhood and vulnerability, re-gendering anti-trafficking law and action precisely means moving away from patriarchal assumptions, acknowledging and understanding the intricated web of gendered elements within the trafficking process, as well as the gender-biases of competent authorities that perpetuate a binary and competitive victimhood ideology. This re-gendering process contributes to a revisitation of patriarchal discourses, which perpetuate a paradigm of ‘feminisation as weakness’, and which “are usually essentialist in the sense that they attribute ... fixed qualities on the basis of biological functions ... or on other “natural” or psychological characteristics.”⁷⁶ Asking the ‘man question’, therefore,

⁷⁴ *ibid* 14.

⁷⁵ *ibid* 15.

⁷⁶ Hilary Charlesworth, ‘Feminists Critiques of International Law and Their Critics’ (1995) 13 *Third World Legal Studies* 17, 9.

does not mean beginning a process of “removing any structural understanding of gender relationships.”⁷⁷ Rather, it recognises the importance of placing the peripheral subject in the foreground, instead of perpetuating universal assumptions about the dominant subject. This change is essential, “if any significant normative shifts or disruptions are to be brought about.”⁷⁸ Just as Sivakumaran transposes Kapur’s arguments in rape discourse,⁷⁹ where the ‘dominant’ subject is female, they can also be transposed in the trafficking discourse, where the same ‘dominant’ subject – according to the mainstream narrative – exists. This process is also of utmost importance in challenging paternalistic and male-centred discourses around gender as, in the words of international relations theorists Ann Sisson Runyan and V. Spike Peterson:

[...] contemporary power relations depend upon sustaining certain notions of masculinity and femininity, notions of what is expected in regard to men's and women's lives.⁸⁰

These patriarchal discourses, which are detrimental across the gender *spectrum*, construe “a ‘culturally sanctioned femininity’, rooted in a Victorian model of ‘proper womanhood’ which is based on – and suits – the white, heterosexual, and

⁷⁷ Ullrich (n 72) 15.

⁷⁸ Ratna Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 15 *Harvard Human Rights Journal* 1, 29.

⁷⁹ Sandesh Sivakumaran, ‘Male/Male Rape and the “Taint” of Homosexuality’ (2005) 27 *Human Rights Quarterly* 1274, 1279.

⁸⁰ Anne Sisson Runyan and V Spike Peterson, ‘The Radical Future of Realism: Feminist Subversions of IR Theory’ (1991) 16 *Alternatives: Global, Local, Political* 67, 87.

cis-gendered female subject.”⁸¹ They further presuppose “a specific ideal of womanhood that is de-racialized and correlates with idealizations around the vulnerability of especially white women.”⁸² When the notion of women is used as, “pinned down to the narrowly sexualized aspect of that category, as 'women' versus 'men' only,”⁸³ it only serves to reinforce patriarchal discourses, imposing a *prima facie* vulnerability onto female bodies, while at the same time imposing a *prima facie* state of invulnerability onto male bodies.

5.4 Concluding remarks

The international protection and the anti-trafficking systems have increasingly placed the concept of vulnerability at their core. Yet, the meaning of vulnerability is contested, and so are its implications in practice. The vulnerability discourse within academia has been pioneered by feminist legal theorists, who have for a long time side-lined reflections on multiple and vulnerable masculinities, ignoring relationships between men. While masculinity studies emerged in the 1980s, the heritage of the early construction of the vulnerability discourse remains. Responses in literature tend to reflect an unresolved dichotomy framed as ‘universal versus

⁸¹ Karen L Blair and Rhea Ashley Hoskin, ‘Experiences of Femme Identity: Coming out, Invisibility and Femmephobia’ (2014) 6 *Psychology and sexuality* 229.

⁸² Mengia Tschalaer, ‘Victimhood and Femininities in Black Lesbian Asylum Cases in Germany’ (no date) ahead-of-print *Journal of ethnic and migration studies* 1.

⁸³ Rey Chow, ‘Violence in the Other Country: China as Crisis, Spectacle, and Woman’ in Chandra Mohanty and others (eds), *Third World Women and the Politics of Feminism* (Indiana University Press 1991) 82.

particular' vulnerability, while States in the Council of Europe context - as well as the ECtHR - have increasingly relied on 'vulnerability by category'.

The absence of a legal definition of vulnerability, which results in an inconsistent use of the concept, has been shaped by cultural and social (mis)perceptions. The 'vulnerable subject' before the anti-trafficking and international protection systems has become associated with victimhood, dependency, or deprivation. In the creation of 'vulnerable groups', stereotypes around both female and male bodies shaped an *ideal* 'victim of trafficking', a profile that fits the dominant narrative and perpetuates the essentialisation of gender. It is only by understanding vulnerability as a tool of exclusion, rather than a tool of inclusion, that we can understand biases in its application.

In order to make use of the concept of vulnerability across the gender spectrum, in a way that is not essentialising nor perpetuating patriarchal narratives, a gendered analysis of 'the man' is crucial. Masculinity, understood as the way of 'being a man' or 'doing male',⁸⁴ can be used to explore how social norms and linked expectations impact and shape trafficked males' experiences, their coping strategies and their protection needs. As both victimhood and masculinity are performative, and the former conflicts with expectations flowing from the latter, the two performative elements do not follow a converging trajectory. As the onus of identification in the anti-trafficking system falls, in practice, on trafficked persons, the lack of self-identification and the extensive use of 'avoiding narratives'⁸⁵

⁸⁴ Hamber (n 39).

⁸⁵ Puvimanasinghe and others (n 41).

contribute to the lack of emergence of the phenomenon and the recognition of trafficked males' protection needs. Shame, guilt, confusion, fear and stigma are less intelligible when associated with the male body - both by the individual and by the (patriarchal) State authorities.

Although more evident in the context of sexual violence and sexual exploitation, the risk of trafficked males to be exposed to emotional and physical violence on return is significant also in other spheres of exploitation. Rejection from family members and from the community is common, as the manhood of 'failed migrants' is considered to be diminished. The return to the country of origin in a situation of debt bondage, or with unaddressed traumatic experiences, exposes individuals to the risk of re-trafficking and increases the risk of falling into substance abuse, which is in turn likely to increase marginalisation and vulnerability. Vulnerability ought to be construed as inclusive, rather than competitive, meaning that gender shall be made visible across the *spectrum*, rather than eliminated through 'neutralisation'.

Conclusion

The aim of the thesis is to critically evaluate how trafficked adult males are identified, recognised and protected, both within domestic anti-trafficking mechanisms and refugee status determination processes, focussing on Italy and the United Kingdom. The thesis examines the theoretical underpinnings, together with the practical implications, of the relationship between gender, victimhood and protection, through an analysis of how the interpretation and application of anti-trafficking and international protection laws, as well as migration control procedures, include (or exclude) trafficked adult males from protection. It focuses, in particular, on adult males who are non-nationals of the State where they find themselves. The study aimed at evaluating, *inter alia*, the obstacles that arise in recognising trafficking-related protection claims brought by adult males, and how constructions of vulnerability influence the protection determination process, or the trafficked person's identification process.

In order to respond to these significant research questions, I followed a four-step socio-legal methodology, which included a socio-legal analysis of primary sources, a literature review of secondary sources, a jurisprudential review of leading case-law pertinent to the research questions, and an analysis of the central case-studies underpinned by empirical evidence collected via qualitative, semi-structured and confidential interviews.

Conclusion

The anti-trafficking legal framework represents at the same time both a reversed exception and a coherent *continuum* of gendering legal processes. The stereotyping of females and males is both a result of the operationalisation of male-dominated structures of law, and a tool of exclusion and silencing of men and boys. Brining the silencing of male ‘victims’ in the anti-trafficking context under the spotlight is an attempt to dismantle the stereotype of the ‘ideal victim’, and to move away from gendered assumptions about both male and female ‘victims’.

Before analysing this silence, it is necessary to understand the context in which it was imposed. Chapter I, therefore, placed the research in context, from both an historical and a socio-legal perspective. It analysed the movement that led to the adoption of international legal instruments concerned with the abolition of the so-called ‘White Slave Traffic’, tracing the roots of the exclusion of men from the anti-trafficking discourse at the beginning of the XX century. Although the trafficking discourse has progressively been de-racialised and un-gendered in the text of international legal instruments, this has not alone been sufficient to shift the narrative of the phenomenon. Law and practice on human trafficking continue to be predominantly centred on sexual exploitation and framed as primarily affecting women and girls. The narrative built around the stereotypical *female* ‘victim’ has produced a rhetoric that has side-lined men and boys, as well as *masculine* females, placing emphasis on their agency and resilience and ignoring systemic factors that produce vulnerability across the gender *spectrum*.

The adoption of the Palermo Protocol and the Council of Europe Anti-Trafficking Convention, together with the progressive expansion of EU anti-

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trafficking law and the work of the International Labour Organisation on labour exploitation, have filled (one of) the legal gap(s) in anti-trafficking action. Building on the progressive de-racialisation and un-gendering of international law, States have increasingly adopted a comprehensive, and *de jure* inclusive, definition of trafficking in human beings. Chapter II analysed this progress, examining international, European and domestic law on trafficking in human beings, examining the forms of protection available to trafficked persons and the guarantees against non-refoulement. It highlighted the engagement of international organisations with the protection of trafficked persons, and the processes through which sovereign States have given effect to international legal obligations, as well as EU law, in their domestic legal systems.

What emerged from the analysis in Chapter II is that the applicable legislation in terms of identification and access to protection for trafficked persons, both in Italy and in the United Kingdom, is comprehensive in terms of purposes of exploitation and in terms of categories of trafficked persons – not limiting the provision of services and access to protection to specific *types* of trafficked persons. Both the Italian Criminal Code, as well as the 1998 *TUI* as amended, and the 2015 MSA provide for an inclusive definition of human trafficking, covering all exploitative purposes and a gender-neutral definition of ‘victim’. Access to protection is *de jure* provided for, regardless of age, sex, or migration status. In both jurisdictions, domestic legal systems have been progressively transformed to reflect changing understandings of the trafficking phenomenon and developing protection standards. In addition, noting the interconnections between the anti-trafficking structures and the asylum systems, in light of, *inter alia*, the 2006 UNHCR

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Guidelines on the application of the Refugee Convention to people who have been trafficked, Chapter II introduced the debate around the trafficking-asylum nexus, providing an overview of the asylum systems in Italy and in the United Kingdom. The possibility that trafficked persons will find themselves in the asylum procedure, or will decide to apply for asylum after having been identified as trafficked persons, is recognised in both jurisdictions. Both jurisdictions have adopted guidance in this respect, providing for specific procedures, or Standard Operating Procedures, to be implemented when a trafficked person enters the asylum process.

However, an analysis of the applicable law is not sufficient to address the research questions posed at the outset of this thesis. While international law, as well as international human rights courts and bodies, have created and developed standards able to offer inclusive protection for trafficked persons, the enforcement of these laws remains limited. Enforcement and implementation are reliant on States' political willingness not only to adjust their domestic legal systems to reflect international obligations, but also – and arguably foremost – to implement those laws in good faith, in a truly gender-based manner, and through a human rights-based approach, that moves beyond a criminal justice or securitised response to human trafficking. Indeed, the availability in practice of assistance and protection to trafficked persons is not guaranteed by the mere existence of inclusive legislation. As Chapter III highlighted, identification bias and gaps in access to protection emerge when the existing law is interpreted and implemented in a restrictive, and arguably biased, manner.

Conclusion

Chapter III explores how access to protection is conditional on the correct and timely identification of trafficked persons, which suffers in practice from structural gender and racial biases. Chapter III also problematises the interconnections between human trafficking and asylum, unpacking the difficulties faced by trafficked persons in accessing asylum on the basis of their trafficking experience. It focussed, in particular, on the concept of membership of a Particular Social Group (PSG), as the most often recognised ‘nexus’ with a Convention ground, and risk on return faced by trafficked persons. The analysis of selected case-law of the Italian Tribunals and the United Kingdom’s Upper Tribunal highlighted that trafficked persons in the asylum system tend to rely on their identification as members of a PSG to be recognised as refugees. The analysis highlighted how the recognition of individuals as members of a PSG is negatively affected by gendered and colonial stereotypes of agency, vulnerability and victimhood, as well as by the lack of recognition of violations of socio-economic rights as grounds on which to seek asylum.

