

Criminal Liability of Legal Persons for Human Trafficking Offences in International and European Law

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Abstract

The most recent international and European laws against human trafficking require states to impose sanctions against legal entities involved in this crime. They aim to respond to the increasing risks of companies resorting to and benefiting from trafficked manpower. However, in spite of these legal improvements, prosecuting a legal person under trafficking laws still is very difficult. This paper will analyse the different ways in which companies can be, directly or indirectly, involved in human trafficking. Subsequently, it will address the international and European legal response to these patterns of involvement. Finally, the main obstacles that hinder the prosecution and punishment of legal persons liable for trafficking offences will be explained, and several avenues for improvement will be pointed out. Overall, this paper aims to highlight that these difficulties need to be overcome in order to truly guarantee adequate accountability of legal persons that commit human trafficking.

I. Introduction

In recent years, the role of corporations as potential perpetrators of human trafficking has become a matter of growing importance. Cases of powerful multinational corporations being accused of engaging in exploitative practices abroad are often reported in the media, exposing the gravity of the problem and drawing the public's attention to this issue. Indeed, companies' involvement in human trafficking for diverse types of exploitation can be very significant, not only in laundering the profits of the illegal activity, but also in recruiting potential victims and exploiting them. The links between human trafficking and corporations are considered so important that it has been suggested that 'the trafficking industry is consistently growing due to its prevalence in the corporate world'.¹

Aware of this situation, the most recent international legal instruments against human trafficking, such as the United Nations Convention against

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¹ T.M. Parente, 'Human Trafficking: identifying forced labour in multinational corporations and the implications of liability', *Brazilian Journal of International Law* 11(1) (2014), 148.

Transnational Organized Crime (UNTOC),² the Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention),³ and Directive 2011/36/UE on preventing and combating trafficking in human beings and protecting its victims (EU Trafficking Directive),⁴ require states to impose sanctions against legal entities involved in this crime. However, the prosecution of human trafficking cases against corporations is still very rare.⁵ The European Commission reported in a study published in 2015 that, despite the fact that most Member States have relevant legislation in place, only one conviction was mentioned in the 23 GRETA (Group of Experts on Action against Trafficking in Human Beings) reports.⁶ Reaching a corporation under a trafficking statute is nowadays very difficult or even impossible.⁷

Several factors can explain this lack of accountability. From a political point of view, the lack of criminal prosecution of the powerful has been justified because of the necessity of capitalising accumulation, enhancing the interests of the capitalist state, and elevating the national well-being of all citizens.⁸ In this sense, the personal and professional relationships, as well as the financial and other aligned interests between corporate representatives and government authorities should not be overlooked as a factor influencing political will in relation to the prosecution of corporations.⁹ From a legal perspective, the principle that corporations cannot commit crimes (*societas delinquere non potest*) was universally accepted until very recently. Nowadays, some countries still do not recognise the concept of corporate criminal liability as consistent with their domestic legal principles, and even when states do recognise it, such liability is limited to certain attribution models, types of legal persons or criminal offences.¹⁰

² New York, 15 November 2000, 2225 UNTS 209.

³ Warsaw, 16 May 2005. CETS No.197.

⁴ [2011] OJ L 101/1.

⁵ See more in TRACE Project (Trafficking as a Criminal Enterprise), Deliverable 6.5_ Final Report (April 2016), 18; A. Feasley, 'Eliminating Corporate Exploitation: Examining Accountability Regimes as Means to Eradicate Forced Labor from Supply Chains', *Journal of Human Trafficking* 2(1) (2016), 16.

⁶ European Commission, *Study on Case-Law on Trafficking for the Purpose of Labour Exploitation* (Luxembourg, 2015), 83.

⁷ S.C. Pierce, 'Turning a Blind Eye: Corporate Involvement in Modern Day Slavery', *The Journal of Gender, Race & Justice* 14 (2011), 578.

⁸ G. Barak (ed.), *The Routledge International Handbook of the Crimes of the Powerful* (London and New York: Routledge, 2015), 1.

⁹ ICAR, *The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases* (October 2016), 1.