Chapter III further challenges the concept of vulnerability that, alongside – and arguably as a product of – a particular, restrictive understanding of gender, has increasingly been relied upon in determining whether an individual will have access to protection. The use of gender, conflated with sex, to impose a presumption of exclusion from the vulnerable, and therefore ‘protectable’, category is recognised as a pattern in both Italy and the United Kingdom, and represents the main hardship faced by trafficked adult men in accessing protection. In both jurisdictions, there have been significant policy innovations on the part of the State, yet at the same time there are significant gaps and fragmentation in practice. These gaps impact in

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particular on trafficked males, who frequently fall through the cracks in identification procedures and referral mechanisms, and in national anti-trafficking policies and plans. Although the anti-trafficking systems in Italy and in the United Kingdom are structured and operate in substantially different ways, they share two fundamental flaws: the (unofficial) construction and perpetuation of a hierarchy of victimhood – and of forms of exploitation – and the lack of sufficient services, including with respect to accommodation and psychological support, available for trafficked males.

Chapter IV sheds a light on how the dominant narrative in the human rights discourse on trafficking has reinforced the *original sin* of the anti-trafficking system – the construction of a stereotypical ‘ideal victim’. This image, although flexible and subject to changes, has been construed both through demographics, such as age and sex, and behaviours, such as passivity and innocence. This reduction of gender to sex, or conflation of the two, has allowed for the reduction of more complex power dynamics behind trafficking. When gender is made invisible with respect to men, or visible only with reference to hegemonic masculinity, trafficked males are subjected to a process of de-victimisation, as victimisation is deemed to be incompatible with (hegemonic) masculinity. I argued that law, policy and practice on human trafficking is particularly punitive towards adult men, whose masculinity is perceived to be challenging the masculinity of the State as an entity, and whose vulnerability and victimhood are rarely acknowledged.

Engaging with reflections around risk factors and root causes of trafficking, Chapter IV also called for a shift of focus in anti-trafficking action from the actions

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of individuals to the actions of the State. By introducing the concept of State-sponsored vulnerability, I explored the role of restrictive immigration policies and laws, on the one hand, and of the normalisation of exploitation, on the other. This normalisation occurs through the exceptionalisation of trafficking and the tolerance towards exploitative situations, and in the production, or enhancement of vulnerability to exploitation. The concept of State-sponsored vulnerability is also useful in explaining both why anti-trafficking actions have been unsuccessful, if not detrimental, to the protection of trafficked persons, and how for meaningful change to happen, States would need to shift their attention to their own behaviour.

Chapter IV further unpacks the role of anti-trafficking action in practice as a mechanism of border control and of exclusion of ‘unwanted’ individuals from the protection of the State. The institutionalisation of anti-trafficking protection processes, particularly where such processes cohabit with the asylum system, has provided the State with yet another tool that, while *de jure* aimed at protecting individuals from persecution, has *de facto* been used as a mechanism of exclusion. This mechanism of exclusion has allowed States to further scrutinise and bring into question the lived experiences of migrant men, and to cherry-pick the ‘protectable’ individual. In this context, gender is once again operationalised as an exclusion mechanism, promoting racialised and gendered interpretations of women and men’s vulnerability in the attempt to regulate the mobility the migrant population, both domestically and internationally. Alongside, and arguably as a product of a restrictive understanding of gender, protection has increasingly been linked with the concept of vulnerability.

Conclusion

Although vulnerability has been presented as a tool of inclusion, I argue that it has been used in practice as a tool of exclusion, restricting access to protection to those individuals deemed to be ‘protectable’. Indeed, asylum and international protection, as well as anti-trafficking laws have increasingly placed the concept of vulnerability at their core. Yet, the meaning of vulnerability is contested, and so are its implications in practice. The vulnerability discourse within academia has been pioneered by feminist legal theorists, who have for a long time side-lined reflections on multiple and vulnerable masculinities, ignoring relationships and power dynamics, as well as inequalities, between men. While masculinity studies emerged in the 1980s, the heritage of the early construction of the vulnerability discourse remains. Responses in literature tend to reflect an unresolved dichotomy framed as ‘universal versus particular’ vulnerability, while States in the Council of Europe context - as well as the European Court of Human Rights - have increasingly relied on ‘vulnerability by category’. The absence of a legal definition of vulnerability, which results in an inconsistent use of the concept, has been shaped by cultural and social (mis)perceptions. The ‘vulnerable subject’ in anti-trafficking and in asylum law, has become associated with victimhood, dependency, or deprivation. In the creation of ‘vulnerable groups’, stereotypes around both female and male bodies shaped an *ideal* ‘victim of trafficking’, a profile that fits the dominant narrative and perpetuates the essentialisation of gender. It is only by understanding vulnerability as a tool of exclusion, rather than a tool of inclusion, that we can understand biases in its application.

In order to make use of the concept of vulnerability across the gender spectrum, in a way that is not essentialising nor perpetuating patriarchal narratives,

Conclusion

a gendered analysis of ‘the man’ is crucial. Shame, guilt, confusion, fear and stigma are less intelligible when associated with the male body - both by the individual and by the (patriarchal) State authorities. Although more evident in the context of sexual violence and sexual exploitation, the risk of trafficked males being exposed to emotional and physical violence on return is not limited to the context of sexual exploitation. The exceptionalisation of sexual violence against men, against a normalisation of sexual violence against women, is a dangerous pattern that could easily contribute, once again, to the reinforcement of the ‘ideal victim’ stereotype through the ‘feminisation’ of the male body. Vulnerability ought to be construed as inclusive, rather than competitive, meaning that gender shall be made visible across the spectrum, rather than eliminated through ‘neutralisation’. Masculinity, understood as the way of ‘being a man’ or ‘doing male’, can be used to explore how social norms and linked expectations impact and shape trafficked males’ experiences, their coping strategies and their protection needs. As both victimhood and masculinity are performative, and the former conflicts with expectations flowing from the latter, the two performative elements do not follow a converging trajectory. As the onus of identification of trafficked persons falls, in practice, on trafficked persons themselves, the lack of self-identification by male ‘victims’, and the extensive use of ‘avoiding narratives’, contribute to a failure to recognise trafficked males’ protection needs and States’ protection obligations.

Bibliography

Treaties

Abolition of Forced Labour Convention (C105) (adopted 25 June 1957, entered into force 15 January 1959).

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978).

Convention Concerning Forced or Compulsory Labour (C029) (adopted 28 June 1930, entered into force 1 May 1932).

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2 December 1949, entered into force 25 July 1951).

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990).

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927).

Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197.

European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS 5.

European Social Charter (adopted 18 October 1961, entered into force 26 February 1965) CETS 035.

Bibliography

- European Social Charter (Revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS 163.
- International Agreement for the Suppression of the White Slave Traffic (adopted 18 May 1904, entered into force 18 July 1905) 1 LNTS 83.
- International Convention for the Suppression of the “White Slave Traffic” (adopted 4 May 1910, entered into force 5 July 1920).
- International Convention for the Suppression of the Traffic in Women and Children (adopted 30 September 1921, entered into force 15 June 1922) 9 LNTS 415.
- International Convention for the Suppression of the Traffic in Women of Full Age (adopted 11 October 1933, entered into force 24 August 1934).
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003).
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
- International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
- International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.
- Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 12 December 2000, entered into force 28 January 2004).
- Protocol of 2014 to the Forced Labour Convention, 1930 (P029) (adopted 11 June 2014, entered into force 9 November 2016).
- Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 12 December 2000, entered into force 25 December 2003) 2237 UNTS 319.

Bibliography

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

European Union Law and instruments

Charter of Fundamental Rights of the European Union (2012) OJ C 326/391.

Directive 2004/81/EC of 29 April 2004 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, and who cooperate with the competent authorities.

Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

European Commission, ‘Communication from the Commission to the Council and the European Parliament on the Application of Directive 2004/81 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’ (2014).

European Commission, ‘Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/81 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' (2010).

Domestic legislation

United Kingdom

Asylum and Immigration (Treatment of Claimants etc.) Act of 2004.

Immigration Act of 1971.

Modern Slavery Act of 2015.

Sexual Offences Act of 1956 (as amended in 1995).

Italy

Attuazione della direttiva 2004/83/CE recante norme minime sull'attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta (2007).

Codice Penale Italiano.

Decreto del Presidente della Repubblica, n 394/99 (1999).

Decreto Legislativo 10 settembre 2003, n 276: Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003, n 30.

Decreto Legislativo 25/2008: Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato.

Decreto Legislativo 4 marzo 2014, n 24: Attuazione della direttiva 2011/36/UE, relativa alla prevenzione e alla repressione della tratta di esseri umani e alla protezione delle vittime, che sostituisce la decisione quadro 2002/629/GAI.

Decreto-legge 13 agosto 2011, n 138, coordinato con la legge di conversione 14 settembre 2011, n 148: Ulteriori misure urgenti per la stabilizzazione finanziaria e per lo sviluppo.

Bibliography

Decreto-legge 4 ottobre 2018, n 113: Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata.

Legge 1 dicembre 2018, n 132: Conversione in legge, con modificazioni, del decreto-legge 4 ottobre 2018, n 113, recante disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata.

Legge 11 agosto 2003, n 228: Misure contro la tratta di persone.

Legge 2 luglio 2010, n 108: Ratifica ed esecuzione della Convenzione del Consiglio d'Europa sulla lotta contro la tratta di esseri umani, fatta a Varsavia il 16 maggio 2005, nonché norme di adeguamento dell'ordinamento interno.

Testo Unico sull'Immigrazione (1998).

Domestic guidance

United Kingdom

UK Home Office, 'Asylum Policy Instruction: Asylum Interviews' (2019).

UK Home Office, 'Discretionary Leave Considerations for Victims of Modern Slavery' (2018).

UK Home Office, 'Human Trafficking: The Government's Strategy' (2011).

UK Home Office, 'Modern Slavery Act 2015 – Statutory Guidance for England and Wales' (2020).

Italy

Commissione Nazionale per il diritto d'asilo and UNHCR, *L'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral Linee Guida per le commissioni territoriali per il riconoscimento della protezione internazionale* (2017).

Bibliography

Commissione Nazionale per il diritto d'asilo and UNHCR, *L'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral Linee Guida per le commissioni territoriali per il riconoscimento della protezione internazionale* (2021).

Consiglio dei Ministri, 'Piano nazionale d'azione contro la tratta e il grave sfruttamento 2016-2018'.

Ministero del Lavoro e delle Politiche Sociali, 'Piano triennale di contrasto allo sfruttamento lavorativo in agricoltura e al caporalato 2020-2022'.

Cases

International Courts and Tribunals

IACHR, Juridical Condition and Rights of the Undocumented Migrants Advisory Opinion OC-18/03, IACHR Series A no 18, IHRL 3237 (17 September 2003).

ICC, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Bosco Ntaganda, ICC-01/04-02/06 (8 July 2019).

ICTY, Prosecutor v Kunarac, Kovac and Vukovic (Appeals Chamber, 6 December 2002).

ICTY, Prosecutor v Kunarac, Kovac and Vukovic, IT-96-23-T & IT-96-23/1-T (Trial Chamber, 22 February 2001).

ICTY, Prosecutor v Ranko Češić, IT-95-10/1-S (Trial Chamber, 11 March 2004).

European Court of Human Rights

Chowdury and Others v Greece No. 21884/15 (30 March 2017).

CN v the United Kingdom No. 4239/08 (13 November 2012).

LE v Greece No. 71545/12 (21 January 2016).

MSS v Belgium and Greece No. 30696/09 (21 January 2011).

OM v Hungary No. 9912/15 (5 July 2016).

Rantsev v Cyprus and Russia No. 25965/04 (7 January 2010).

Bibliography

Siliadin v France No. 73316/01 (26 October 2005).

SM v Croatia [GC] No. 60561/14 (25 June 2020).

SM v Croatia No. 60561/14 (19 July 2018).

VCL and AN v the United Kingdom Nos. 77587/12 and 74603/12 (16 February 2021).

United Kingdom

AB (Albania) AA/10878/2015 (14 March 2018).

AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC) (18 February 2010).

AN (Albania) PA/04137/2016 (17 August 2017).

AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC) (23 April 2010).

ED (Albania) PA/13347/2018 (27 June 2019).

Gerald A (Albania) PA/06047/2018 (29 October 2018).

HVT (Vietnam) PA/03104/2017 (8 October 2018).

JFK (China) PA/06854/2016 (8 February 2018).

LA (Kosovo) PA/07171/2017 (29 November 2017).

MK (Lesbians) Albania CG [2009] UKAIT 00036 (9 September 2009).

Nguyen (Anti-Trafficking Convention: respondent's duties) [2015] UKUT 00170 (IAC) (25 March 2015).

SB v The Secretary of State for the Home Department [2008] UKAIT 00002 (IAC) (26 November 2007).

Secretary of State for the Home Department (Respondent) v K (FC) (Appellant) and Fornah (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2006] UKHL 46 (18 October 2006).

SSHD v TAN (Vietnam) PA/04075/2017 (31 January 2018).

SSHD v TSN (Vietnam) PA/07665/2017 (19 February 2019).

Bibliography

TD (Vietnam) PA/13078/2016 (11 May 2018).

TD and AD (Trafficked women) CG [2016] UKUT 00092 (IAC) (23 February 2016).

TVP (Vietnam) PA/02997/2018 (12 November 2018).

YL (China) PA/07920/2017 (9 March 2018).

Italy

Commissione Territoriale di Salerno, Case of unknown (29 October 2015).

Corte di Assise di Reggio Calabria, R.G.N.R.DDA 1171/2012, Sez I (30 June 2014).

Corte di Cassazione n 6503/2014, Cass Civ Sez VI (20 March 2014).

Tribunale di Milano, Unknown v Ministry of the Interior (Territorial Commission of Milan) (29 April 2016).

Tribunale dell'Aquila, Unknown v Ministry of the Interior (Territorial Commission of Ancona), n 2429/2017 (10 May 2018).

Tribunale di Bari, Unknown v Ministry of the Interior (Territorial Commission of Bari), n 7212/2018 10 November 2018.

Tribunale di Napoli, Sez Giudice per le indagini preliminary (11 July 2017).

Tribunale di Palermo, Unknown v Ministry of the Interior (11 December 2017).

Tribunale di Salerno, Unknown v Ministry of the Interior (Territorial Commission of Salerno) (2 February 2017).

Tribunale di Venezia, Unknown v Territorial Commission of Verona, n 10118/2017 (27 July 2018).

Scholarly material: Books, book chapters, and journal articles

Achiume ET, 'Reimagining International Law for Global Migration: Migration as Decolonization?' (2017) 111 *American Journal of International Law Unbound* 142.

Bibliography

- Achiume ET, 'The Fatal Flaw in International Law for Migration' (2017) 56 Columbia Journal of Transnational Law 257.
- Achiume ET, 'Migration as Decolonization' (2019) 71 Stanford Law Review 66.
- Allain J, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10 Human Rights Law Review 546.
- Allain J, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff Publishers 2008).
- Allais C, 'The Profile Less Considered: The Trafficking of Men in South Africa' (2013) 44 South African Review of Sociology 40.
- Ambrosini M, Cinalli M and Jacobson D (eds), *Migration, Borders and Citizenship: Between Policy and Public Spheres* (Palgrave Macmillan 2020).
- Anker C van den, 'Trafficking and Women's Rights: Beyond the Sex Industry to "Other Industries"' (2006) 2 Journal of Global Ethics 163.
- Anker DE, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 Harvard Human Rights Journal 133.
- Aradau C, 'The Perverse Politics of Four-Letter Words: Risk and Pity in the Securitisation of Human Trafficking' (2004) 33 Millennium: Journal of International Studies 2, 251.
- Arbel E, Dauvergne C, and Millbank J, *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014).
- Aronowitz AA, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (Praeger 2009).
- Atak I, Nakache D, Guild E and Crépeau F, 'Migrants in Vulnerable Situations and the Global Compact for Safe Orderly and Regular Migration' (2018) Queen Mary School of Law Legal Studies Research Paper No. 273/2018.
- Azis A and Wahyudi R, 'Imperfect Victims and an Imperfect Protocol: Reflecting on the Trafficking Experiences of Indonesian Migrant Fishermen' (2020) 6 Journal of Human Trafficking 156.
- Baarda CS, 'Human Trafficking for Sexual Exploitation from Nigeria into Western Europe: The Role of Voodoo Rituals in the Functioning of a Criminal Network' (2016) 13 European Journal of Criminology 257.

Bibliography

- Bacchi C, *Women, Policy and Politics: The Construction of Policy Problems* (SAGE 1999).
- Baillot H, Cowan S, and Munro VE, “‘Hearing the Right Gaps’”: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process’ (2012) 21 *Social & Legal Studies* 269.
- Baillot H, Cowan S, and Munro VE, ‘Second-hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context’ (2013) 40 *Journal of Law and Society* 509.
- Baillot H, Cowan S, and Munro VE, ‘Reason to Disbelieve: Evaluating the Rape Claims of Women Seeking Asylum in the UK’ (2014) 10 *International Journal of Law in Context* 105.
- Balch A, ‘Understanding and Evaluating UK Efforts to Tackle Forced Labour’ in *Vulnerability, Exploitation and Migrants Insecure Work in a Globalised Economy* (Palgrave Macmillan UK 2015).
- Bartlett K and Kennedy R (eds), *Feminist Legal Theory: Readings In Law And Gender* (Avalon Publishing 1991).
- Benhabib S, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004).
- Benhabib S and Resnik J, *Migrations and Mobilities: Citizenship, Borders, and Gender* (New York University Press 2009).
- Benhabib S, ‘The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights’ (2020) 2 *Jus Cogens* 75.
- Bhabha J and Zard M, ‘Smuggled or Trafficked?’ (2006) *Forced Migration Review* 6.
- Bigo D, ‘Criminalisation of “Migrants”: The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion’, in B Bogusz et al. (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff Publishers 2004).
- Biondi Dal Monte F, ‘Lo Stato Sociale di Fronte alle Migrazioni. Diritti Sociali, Appartenenza e Dignità della Persona’ (2012) 3 *Rivista del Gruppo di Pisa* 1.
- Blair KL and Hoskin RA, ‘Experiences of Femme Identity: Coming out, Invisibility and Femmephobia’ (2014) 6 *Psychology and Sexuality* 229.

Bibliography

- Blanchet T et al, 'Beyond Boundaries: A Critical Look at Women Labour Migration and the Trafficking Within' (Drishti Research Centre 2002).
- Brace L and O'Connell Davidson J (eds), *Revisiting Slavery and Antislavery: Towards a Critical Analysis* (Palgrave Macmillan 2018).
- Bravo K, 'Contemporary State Anti-'Slavery' Efforts: Dishonest and Ineffective' (2019) 46 Northern Kentucky Law Review 106.
- Broad R and Turnbull N, 'From Human Trafficking to Modern Slavery: The Development of Anti-Trafficking Policy in the UK' (2018) European Journal on Criminal Policy and Research 1.
- Broban A, Van den Bergh R, Russell W, Benedetti G, Caluwaerts S, Owiti P, Reid A and De Plecker E, 'Assault and Care Characteristics of Victims of Sexual Violence in Eleven Médecins Sans Frontières Programs in Africa. What about Men and Boys?' (2020) 15 PLOS ONE.
- Brown K, Ecclestone K and Emmel N, 'The Many Faces of Vulnerability' (2017) 16 Social Policy and Society 497.
- Bryant-Davis T and Tummala-Narra P, 'Cultural Oppression and Human Trafficking: Exploring the Role of Racism and Ethnic Bias' (2017) 40 Women & Therapy 152.
- Bustamante JA, 'Immigrants' Vulnerability as Subjects of Human Rights' (2002) 36 International Migration Review 2: 339.
- Butler J, *Frames of War: When is Life Grievable?* (Verso 2009).
- Butler J, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 2011).
- Butler J, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40 Theatre Journal 519.
- Butler J, *Precarious Life: The Powers of Mourning and Violence* (Verso 2006).
- Calavita K, 'Immigration, Social Control, and Punishment in the Industrial Era' in *Race, gender, & punishment: From colonialism to the War on Terror* (Rutgers University Press 2007).
- Campana P, 'The Structure of Human Trafficking: Lifting the Bonnet on a Nigerian Transnational Network' (2016) 56 British Journal of Criminology 68.

Bibliography

- Campbell K, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' (2007) 1 *International Journal of Transitional Justice* 411.
- Carens JH, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *The Review of Politics* 251.
- Carens JH, 'The Rights of Irregular Migrants' (2008) 22 *Ethics and International Affairs* 2: 163.
- Carlson ES, 'The Hidden Prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals' (2006) 46 *British Journal of Criminology* 16.
- Carpenter CR, *'Innocent Women and Children': Gender, Norms and the Protection of Civilians* (Routledge 2006).
- Celik E, 'The Role of CRPD in Rethinking the Subject of Human Rights' (2017) 21 *The International Journal of Human Rights* 933.
- Charlesworth H, 'Feminists Critiques of International Law and Their Critics' (1995) 13 *Third World Legal Studies* 17.
- Charlesworth H, 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 379.
- Charlesworth H, Chaiton S, and Chinkin CM, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000).
- Charman T, 'A Story that Can(Not) Be Told: Sexual Violence against Men in ICTR and ICTY Jurisprudence' in S Stolk and R Vos (eds), *International Law's Collected Stories* (Springer 2020).
- Chinkin C and Kaldor M, 'Gender and New Wars' (2013) 67 *Journal of International Affairs* 167.
- Chow R, 'Violence in the Other Country: China as Crisis, Spectacle, and Woman' in C Mohanty, L Torres, and A Russo (eds), *Third World Women and the Politics of Feminism* (Indiana University Press 1991).
- Christensen TM, 'Trafficking for Sexual Exploitation: Victim Protection in International and Domestic Asylum Law' (New Issues in Refugee Research, 2011).

Bibliography

- Christie N, 'The Ideal Victim' in EA Fattah, *From Crime Policy to Victim Policy: Reorienting the Justice System* (Palgrave Macmillan, London 1986).
- Chuang J, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 *American Journal of International Law* 609.
- Clark JN, 'Masculinity and Male Survivors of Wartime Sexual Violence: A Bosnian Case Study' (2017) 17 *Conflict, Security & Development* 287.
- Cockbain E, Bowers K, and Dimitrova G, 'Human Trafficking for Labour Exploitation: The Results of a Two-Phase Systematic Review Mapping the European Evidence Base and Synthesising Key Scientific Research Evidence' (2018) 14 *Journal of Experimental Criminology* 319.
- Cohen C, *Male Rape is a Feminist Issue. Feminism, Governmentality and Male Rape* (Palgrave Macmillan 2014).
- Cole A, 'All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique' (2016) 17 *Critical Horizons* 260.
- Cole D, 'The New Know-Nothingism: Five Myths about Immigration' (1994) *The Nation* 155.
- Cole D, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (The New Press 2003).
- Cole J, 'Service Providers' Perspectives on Sex Trafficking of Male Minors: Comparing Background and Trafficking Situations of Male and Female Victims' (2018) 35 *Child and Adolescent Social Work Journal* 423.
- Collier R, 'Researching Men, Masculinities and Law: On Sources, Methods and the "Man Question"' (2015) 15 *Legal Information Management* 19.
- Connell RW and Messerschmidt JW, 'Hegemonic Masculinity: Rethinking the Concept' (2005) 19 *Gender & Society* 829.
- Coutin SB, 'The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence' (2001) 26 *Law & Social Inquiry* 63.
- Crépeau F and Hastie B, 'The Case for "Firewall" Protections for Irregular Migrants: Safeguarding Fundamental Rights' (2015) 17 *European Journal of Migration and Law* 157.