¹⁰ A. Saraiva-Leao, 'Corporate Criminal Liability for Human Trafficking in the UE: a Legal Obligation for Member States?', Master's Thesis, Uppsala Universitet, Autumn Term 2015, 63.

This paper will explore the multiple ways in which companies can engage in human trafficking nowadays, and the legal response offered to this problem by international and European law. It is important to clarify from the beginning that, despite focussing on human trafficking, this paper will inevitably make reference to exploitation, as the purpose and, therefore, an integral element of trafficking.¹¹ Thus, the first section will address the role of legal persons as potential perpetrators of human trafficking, analysing the three elements of this crime: act, means and purpose. Secondly, this paper will address the international and European legal response to these patterns of involvement, primarily from the perspective of criminal law. Finally, the third section will study the factors that hinder the punishment of legal persons involved in human trafficking, and suggest possible improvements to guarantee adequate accountability.

2. Corporations' Involvement in Human Trafficking

According to the internationally recognised definition offered by the Palermo Protocol, which has served as the basis for European anti-trafficking instruments,¹² human trafficking is a process that requires three elements: act, means and purpose. The 'act' element includes the recruitment, transportation, transfer, harbouring or receipt of persons.¹³ The 'means' element refers to the use of threats, force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or giving or receiving payments or benefits to achieve the consent of a person having control over another person. The purpose is the exploitation of the person, including, at least, sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁴ As this definition shows, human trafficking is a complex crime that can occur in several different forms. Likewise, corporations' involvement in human trafficking can be very diverse, since they

¹¹ As Gallagher points out 'the concept of trafficking in international law does not just refer to the *process* by which an individual is moved into a situation of exploitation: It extends to include the maintenance of that person in a situation of exploitation. Accordingly, it is not just the recruiter, broker, or transporter who can be identified as a trafficker, but also the individual or entity involved in initiating or sustaining the exploitation'. A. Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010), 47.

¹² It is necessary to keep in mind that European anti-trafficking instruments have expanded the definition of trafficking provided by the Palermo Protocol. This has been reflected in European national legislation too. The new actions and forms of exploitation included in European law will be indicated as each element is analysed.

¹³ Directive 2011/36/EU adds the exchange or transfer of control over persons to the actions of human trafficking.

¹⁴ Directive 2011/36/EU includes, on top of the types of exploitation foreseen in the Palermo Protocol, the exploitation of criminal activities and begging.

can commit any of these actions, using any of these means and for any kind of exploitation.

The multiple ways in which corporations can commit the acts of trafficking can be classified in three different categories. The first one involves the most obvious cases, which occur when companies directly and willingly recruit victims, transport them, provide them with the required documentation required to be moved to the place where they will be exploited, and obtain benefits from that exploitation.¹⁵ Examples of these conducts are the frequent, and perhaps most stereotypical, cases of women recruited, transported and sexually exploited by a brothel. The UNODC Case Law Database includes several cases following this pattern; although in none of them did the legal person face any accountability, only natural persons were charged with human trafficking. For instance, in 2012 a Danish court considered two men, who ran a brothel, guilty of human trafficking for recruiting women in Thailand, picking them up at the airport, depriving them of their passports and transporting them to the brothel where they would be forced to work as prostitutes, while being subject to threats of violence against them or their families or being reported to the police for illegal residence.¹⁶ A similar case occurred in Spain, where the owner and manager of a night club deceived and transported two Belorussian women to a brothel where they were told they would have to work as prostitutes to pay their 'debt'.¹⁷ In the most egregious cases, companies are created specifically as an instrument to commit this crime and launder the obtained benefits.¹⁸ A good example can be found in Argentina, where labour inspectors reported in 2013 that a cooperative had been used 'to give an appearance of legitimacy to the criminal business which consisted in the exploitation of workers [56 victims] for the production and sale of clothing'.¹⁹

The second category includes cases of companies that hire trafficked workers supplied by third parties, both domestically and abroad. This may occur when companies resort to subcontracting, recruitment agencies and temporary employment agencies to hire workers, and these agencies use fraudulent recruitment practices such as lying about working conditions, the location or nature of the job, which may eventually constitute human trafficking. The UNODC reports that recruitment agencies might 'engage in coercive recruitment prac-

¹⁵ M. Hoff/K. McGauran, *Engaging the Private Sector to End Human Trafficking. A Resource Guide for NGOs* (Amsterdam: La Strata International, 2015), 55.