Bibliography

- Creswell JW and Plano Clark VL, *Designing and Conducting Mixed Methods Research* (SAGE 2017).
- Cunniff Gilson E, 'Vulnerability and Victimization: Rethinking Key Concepts in Feminist Discourses on Sexual Violence' (2016) 42 *Signs: Journal of Women in Culture and Society* 71.
- Davies J, 'From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry' (2018) *Criminology & Criminal Justice*.
- De La Cruz R, 'No Asylum for the Innocent: Gendered Representations of Salvadoran Refugees in the 1980s' (2017) 61 *American Behavioral Scientist* 1103.
- Dembour MB, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg' (2003) 21 *Netherlands Quarterly of Human Rights* 63.
- Dembour MB, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015).
- Dembour MB and Kelly T (eds), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Routledge 2011).
- Demetriou D, 'Connell's concept of hegemonic masculinity: A critique' (2001) 30 *Theory and Society* 3.
- Desmond A (ed), *Shining New Light on the UN Migrant Workers Convention* (Pretoria University Law Press 2017).
- Desyllas M, 'A Critique of the Global Trafficking Discourse and U.S. Policy' (2007) 34 *The Journal of Sociology & Social Welfare* 57.
- Devereux C, "'The Maiden Tribute" and the Rise of the White Slave in the Nineteenth Century: The Making of an Imperial Construct' (2000) 26 *Victorian Review* 1.
- Dikötter F, *Imperfect Conceptions: Medical Knowledge, Birth Defects, and Eugenics in China* (Columbia University Press 1998).
- Dolan C, 'Inclusive Gender: Why Tackling Gender Hierarchies Cannot Be at the Expense of Human Rights and the Humanitarian Imperative' (2016) 98 *International Review of the Red Cross* 625.

Bibliography

- Donovan B, *White Slave Crusades: Race, Gender, and Anti-Vice Activism, 1887-1917* (University of Illinois Press 2006).
- Dowd NE, 'Masculinities and Feminist Legal Theory' (2008) 23 *Wisconsin Journal of Law, Gender & Society* 201.
- Dowd NE, 'Asking the Man Question: Masculinities Analysis and Feminist Theory' (2010) 33 *Harvard Journal of Law & Gender* 415.
- Dwyer P, Lewis H, Scullion L, and Waite L, 'Forced Labour and UK Immigration Policy: Status Matters?' (Joseph Rowntree Foundation 2011).
- Eastmond M and Selimovic JM, 'Silence as Possibility in Postwar Everyday Life' (2012) 6 *International Journal of Transitional Justice* 502.
- Enloe C, *Maneuvers: The International Politics of Militarizing Women's Lives* (University of California Press 2000).
- Esposito F, Quinto CR, Masi FD, Gargano O, and Costa PA, 'Voices of Nigerian Women Survivors of Trafficking Held in Italian Centres for Identification and Expulsion' (2016) 54 *International Migration* 133.
- Ewald F, 'Norms, Discipline, and the Law' (1990) *Representations* 138.
- Fassin D, 'The Biopolitics of Otherness: Undocumented Foreigners and Racial Discrimination in French Public Debate' (2001) 17 *Anthropology Today* 3.
- Feller E, Türk V and Nicholson F, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003).
- Fellmeth AX, 'Feminism and International Law: Theory, Methodology, and Substantive Reform' (2000) 22 *Human Rights Quarterly* 658.
- Fineman MA, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *The Yale Journal of Law & Feminism* 1.
- Fineman MA, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251.
- Fineman MA, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in MA Fineman and A Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013).

Bibliography

- Fineman MA, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133.
- Finnemore M and Sikkink K, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887.
- Fischer-Tiné H, "'White Women De-grading Themselves to the Lowest Depths": European Networks of Prostitution and Colonial Anxieties in British India and Ceylon ca. 1880-1914' (2003) 40 The Indian Economic & Social History Review 163.
- FitzGerald SA, 'The Female Diaspora: Interrogating the Female Trafficked Migrant' in *Decolonisation of Legal Knowledge* (Routledge 2009).
- FitzGerald SA, 'Biopolitics and the Regulation of Vulnerability: The Case of the Female Trafficked Migrant' (2010) 6 International Journal of Law in Context 277.
- FitzGerald SA, 'Vulnerable Bodies, Vulnerable Borders: Extraterritoriality and Human Trafficking' (2012) 20 Feminist Legal Studies 227.
- FitzGerald SA, 'Vulnerable Geographies: Human Trafficking, Immigration and Border Control in the UK and Beyond' (2016) 23 Gender, Place & Culture 181.
- Fitzpatrick J, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking' (2003) 24 Michigan Journal of International Law 1143.
- Foster M, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press 2009).
- Foucault M, *The Use of Pleasure* (Penguin 1984).
- Freccero J, Biswas D, Whiting A, Alrabe K, and Seelinger KT, 'Sexual Exploitation of Unaccompanied Migrant and Refugee Boys in Greece: Approaches to Prevention' (2017) 14 PLOS Medicine 11.
- Freedman J, *Gendering the International Asylum and Refugee Debate* (Palgrave Macmillan 2007).
- Freedman J, 'Taking Gender Seriously in Asylum and Refugee Policies' in KR Khory (ed), *Global Migration: Challenges in the Twenty-First Century* (Palgrave Macmillan 2012).

Bibliography

- Gallagher AT, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 975.
- Gallagher AT, *The International Law of Human Trafficking* (Cambridge University Press 2012).
- Gallagher A, *Issue Paper: Abuse of a Position of Vulnerability and Other Means Within The Definition of Trafficking in persons* (United Nations Office on Drugs and Crime 2013).
- Gallo E and Scrinzi F, *Migration, Masculinities and Reproductive Labour* (Palgrave Macmillan 2016).
- Gauci J-P, 'Trafficked Persons as Refugees' (Ph.D., King's College London 2014).
- Gauci J-P, 'Why Trafficked Persons Need Asylum' in M Giuffrè, JP Gauci, L Tsourdi (eds), *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Brill 2015).
- Genovese D and Santoro E, 'L'articolo 18 (t.u. Immigrazione) e Il Contrasto Allo Sfruttamento Lavorativo: La Fantasia Del Giurista Tra Libertà e Dignità' (2018) 159 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 543.
- Global Alliance Against Trafficking in Women (GAATW) (ed), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (GAATW 2007).
- Goodey J, 'Sex Trafficking in Women from Central and East European Countries: Promoting a "Victim-Centred" and "Woman-Centred" Approach to Criminal Justice Intervention' (2004) *Feminist Review* 26.
- Goodey J, 'Human Trafficking: Sketchy Data and Policy Responses' (2008) 8 *Criminology & Criminal Justice* 421.
- Goodin RE, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (University of Chicago Press 1985).
- Goodwin-Gill GS and McAdam J, *The Refugee in International Law* (Clarendon Press Oxford 2011).
- Gordon C, 'Introduction' in Faubion J D (ed), *Michel Foucault: Power. Essential works of Foucault, 1954–1984* (The New Press 2000).

Bibliography

- Greatbatch J, 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1 *International Journal of Refugee Law* 518.
- Griffiths M, "'Here, Man Is Nothing!': Gender and Policy in an Asylum Context' (2015) 18 *Men and Masculinities* 468.
- Gutiérrez Rodríguez E, 'The Coloniality of Migration and the "Refugee Crisis": On the Asylum-Migration Nexus, the Transatlantic White European Settler Colonialism-Migration and Racial Capitalism' (2018) 34 *Canada's Journal on Refugees*.
- Hacker D, Levine-Fraiman Y, and Halili I, 'Ungendering and Regendering Shelters for Survivors of Human Trafficking' (2015) 3 *Social Inclusion* 35.
- Halberstam J, *Female Masculinity* (Duke University Press 1998).
- Hamber B, 'Masculinity and Transitional Justice: An Exploratory Essay' (2007) 1 *International Journal of Transitional Justice* 375.
- Hamilton L, '(Re)Conceptualising Vulnerability in International Refugee Law and Practice: An Exploration of the Value of a More Dynamic Approach to Vulnerability in Refugee Status Determination' (NUI Galway 2020).
- Hansen R and King D, 'Eugenic Ideas, Political Interests, and Policy Variance: Immigration and Sterilization Policy in Britain and the U.S.' (2001) 53 *World Politics* 237.
- Haynes J, 'The Modern Slavery Act (2015): A Legislative Commentary' (2016) 37 *Statute Law Review* 33.
- Hebert LA, 'Always Victimizers, Never Victims: Engaging Men and Boys in Human Trafficking Scholarship' (2016) 2 *Journal of Human Trafficking* 281.
- Held V, 'Non-Contractual Society: A Feminist View' (1987) 17 *Canadian Journal of Philosophy* 111.
- Helms E, *Innocence and Victimhood: Gender, Nation, and Women's Activism in Postwar Bosnia-Herzegovina* (University of Wisconsin Press 2013).
- Herzfeld B, 'Slavery and Gender: Women's Double Exploitation' (2002) 10 *Gender and Development* 50.
- Hilhorst D, 'Classical Humanitarianism and Resilience Humanitarianism: Making Sense of Two Brands of Humanitarian Action' (2018) 3 *Journal of International Humanitarian Action*.

Bibliography

- Holter ØG, 'Gender, Patriarchy and Capitalism: A Social Forms Analysis' (University of Oslo 1997).
- Holter ØG, *Can Men Do It?: Men and Gender Equality - the Nordic Experience* (Nordic Council of Ministers 2003).
- Honkala N, "'She, of Course, Holds No Political Opinions": Gendered Political Opinion Ground in Women's Forced Marriage Asylum Claims' (2017) 26 *Social & Legal Studies* 166.
- Howard N, 'Of Coyotes and Caporali: How Anti-Trafficking Discourses of Criminality Depoliticise Mobility and Exploitation' in C Rijken, RW Piotrowicz, BH Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge 2018).
- Hoyle C, Bosworth M, and Dempsey M, 'Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality' (2011) 20 *Social & Legal Studies* 313.
- Ibbetson D, 'Historical Research in Law', in Mark Tushnet and Peter Cane (eds) *Oxford Handbook of Legal Studies* (OUP 2003).
- Indra D, 'Gender: A Key Dimension of the Refugee Experience' (1987) *Refuge: Canada's Journal on Refugees* 3.
- Irwin M A, "'White Slavery" As Metaphor: Anatomy of a Moral Panic' (1996) 5 *Ex Post Facto: The History Journal*.
- Jacobson MF, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Harvard University Press 1999).
- Jobe A, 'Telling the Right Story at the Right Time: Women Seeking Asylum with Stories of Trafficking into the Sex Industry' (2020) 54 *Sociology* 936.
- Jones SV, 'The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking' (2010) 4 *Utah Law Review* 1143.
- Juss SS, *International Migration and the Global Justice* (Ashgate Publishing 2006).
- Juss SS, 'Recognizing Refugee Status for Victims of Trafficking and the Myth of Progress' (2015) 34 *Refugee Survey Quarterly* 107.
- Kapur R, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Journal* 1.

Bibliography

- Kapur R, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glass House Press 2005).
- Kesby A, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012).
- King D, *In The Name of Liberalism: Illiberal Social Policy in the USA and Britain* (Oxford University Press 1999).
- Kirchherr J and Charles K, 'Enhancing the Sample Diversity of Snowball Samples: Recommendations from a Research Project on Anti-Dam Movements in Southeast Asia' (2018) 13 PLoS ONE 17.
- Kittay EF, *Love's Labor: Essays on Women, Equality, and Dependency* (Routledge 1999).
- Knepper P, 'White Slave Trade' in Paul Knepper (ed), *The Invention of International Crime: A Global Issue in the Making, 1881–1914* (Palgrave Macmillan UK 2010).
- Koskenniemi M, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *The Modern Law Review* 1.
- Kraler A, 'Regularization of Irregular Migrants and Social Policies: Comparative Perspectives' (2019) 17 *Journal of Immigrant & Refugee Studies* 94.
- Lewis DA, 'Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law' (2009) 27 *Wisconsin International Law Journal*.
- Linfield S, *The Cruel Radiance: The Cruel Radiance Photography and Political Violence* (University of Chicago Press 2010).
- Lobasz JK, 'Beyond Border Security: Feminist Approaches to Human Trafficking' (2009) 18 *Security Studies* 319.
- Luna F, 'Elucidating the Concept of Vulnerability: Layers Not Labels' (2009) 2 *International Journal of Feminist Approaches to Bioethics* 121.
- MacIntyre AC, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Open Court Publishing 1999).
- MacKinnon CA, 'Reflections on Sex Equality under Law' (1991) 100 *The Yale Law Journal* 1281.

Bibliography

- MacKinnon CA, 'Trafficking, Prostitution, and Inequality' (2011) 46 *Harvard Civil Rights-Civil Liberties Law Review* 271.
- Macklin A, 'Dancing Across Borders: 'Exotic Dancers,' Trafficking, and Canadian Immigration Policy' (2003) 37 *International Migration Review* 464.
- Mancuso M, 'Not All Madams Have a Central Role: Analysis of a Nigerian Sex Trafficking Network' (2014) 17 *Trends in Organized Crime* 66.
- Mattosio M and MacDonald MC, 'Gender, Migration, and the Media' (2018) 18 *Feminist Media Studies* 1117.
- Mayblin L, 'Complexity Reduction and Policy Consensus: Asylum Seekers, the Right to Work, and the "Pull Factor" Thesis in the UK Context' (2016) 18 *The British Journal of Politics and International Relations* 812.
- McCrudden C, 'Legal Research and the Social Sciences' (2006) *Oxford Legal Studies Research Paper No. 33/2006, Law Quarterly Review*.
- McGregor KM, 'Human Trafficking and U.S. Asylum: Embracing the Seventh Circuit's Approach' (2014) 88 *Southern California Law Review* 197.
- Messerschmidt JW, *Flesh and Blood: Adolescent Gender Diversity and Violence* (Rowman & Littlefield International Ltd 2004).
- Messerschmidt JW, 'The Saliency of "Hegemonic Masculinity"' (2019) 22 *Men and Masculinities* 85.
- Miazga S, 'Stereotypes of Refugees as Presented in the Media and the Reality of Problems Linked with Cultural Adaptation and Social Integration of the Immigrant Children' (2018) *Social Communication* 30.
- Milano V, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of *L.E. v Greece: A Disturbing Setback?*' (2017) 17 *Human Rights Law Review* 701.
- Mink G, 'The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State' in L Gordon (ed), *Women, the state, and welfare* (University of Wisconsin Press 1990).
- Mouthaan S, 'Sexual Violence against Men and International Law – Criminalising the Unmentionable' (2013) 13 *International Criminal Law Review* 665.
- Mullins LB, 'CEDAW: The Challenges of Enshrining Women's Equality in International Law' (2018) 20 *Public Integrity* 257.

Bibliography

- Munro VE, 'Stopping Traffic? A Comparative Study of Responses to the Trafficking in Women for Prostitution' (2006) 46 *The British Journal of Criminology* 318.
- Munro VE, 'Exploring Exploitation: Trafficking in Sex, Work and Sex Work' in M Della Giusta and V Munro (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Ashgate Publishers 2008).
- Murphy C, 'Tackling Vulnerability to Labour Exploitation through Regulation: The Case of Migrant Fishermen in Ireland' (2017) 46 *Indiana Law Journal* 417.
- Naffine N and Owens RJ, *Sexing the Subject of Law* (LBC Information Services 1997).
- Nayak M, *Who Is Worthy of Protection?: Gender-Based Asylum and U.S. Immigration Politics* (Oxford University Press 2015).
- Nishida M, 'Slavery and Gender', *Atlantic History* (Oxford Bibliographies 2015).
- Noronha L de, *Deporting Black Britons: Portraits of Deportation to Jamaica* (Manchester University Press 2020).
- Norwood JS, 'Labor Exploitation of Migrant Farmworkers: Risks for Human Trafficking' (2020) 6 *Journal of Human Trafficking* 209.
- O'Brien E, 'Ideal Victims in Trafficking Awareness Campaigns' in K Carrington, M Ball, E O'Brien, J Tauri (eds), *Crime, Justice and Social Democracy* (Palgrave Macmillan 2013).
- O'Connell Davidson J, *Modern Slavery - The Margins of Freedom* (Palgrave Macmillan 2015).
- Obokata T, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers 2006).
- Ofer N, 'Implementation of the Non-Punishment Principle in England: Why Are Victims of Trafficking Not Benefiting from the Protection from Prosecution Provided by International Law?' (2019) 11 *Journal of Human Rights Practice* 486.
- Olufade CA, *Oath Taking and the Transnationalism of Silence among Edo Female Sex Workers in Italy* (African Studies Centre Leiden ASCL 2020).

Bibliography

- Oosterveld V, 'Gender at the Intersection of International Refugee Law and International Criminal Law' (2014) 12 *Journal of International Criminal Justice* 953.
- Otto D, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law' in A Orford (ed), *International Law and its Others* (Cambridge University Press 2006).
- Otto D, 'Remapping Crisis Through a Feminist Lens' (2011) 5 *University of Melbourne Law School Research Series*.
- Palinkas LA, Horwitz SM, Green CA, Wisdom JP, Duan N, and Hoagwood K, 'Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research' (2015) 42 *Administration and Policy in Mental Health and Mental Health Services* 533.
- Palumbo L and Scieurba A, 'Vulnerability to Forced Labour and Trafficking: The Case of Romanian Women in the Agricultural Sector in Sicily' (2015) *Anti-Trafficking Review* 89.
- Pascoal R, 'Are Men Victims of THB Considered to Be Vulnerable? The Study Case of Labour Exploitation of Romanian Men in Agriculture' (Social Inclusion and Equal Opportunities, Timisoara, 2016).
- Patton MQ, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (SAGE 2015).
- Peroni L and Timmer A, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056.
- Philo C, 'The Geographies that Wound' (2005) 11 *Population, Space and Place* 441.
- Pocock N S, Kiss L, Oram S and Zimmerman C, 'Labour Trafficking among Men and Boys in the Great-er Mekong Subregion: Exploitation, Violence, Occupational Health Risks and Injuries' (2016) 11 *PLoS One*.
- Probst E, 'Victims' Protection within the Context of Trafficking in Human Beings and European Union Standards' (2019) 19 *ERA Forum* 357.
- Pruitt L, Berents H, and Munro G, 'Gender and Age in the Construction of Male Youth in the European Migration "Crisis"' (2018) 43 *Signs: Journal of Women in Culture and Society* 687.

Bibliography

- Puvimanasinghe T, Denson LA, Augoustinos M, and Somasundaram D, 'Narrative and Silence: How Former Refugees Talk about Loss and Past Trauma' (2015) 28 *Journal of Refugee Studies* 69.
- Rosenberg ES, 'Rescuing Women and Children' (2002) 89 *The Journal of American History* 456.
- Rosenblum D, 'Unsex CEDAW, or What's Wrong With Women's Rights' (2011) 20 *Columbia Journal of Gender and Law* 98.
- Runyan AS and Peterson VS, 'The Radical Future of Realism: Feminist Subversions of IR Theory' (1991) 16 *Alternatives: Global, Local, Political* 67.
- Russell AM, "'Victims of Trafficking": The Feminisation of Poverty and Migration in the Gendered Narratives of Human Trafficking' (2014) 4 *Societies* 532.
- Sabohi M, Maher S, and Hassan S, 'Feminist Perspective of International Law and Its Effect on International Courts and Tribunals' (2019) 22 *Journal of Legal, Ethical and Regulatory Issues* 1.
- Santoro E and Stoppioni C, 'Il Contrasto Allo Sfruttamento Lavorativo: I Primi Dati Dell'applicazione Della Legge 199/2016' (2019) 162 *Giornale di Diritto del Lavoro e di Relazioni Industriali* 267.
- Schulz Philipp, *Male Survivors of Wartime Sexual Violence* (University of California Press 2020).
- Scoular J, 'What's Law Got To Do With It? How and Why Law Matters in the Regulation of Sex Work' (2010) 37 *Journal of Law and Society* 12.
- Seelinger KT, 'Rape and the President: The Remarkable Trial and (Partial) Acquittal of Hissène Habré' (2017) 34 *World Policy Journal* 16.
- Seelinger KT, 'Uganda's Case of Thomas Kwoyelo: Customary International Law on Trial' (2017) 8 *California Law Review Online IR*, 19.
- Segrave M, 'Order at the Border: The Repatriation of Victims of Trafficking' (2009) 32 *Women's Studies International Forum* 251.
- Sellers PV, '(Re)Considering Gender Jurisprudence' in F Ní Aoláin, N Cahn, DF Haynes, and N Valji (eds), *The Oxford Handbook of Gender and Conflict* (Oxford University Press 2018).

Bibliography

- Serughetti G, 'Smuggled or Trafficked? Refugee or Job Seeker? Deconstructing Rigid Classifications by Rethinking Women's Vulnerability' (2018) *Anti-Trafficking Review* 11.
- Shamir H, 'A Labor Paradigm for Human Trafficking' (2012) 60 *UCLA Law Review* 76.
- Shuman A and Bohmer C, 'Gender and Cultural Silences in the Political Asylum Process' (2014) 17 *Sexualities* 939.
- Sinatti G, 'Masculinities and Intersectionality in Migration: Transnational Wolof Migrants Negotiating Manhood and Gendered Family Roles' in TD Truong, D Gasper, J Handmaker and SI Bergh (eds), *Migration, Gender and Social Justice* (Springer 2014).
- Sivakumaran S, 'Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict' (2010) 92 *International Review of the Red Cross* 259.
- Sivakumaran S, 'Male/Male Rape and the "Taint" of Homosexuality' (2005) 27 *Human Rights Quarterly* 1274.
- Sivakumaran S, 'Sexual Violence Against Men in Armed Conflict' (2007) 18 *European Journal of International Law* 253.
- Smith MD, 'Rethinking Gender in the International Refugee Regime' (2016) 53 *Forced Migration Review* 65.
- Smyth C, *European Asylum Law and the Rights of the Child* (Routledge 2016).
- Smyth C, 'The Jurisprudence of the European Court of Human Rights Relevant to Child Migrants' in J Bhabha, J Kanics, and D Senovilla Hernández (eds), *Research Handbook on Child Migration* (Edward Elgar Publishing 2018).
- Sontag S, *Regarding the Pain of Others* (Penguin 2004).
- Squillante D, 'Single, Young Female - Seeking Asylum: The Struggles Victims of Sex Trafficking Face under Current United States Refugee Law Notes' (2014) 88 *St. John's Law Review* 223.
- Srikantiah J, 'Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law' (2007) 87 *Boston University Law Review* 157.

Bibliography

- Steele SL, ““Combating the Scourge””: Constructing the Masculine “Other” Through U.S. Government Anti-Trafficking Campaigns’ (2011) 9 *Journal of Hate Studies* 33.
- Steele SL and Shores T, ‘Real and Unreal Masculinities: The Celebrity Image in Anti-Trafficking Campaigns’ (2015) 24 *Journal of Gender Studies* 419.
- Stemple L, ‘Male Rape and Human Rights’ (2009) 60 *Hastings Law Journal* 605.
- Stepnitz A, ‘A Lie More Disastrous than the Truth: Asylum and the Identification of Trafficked Women in the UK’ (2012) 1 *Anti Trafficking Review* 104.
- Stoppioni C, ‘Tratta, sfruttamento e smuggling: Un’ipotesi di finium regundorum a partire da una recente sentenza’ (2019) *Approfondimenti - La Legislazione Penale*.
- Stoyanova V, ‘Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case’ (2012) 30 *Netherlands Quarterly of Human Rights* 163.
- Stoyanova V, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States’ Positive Obligations in European Law* (Cambridge University Press 2017).
- Surtees R, ‘Trafficking of Men: A Trend Less Considered - The Case of Belarus and Ukraine’ (IOM Migration Research Series, 2008).
- Thiemann I, ‘Villains and Victims, but No Workers: Why a Prosecution-Focussed Approach to Human Trafficking Fails Trafficked Persons’ (2016) 6 *Anti-Trafficking Review* 126.
- Thomas C, ‘New York State Farmworkers as a Study of Globalization, Irregular Labor Migration, and International Law’ (Bellagio Workshop, 2016).
- Ticktin M, ‘Policing and Humanitarianism in France: Immigration and the Turn to Law as State of Exception’ (2005) 7 *International Journal of Postcolonial Studies* 346.
- Ticktin M, *Casualties of Care: Immigration and the Politics of Humanitarianism in France* (California University Press 2011).
- Tschalaer M, ‘Victimhood and Femininities in Black Lesbian Asylum Cases in Germany’ (2020) *Journal of Ethnic and Migration Studies* 1.

Bibliography

- Ullrich L, “‘But What about Men?’ Gender Disquiet in International Criminal Justice’ (2019) *Theoretical Criminology*.
- Uy R, ‘Blinded by Red Lights: Why Trafficking Discourse Should Shift Away from Sex and the “Perfect Victim” Paradigm’ (2011) 26 *Berkeley Journal of Gender, Law & Justice* 204.
- Vettori C, ‘La Tratta Degli Esseri Umani: Evoluzione Normativa e Aspetti Sociologici’ (2014) *ADIR - L’altro diritto*.
- Vijayarasa R, *Sex, Slavery and the Trafficked Woman* (Routledge 2016).
- Villacampa C and Flórez K, ‘Human Trafficking for Criminal Exploitation and Participation in Armed Conflicts: The Colombian Case’ (2018) 69 *Crime, Law and Social Change* 421.
- Villacampa C and Torres N, ‘Human Trafficking for Criminal Exploitation: The Failure to Identify Victims’ (2017) 23 *European Journal on Criminal Policy and Research* 393.
- Wæver O, ‘Aberystwyth, Paris, Copenhagen: New “Schools” in Security Theory and Their Origins between Core and Periphery’ (2004).
- Waite L, Craig G, Lewis H and Skrivankova K (eds), *Vulnerability, Exploitation and Migrants* (Palgrave Macmillan 2015).
- Webb P and Garcíandia R, ‘State Responsibility for Modern Slavery: Uncovering and Bridging the Gap’ (2019) 68 *International & Comparative Law Quarterly* 539.
- Wilson M and O’Brien E, ‘Constructing the Ideal Victim in the United States of America’s Annual Trafficking in Persons Reports’ (2016) 65 *Crime, Law & Social Change* 29.
- Wood KE, ‘Gender and Slavery’ in MM Smith and RL Paquette (eds), *The Oxford Handbook of Slavery in the Americas* (Oxford University Press 2010).
- Wylie G, *The International Politics of Human Trafficking* (Palgrave Macmillan 2016).
- Yousaf O, Popat A, and Hunter MS, ‘An Investigation of Masculinity, Attitudes, Gender and Attitudes towards Psychological Help-Seeking’ (2014) 16 *Psychology of men and masculinity* 234.

Bibliography

Zarkov D, 'The Body of the Other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity in Croatian Media' in C Moser and F Clark (eds), *Victims, Perpetrators or Actors? Gender, Armed Conflict, and Political Violence* (Zed Books 2001).

Zawati H, 'Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity' (2007) 17 *Journal on Rehabilitation of Torture Victims and Prevention of Torture* 27.

Reports, blogs and online resources

All Survivors Project, "'I Don't Know Who Can Help": Men and Boys Facing Sexual Violence in Central African Republic' (2018).

American Psychological Association, 'APA Guidelines for Psychological Practice with Boys and Men' (2018).

Anti-Slavery International, Anti-Trafficking Monitoring Group, Bawso, ECPAT UK (Every Child Protected Against Trafficking), Focus on Labour Exploitation (FLEX), Freedom United, JustRight Scotland, Kalayaan, The Voice of Domestic Workers, and UNICEF UK, 'Joint Civil Society Report on Trafficking and Modern Slavery in the UK to the UN Human Rights Committee. UN Human Rights Committee, 128th Session (02 Mar 2020 - 27 Mar 2020), Examination of the Eighth Periodic Report of the United Kingdom (List of Issues Prior to Reporting)' (2020).

Asylos and ARC Foundation, 'Albania: Trafficked Boys and Young Men' (2019).

Bird G, 'Changing Vulnerabilities on Samos: Why Young Men Are Not Always the Least Vulnerable Refugees' (*LSE European Politics and Policy*, 12 July 2019) <<https://blogs.lse.ac.uk/europpblog/2019/07/12/changing-vulnerabilities-on-samos-why-young-men-are-not-always-the-least-vulnerable-refugees/>> accessed 27 October 2019.

Bulman M, "'Traumatised" Vietnamese Man Detained in UK for Two Years despite Evidence He Was Trafficking Victim', *The Independent* (4 November 2019) <<https://www.independent.co.uk/news/uk/home-news/human-trafficking-vietnam-uk-cannabis-farm-modern-slavery-essex-lorry-deaths-a9184596.html>> accessed 26 November 2019.

Bulman M, 'Home Office "Illegally" Put Trafficking Victims in Detention Centres, Report Finds', *The Independent* (30 July 2019)

Bibliography

- <<https://www.independent.co.uk/news/uk/home-news/home-office-modern-slavery-victims-trafficking-immigration-detention-labour-exploitation-advisory-group-leag-report-a9019361.html>> accessed 16 December 2020.
- Candito A, ‘Caporalato, Braccianti Sfruttati e Venduti a Giornata: 60 Misure Cautelari e 14 Aziende Agricole Sequestrate Tra Cosenza e Matera’, *La Repubblica* (10 June 2020) <https://www.repubblica.it/cronaca/2020/06/10/news/caporalato_60_misure_cautelari_e_14_aziende_agricole_sequestrate_tra_cosenza_e_matera-258847533/> accessed 16 January 2021.
- Candito A, ‘Caporalato, Braccianti Sfruttati e Venduti a Giornata: 60 Misure Cautelari e 14 Aziende Agricole Sequestrate Tra Cosenza e Matera’, *La Repubblica* (10 June 2020) <https://www.repubblica.it/cronaca/2020/06/10/news/caporalato_60_misure_cautelari_e_14_aziende_agricole_sequestrate_tra_cosenza_e_matera-258847533/> accessed 4 January 2021.
- Carchedi F, ‘Legge n. 199/2016. Riflessioni Valutative Sullo Stato Di Attuazione’ in *Agromafie e caporalato, Quarto rapporto* (2018).
- Carpio K, ‘Coming Home Can Be Harder than Leaving: The Psychosocial Challenges of Being a Returnee’ (*On the Move*, 2017).
- Chynoweth S, ‘“We Kept in in Our Hearts”: Sexual Violence against Men and Boys in the Syria Crisis’ (*UNHCR*, 2017).
- Corrado A, ‘Caporalato, il Riesame ridimensiona l’operazione «Demetra»’ (*Il Quotidiano del Sud*, 4 July 2020) <<https://www.quotidianodelsud.it/basilicata/matera/cronache/cronaca/2020/07/04/caporalato-il-riesame-ridimensiona-loperazione-demetra/>> accessed 24 February 2021
- Davis J, Havey J, Vanntheory L, Channtha N, and Phaly S, ‘The Forgotten Cohort: An Exploration of Themes and Patterns Among Male Survivors of Sexual Exploitation & Trafficking’ (2016).
- De Masi F and Coresi F, ‘Mondi connessi: La migrazione femminile dalla Nigeria all’Italia e la sorte delle donne rimpatriate’ (2018).
- Demetriou DZ, ‘Connell’s Concept of Hegemonic Masculinity: A Critique’ (2001).
- Akbar J, ‘Brits Working as Bar Touts in Magaluf Are Forced to Work Long Hours for Little Pay by Bosses Who Seize Their Passports, Foreign Office Warns’,

Bibliography

The Sun (26 May 2018) <<https://www.thesun.co.uk/news/6385180/british-bar-touts-magaluf-wages-passports-seized-foreign-office-warning/>> accessed 16 December 2020.

Dipartimento per le pari opportunità, ‘Dati Estratti Dal Sistema Informatizzato per La Raccolta Di Informazioni Sulla Tratta (SIRIT). Dati Riferiti Alle Persone Che Sono Emerse e Che Sono Risultate in Carico Al Sistema Antitratta Nel Primo Semestre 2019’ (2019).

Dipartimento per le pari opportunità, ‘Dati Estratti Dal Sistema Informatizzato per La Raccolta Di Informazioni Sulla Tratta (SIRIT). Dati Riferiti Alle Persone Che Sono Emerse e Che Sono Risultate in Carico Al Sistema Antitratta Nell’anno 2018’ (2019).

Dustin M, ‘Designating “Vulnerability”: The Asylum Claims of Women and Sexual Minorities’ (*Security Praxis*, 3 June 2017) <<https://securitypraxis.eu/vulnerability-asylum-claims-women-minorities/>> accessed 27 February 2018.

Dutta I and Gray A, ‘Is the UN about to Change How States Address Trafficking in Women and Girls?’ (*OpenDemocracy*, 30 July 2020) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/un-about-change-how-states-address-trafficking-women-and-girls/>> accessed 23 February 2021.

European Migration Network and European Commission, ‘Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures’ (2014).

Fiorini A, ‘La protezione internazionale davanti al giudice: Uno studio sui decreti del Tribunale di Bologna’ (2019).

Fondation Scelles, ‘Sexual Exploitation: New Challenges, New Answers (5th Global Report)’ (2019).

Global Alliance Against Trafficking in Women (GAATW), ‘Comments on the Draft CEDAW General Recommendation on Trafficking in Women and Girls in the Context of Global Migration’ (2020).

Grey R, O’Donohue J, and Krasny L, ‘Evidence of Sexual Violence against Men and Boys Rejected in Ongwen’ (*Human Rights in International Justice*, 10 April 2018) <<https://hrij.amnesty.nl/evidence-sexual-violence-men-boys-rejected-ongwen/>> accessed 20 January 2021.

Bibliography

- Hooper J, 'Racial violence continues in Italy as four migrant workers wounded in shootings' *The Guardian* (9 January 2010) <<https://www.theguardian.com/world/2010/jan/08/standoff-italy-four-africans-wounded>> accessed 24 February 2021.
- Independent Anti-Slavery Commissioner *Combating modern slavery experienced by Vietnamese nationals en route to, and within, the UK* (UK 2017).
- International Rescue Committee, 'Vulnerability Assessment of Syrian Refugee Men in Lebanon. Investigating Protection Gaps, Needs and Responses Relevant to Single and Working Syrian Refugee Men in Lebanon' (2016).
- IWRAW-AP et al, 'Joint Response to the Draft CEDAW General Recommendation on TWGCGM' (2020).
- Kapur A and Muddell K, 'When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys in Transitional Contexts' (December 2016).
- Kennedy D, 'Selling the Distant Other: Humanitarianism and Imagery—Ethical Dilemmas of Humanitarian Action' (*The Journal of Humanitarian Assistance*, 28 February 2009) <<https://sites.tufts.edu/jha/archives/411>> accessed 10 January 2021.
- Mancini D, 'Contrasto Penale Allo Sfruttamento Lavorativo: Dalla "Legge 30" Alla Legge n. 199/2016' in *Agromafie e caporalato, Quarto rapporto* (2018).
- Ministero della Giustizia (Direzione Generale di Statistica e Analisi Organizzativa), 'La tratta degli esseri umani. Indagine statistica su un campione rappresentativo di fascicoli definiti con sentenza relativamente ai reati ex art. 600, 601 e 602 del codice penale' (2015).
- Ministero dell'Interno, 'Relazione del Ministro dell'interno al Parlamento sull'attività svolta e sui risultati conseguiti dalla Direzione Investigativa Antimafia' (2016).
- National Crime Agency (NCA) *National Referral Mechanism Statistics—End of the Year Summary 2017* (UK England and Wales NCA 2018).
- O'Connell Davidson J, 'Gender, Migration, "Trafficking" and the Troublesome Relationship between Agency and Force' (*Gender and Migration*, 2015) <<http://www.compas.ox.ac.uk/2015/gender-migration-trafficking-and-the-troublesome-relationship-between-agency-and-force/>> accessed 1 February 2021.

Bibliography

- On the Road Onlus, 'Oltre gli scenari consueti della tratta di esseri umani.' (2019) <<http://www.ontheroadonlus.it/news/articoli/oltre-gli-scenari-consueti-della-tratta-di-esseri-umani/>> accessed 9 February 2019.
- Palumbo L, 'The Need for a Gendered Approach to Exploitation and Trafficking' (*OpenDemocracy*, 2015).
- Pierini E, 'Caporalato, Braccianti Agricoli Trattati Come Schiavi: Arresti e Denunce', *Il Mattino* (21 November 2020) <https://www.ilmattino.it/primopiano/cronaca/sabaudia_finanza_caporalato_braccianti_agricoli_trattati_come_schiavi_arresti_e_denunce-5599488.html?fbclid=IwAR3hGEU-sGeeDtFRU6Ir2MJkSP_wxnEJqIzO2BiBTvxi7OulIfqe7SE44vo> accessed 20 January 2021.
- Redazione, 'Azienda Degli Orrore: Operai Picchiati e Senza Paga, Pochi Minuti per Mangiare', *Brescia Today* (18 November 2020) <<https://www.bresciatoday.it/cronaca/monza-usmate-pellet-rumeni.html>> accessed 10 January 2021.
- Reporters T, '97 Nail Bar Workers Arrested in Crackdown on "barbaric" Modern Slavery', *The Telegraph* (28 December 2016) <<https://www.telegraph.co.uk/news/2016/12/28/97-nail-bar-workers-arrested-incrackdown-barbaric-modern-slavery/>> accessed 10 January 2021.
- Santoro E and Stoppioni C, 'Rapporto Sul 2019 Del Laboratorio Sullo Sfruttamento Lavorativo e La Protezione Delle Sue Vittime Altro Diritto/FLAI CGIL' (2020).
- Seelinger KT and Freccero J, 'Accountability for Sexual Violence in Conflict and Post-Conflict Settings' (2015).
- Skrivankova K, 'United Kingdom (UK)' in *Collateral damage: the Impact of Anti-Trafficking Measures on Human Rights around the World* (GAATW 2007).
- The Inter-Agency Coordination Group against Trafficking in Persons, 'Trafficking in Persons and Refugee Status' (2017).
- United States State Department, '2020 Trafficking in Persons Report: Italy' (2020).
- Women's Refugee Commission (WRC), "'More Than One Million Pains": Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy' (2019).

Bibliography

- ‘Guardia di Finanza, smantellato traffico di esseri umani dalla Nigeria’, *La Nazione* (11 July 2012) <<https://www.lanazione.it/cronaca/2012/07/11/742419-immigrazione-arresti-droga-prostituzione.shtml>> accessed 24 February 2021.
- ‘Operazione "Pesha", decapitata la mafia nigeriana nel Teramano: c'è pure una cellula agrigentina’, *Agrigento Notizie* (21 July 2020) <<https://www.agrigentonotizie.it/cronaca/arresti-operazione-pesha-teramo.html>> accessed 24 February 2021.
- ‘Prostituzione: operazione 'Casa Transilvania', 22 in carcere’, *Ansa* (7 April 2014) <https://www.ansa.it/marche/notizie/2014/04/04/prostituzione-blitz-del-ros-26-arresti_85f17f27-97ea-4c4e-9ba8-1fdbab905a4d.html> accessed 24 February 2021.
- ‘Riti voodoo e minacce per fare prostituire giovani nigeriane: due arresti’, *Palermo Today* (18 October 2016) <<https://www.palermotoday.it/cronaca/prostituzione-immigrazione-clandestina-nigeriane-operazione-boga-arresti.html>> accessed 24 February 2021.

Reports from international and regional organisations

- 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 Italy’ (2014) GRETA(2014)18.
- Council of Europe, Group of Experts on Action against Trafficking in Human Beings, ‘5th General Report on GRETA’s Activities’ (2016) GRETA(2016)1.
- 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 the United Kingdom’ (2016) GRETA (2016)21.
- Council of Europe, Group of Experts on Action against Trafficking in Human Beings, ‘7th General Report on GRETA’s Activities’ (2017) GRETA(2018)1.
- Council of Europe, Group of Experts on Action against Trafficking in Human Beings, ‘Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings’ (2017) GRETA(2016)29.

Bibliography

- 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 Italy' (2019) GRETA(2018)28.
- 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 Finland' (2019) GRETA(2019)06.
- Council of Europe, Group of Experts on Action against Trafficking in Human Beings, 'Evaluation Re-port: Austria. Access to Justice and Effective Remedies for Victims of Trafficking in Human Beings' (2020) GRETA(2020)0.
- Council of Europe, Group of Experts on Action against Trafficking in Human Beings, 'Guidance Note on the Entitlement of Victims of Trafficking, and Persons at Risk of Being Trafficked, to International Protection' (2020) GRETA(2020)06.
- Council of Europe, Group of Experts on Action against Trafficking in Human Beings, 'Guidance Note on preventing and combatting trafficking in human beings for the purpose of labour exploitation' (2020) GRETA(2020)12.
- International Labour Organisation, 'Report of the Committee of Experts on the Application of Conventions and Recommendations' (2001) International Labour Conference, 89th Session.
- International Labour Organisation, 'Fundamental Rights at Work and International Labour Standards' (2003).
- International Labour Organisation, 'Report III(1B): Giving Globalization a Human Face (General Survey on the Fundamental Conventions)' (2 March 2012) <http://www.ilo.org/ilc/ILCSessions/101stSession/reports/reports-submitted/WCMS_174846/lang--en/index.htm> accessed 9 November 2017.
- International Organisation for Migration, 'Reintegration: Effective Approaches' (2015).
- International Organisation for Migration, 'Towards an Integrated Approach to Reintegration in the Context of Return' (2017).
- Organisation for Economic Cooperation and Development, 'Trends in International Migration: Continuous Reporting System on Migration' (2001).

Bibliography

Statement of International Criminal Court Prosecutor to the United Nations Security Council on the Situation in Libya (9 May 2017).

Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) (8 May 2019).

UNHCR, 'Desperate Journeys: Refugees and Migrants Arriving in Europe and at Europe's Borders' (2019).

UN Documents

Office of the High Commissioner for Human Rights, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking. Addendum to the Report of the United Nations High Commissioner for Human Rights' (2002).

UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees' (2001).

UNHCR, "'Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees' (2002).

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).

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).

UNHCR, 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (United Nations 2011).

United Nations Commission on Human Rights, 'Report on the Twenty-Ninth Session (26 February-6 April 1973). Economic and Social Council Official Records: Fifty-Fourth Session. Supplement No. 6' (1973).

United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights' (2009) UN Doc E/C.12/GC/20.

Bibliography

- United Nations Committee on the Elimination of Discrimination against Women, 'Draft General recommendation on Trafficking in Women and Girls in the Context of Global Migration' (2020).
- United Nations Committee on the Elimination of Racial Discrimination, 'General Recommendation XXX on Discrimination against Non-Citizens' (2005).
- United Nations Committee on Elimination of Racial Discrimination, 'Concluding observations on the combined nineteenth and twentieth periodic reports of Italy' (2017) UN Doc CERD/C/ITA/CO/19-20.
- United Nations Committee on Elimination of Racial Discrimination, 'Concluding observations on the combined second to fifth periodic reports of Serbia' (2018) UN Doc CERD/C/SRB/CO/2-5.
- United Nations Committee on Elimination of Racial Discrimination, 'Concluding observations on the combined twentieth to twenty-second periodic reports of Bulgaria' (2017) UN Doc CERD/C/BGR/CO/20-22.
- United Nations Committee on Elimination of Racial Discrimination, 'Concluding observations on the twenty-third periodic report of Finland' (2017) UN Doc CERD/C/FIN/CO/23.
- United Nations Economic and Social Council, 'Exploitation of Labour through Illicit and Clandestine Trafficking. Note by the Secretary-General. Study Prepared by Mrs. Halima Embarek Warzazi on the Exploitation of Labour through Illicit and Clandestine Trafficking' (17 June 1974).
- United Nations Economic and Social Council, 'Exploitation of Labour through Illicit and Clandestine Trafficking' (Resolution 1706 (LIII) July 1972).
- United Nations Economic and Social Council, 'Exploitation of Labour through Illicit and Clandestine Trafficking' (Resolution 1789 (LIV) 18 May 1973).
- United Nations Economic and Social Council, 'Question of International Legal Protection of the Human Rights of Individuals Who Are Not Citizens of the Country in Which They Live' (Resolution 1790 (LIV) 18 May 1973).
- United Nations Economic and Social Council, 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Twenty-Sixth Session. Note by the Secretary-General' (E/CN4/1128, E/CN4/Sub 2/3143 28 December 1973).
- United Nations General Assembly, 'Exploitation of Labour through Illicit and Clandestine Trafficking' (A/RES/2920 (XXVII) 1972).

Bibliography

- United Nations General Assembly, 'Measures to Improve the Situation of Migrant Workers' (Resolution 3224 (XXIX) 6 November 1974).
- United Nations General Assembly, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (13 December 1985).
- United Nations General Assembly, 'Violence against Migrant Women Workers' (UN Doc A/RES/47/96 5 April 1993).
- United Nations General Assembly, 'Traffic in Women and Girls' (UN Doc A/RES/49/166 23 December 1994).
- United Nations General Assembly, 'Agenda for Protection (Addendum)' (26 June 2002).
- United Nations General Assembly, 'Traffic in Women and Girls: Report of the Secretary General' (UN Doc A/50/369 24 August 1995).
- United Nations General Assembly, 'Global Compact on Refugees' (2018).
- United Nations Human Rights Committee, 'General comment No. 15: The position of aliens under the Covenant' (1986).
- United Nations Population Fund, 'Programme of Action of the International Conference on Population Development, Adopted at the International Conference on Population and Development, Cairo (5–13 September 1994)' (1994).
- United Nations Security Council, 'Prevention of the smuggling of aliens' (8 March 1994) UN Doc A/RES/48/102.
- United Nations Security Council, 'Security Council Committee concerning Libya Adds Six Individuals to Its Sanctions List' (7 June 2018) UN Doc SC/13371.
- Working Group on Trafficking in Persons, 'Analysis of Key Concepts of the Trafficking in Persons Protocol, Background Paper prepared by the Secretariat', UN Doc CTOC/COP/WG.4/2010/2.

Annexes

Annex 1 – Participant Information Sheet

As outlined in the Introduction, a series of semi-structured interviews were carried out with a purposeful sample of respondents in accordance with guidance established by the Research Ethics Committee (REC) of the National University of Ireland, Galway.

Participant Information Sheet

This letter is to invite you to take part in the study: “Trafficked adult males, gendered constructions of vulnerability and access to protection.” This sheet contains some information on the project and on the researcher, in order to answer some preliminary questions you might have. If anything remains unclear, please feel free to ask any other questions. If you agree to take part in this study, your full consent will need to be given.

Who is conducting this study?

Noemi Magugliani, PhD Candidate at the Irish Human Rights Centre, National University of Ireland, Galway. Noemi holds a B.A. in International Relations from the University of Milan (Italy) and an LL.M. in International Human Rights Law and Public Policy from University College Cork. She is a Legal Researcher with the Global Legal Action Network (GLAN), where she coordinates the Migration and Border Violence stream. Her main areas of interest are International Human Rights Law, Migration Law, Refugee Law, and Human Trafficking. Prior to being a Fellow at the ICHR, she worked with Nasc Ireland, the Irish Immigrant Support Centre, and Galway Migrant Service as a Legal Adviser, as well as with IOM Italy as a Researcher.

What is this research about and what does it involve?

The purpose of this research is to critically evaluate how trafficked adult males are identified, recognised and protected. Protection is conceived broadly as to include not only asylum, subsidiary and humanitarian protection, but also obtainment of protection through recognition of victim of trafficking status. The project further examines the theoretical underpinnings, together with the practical implications, of the relationship between gender, victimhood and protection and to explore how anti-trafficking and international protection laws, as well as migration control procedures, in Italy and in the UK include (or exclude) trafficked adult males from protection mechanisms.

How can you help?

I am interested in gaining as many perspectives from professionals working in or with the protection system and the anti-trafficking institutions and actors. In particular, I am interested in your personal experience and expertise, which will be of utmost importance in combination with quantitative data which has been and will be collected during the study.

Do I have to take part?

No, participation is entirely voluntary. If you agree to take part in the interview, I will meet you at your choice of location. You can withdraw your consent any time before, during, or after the interview, or refuse to answer questions.

What will happen if I take part?

You will be interviewed by the researcher. The interviewer will ask you questions about your professional experience with respect to the asylum and/or anti-trafficking system. Your interview will be recorded, and notes will be taken. A summary of the interview (which will be anonymous) will be written down. This summary, as well as a transcript of the recording that contains no identifying information will be stored according to data protection law.

What will happen after the interview?

Interviews will be transcribed and summarised by the researcher. You will receive a copy of the summary in order to guarantee transparency in the process. Findings from the interviews, which will be kept anonymous and unlinked with specific interviews and participants, will inform the research. The result of the study will be presented in the form of academic articles and of a PhD thesis.

How will the information be treated?

The information will be stored on a cloud server to which only the researcher has access. The researcher will keep the recordings, transcripts, field notes and any other data for five years after the completion of the project in 2021, conforming with NUI Galway and international data protection standards.

Further information and advice

Feel free to ask any further information and/or advice to Noemi Magugliani, at N.Magugliani1@nuigalway.ie or at +353892064578.

Confidentiality

Your name and any identifying information will not be used at any stage in the study. Recordings, transcripts and notes will be marked by progressive numbers and will not include any data which could reveal your identity.

Thank you for your cooperation. If you have any concerns about this study, please feel free to contact an independent expert of the NUI Galway Research Ethics Committee at ethics@nuigalway.ie.

Annex 2 – Interview Questions (sample)

1. What is your perception of the meaning and scope of human trafficking in the protection system? Has this perception changed since the adoption of [the *Misure contro la Tratta di Persone and Prevenzione e Repressione della Tratta di Esseri Umani e Protezione delle Vittime* / the UK Modern Slavery Act]?
2. How do you evaluate the current protection paths available to trafficked persons in terms of accessibility, effectiveness, and transparency?
3. How do you evaluate the connections and referral mechanisms that are in place, if any, between the anti-trafficking and the asylum system?
4. What do you think are the hurdles which arise in asylum determination proceedings to recognising trafficking related claims? Do you think that gender plays a role in asylum determination proceedings with a trafficking component?
5. Is there a type of trafficking and/or a type of ‘victim’ of trafficking which, in your experience, is more likely to claim and receive protection? If yes, why do you think that is the case?
6. How much weight do credibility and vulnerability assessments have in the decision? What are your thoughts about the way in which such assessments are performed? Do you think there is an aspect or facet that is being given too much or too little attention? Do you perceive that such assessments are fair/unfair?
7. Do you think that the State adopts the same approach in tackling trafficking for sexual exploitation and for other forms of exploitation? If not, would you say that this is somewhat mirrored in the outcome of protection claims?
8. Do you think that other forms of exploitation besides sexual exploitation are overlooked in anti-trafficking actions? If yes, why – and do you think that the gender of trafficked persons plays a role?

Annex 3 – List of participants (anonymous)

	Location	Type of organisation	Area of work	Modality
1	Italy	International Organisation	Legal	Interview
2	Italy	NGO	Social	Questionnaire
3	Italy	Other	Legal	Questionnaire
4	Italy	Local Authority	Administrative	Questionnaire
5	Italy	NGO	Social	Questionnaire
6	Italy	Local Authority	Administrative	Questionnaire
7	Italy (Apulia)	NGO	Legal	Interview
8	Italy (Latium)	NGO	Social	Interview
9	Italy	NGO	Social	Questionnaire
10	Italy	NGO	Administrative	Interview
11	Italy	NGO	Legal	Questionnaire
12	Italy	NGO	Social	Questionnaire
13	Italy	Local Authority	Administrative	Questionnaire
14	UK	NGO	Social	Questionnaire
15	UK	Other	Legal	Interview
16	UK (Scotland)	NGO	Social	Interview
17	UK	NGO	Social	Questionnaire
18	UK	NGO	Legal	Questionnaire
19	UK	NGO	Health	Questionnaire
20	UK	NGO	Social	Interview
21	UK	Other	Legal	Interview

Annexes

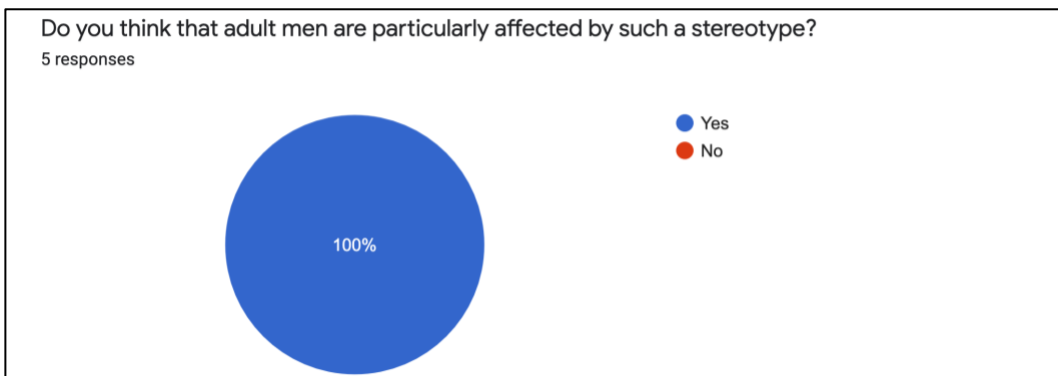
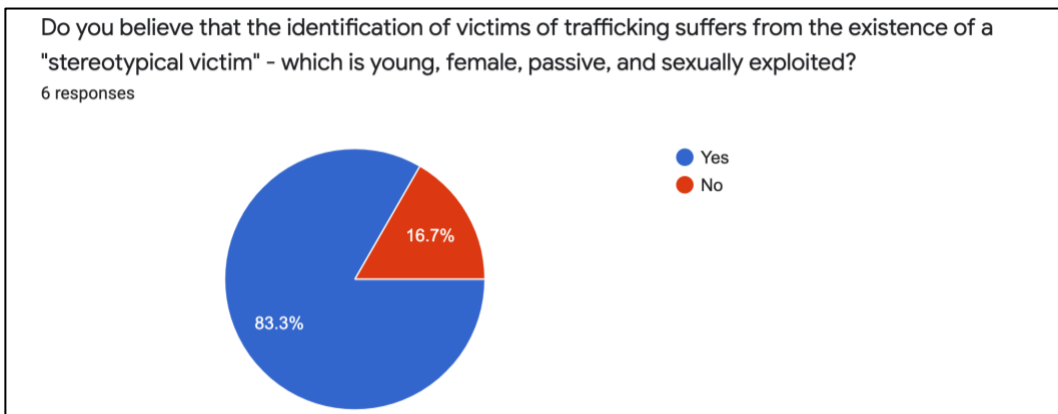
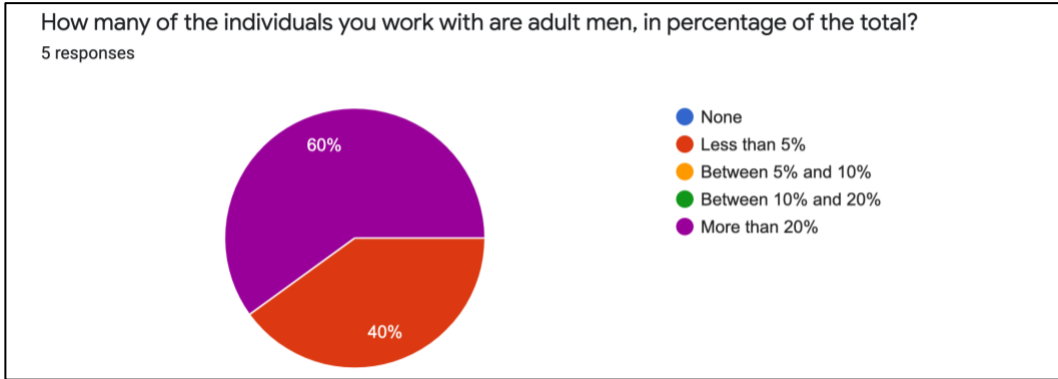
22	UK	NGO	Social	Questionnaire
23	UK	NGO	Administrative	Questionnaire

As per confidentiality agreement, the personal details of interviewees are not made public. The numbers indicated in the table above do not correspond with the numbers associated to a particular interviewee throughout the thesis. Where a specific location is indicated, the organisation has a regional presence and is not operative throughout the country.

A wide range of other professionals also contributed views in the course of the research in an informal manner, including judges in domestic courts and tribunals, members of Territorial Commissions, lawyers, as well as members of civil society organisations and trade unions, officials from human rights institutions, and human rights defenders.

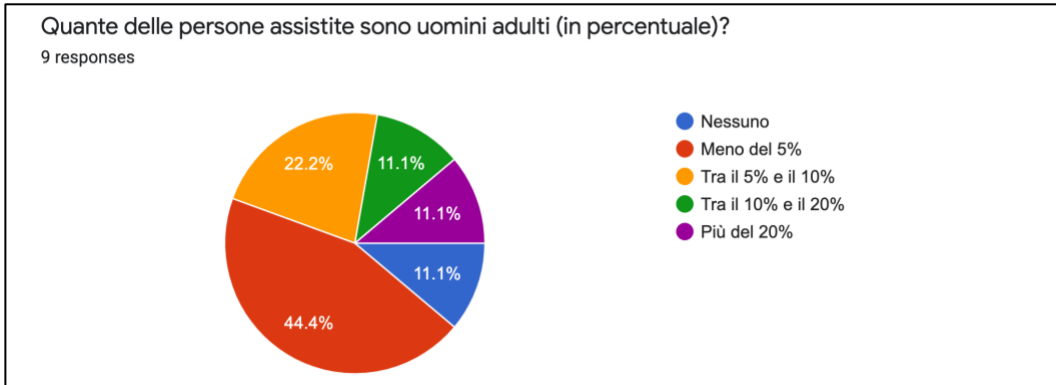
Annex 4 – Questionnaires

Selected responses to questionnaire (United Kingdom):



Selected responses to questionnaire (Italy):

1. How many of the individuals you assist with are adult men (% of the total)?



2. Do you believe that the identification of 'victims of trafficking' suffers from the existence of a "stereotypical victim" – which is young, female, passive, and exploited for the purpose of sexual exploitation?