¹⁶ UNODC Case Law Database, Hjoerring City Court Judgement 22 August 2012, DNK014.

¹⁷ UNODC Case Law Database, Cesar et al., ESP003.

¹⁸ EUROPOL, *The THB Financial Business Model. Assessing the Current State of Knowledge* (The Hague, 2015), 7-8.

¹⁹ UNODC Case Law Database, Case No. 3692/13, ARG064.

tices, including debt bondage, isolation, surveillance, withholding of money, violence, and threats of violence and of denunciation to authorities'.²⁰ Several cases were reported in the UNODC Case Law Database of employment agencies used to lure young women abroad, convincing them to sign contracts to work as dancers or waitresses to finally end up being exploited as prostitutes in a brothel.²¹ There are also examples of recruiters involved in human trafficking for the purposes of exploitation in agriculture.²² In these cases, neither the employment agencies nor the brothels faced any kind of liability. These practices are especially common in sectors where 'there is a seasonal demand for workers, when workers and employers do not speak the same language, or where aspiring workers need to travel long distances (including across borders) to reach the job site'.²³ The Odebrecht case in Brazil exemplifies this tendency. The said multinational construction company was charged with engaging in trafficking of Brazilian nationals in Angola through abuses committed by its subcontractors.²⁴

The third category covers companies' involvement in human trafficking when their products, services or facilities are used in the trafficking process. This can occur in the hospitality, tourism and transport sectors.²⁵ For example, it may affect airlines or shipping companies used to move the victims, and hotels used to host them.²⁶ Corporations can also be involved when trafficking victims are exploited at their properties such as bars, nightclubs, brothels, factories and construction sites, among others.²⁷ With the increasing importance of new technologies, internet advertisers or dating sites, for instance, might facilitate sex trafficking even if they do not have a direct relationship with the traffickers.²⁸ *US v. Marvin Chavelle Epps* illustrates how companies might indirectly facilitate trafficking. In this case, a man recruited a 16 year-old girl through a website to exploit her as a prostitute. He used another website to advertise the victim for sexual exploitation in a hotel, and he took the victim to a tattoo parlour

²⁰ UNODC, *The Role of Recruitment Fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons* (Vienna, 2015) 6.

²¹ In this sense, for example: UNODC Case Law Database, *Ministerio Publico v. Jose Luis Castro Sosa*, CHL001; and *Chile v. Nelly Viviana Condori Nicolas*, CHL002.

²² UNODC Case Law Database R.G. 40262009, ITAx023.

²³ UNODC, *The Role of Recruitment* 2015 (n. 20), 6.

²⁴ Processo No. 10230-31.2014.5.15.0079. 2ª Vara do Trabalho de Araraquara.

²⁵ P. Hunter/Q. Kepes, *Human Trafficking & Global Supply Chains: A Background Paper* (2012), 13.

²⁶ Hoff/McGauran, *Engaging the Private Sector* 2015 (n. 15), 57.

²⁷ EUROPOL, *Trafficking in Human Beings in the European Union* (The Hague, 2011), 6.

²⁸ A.W. Shavers, 'Human Trafficking, the Rule of Law and Corporate Social Responsibility', *South California Journal of International Law & Business* 9 (2013), 64.

to have his street name tattooed on her arm. Neither the hotel, the websites nor the tattoo parlour reported the case, despite the victim's youthful appearance.²⁹

Concerning the 'means' element, companies can also use different techniques to carry out trafficking. Some companies use violence or coercion to force workers to stay in a job, for example by threatening them with physical harm or even death if they try to escape.³⁰ However, the abuse of a position of vulnerability of the victim is more common in a global post-crisis context.³¹ That is to say, companies might take advantage of economic, social, cultural, environmental and/or political conditions that increase the susceptibility of an individual or group to being trafficked.³²

Finally, when it comes to address the 'purpose' element of trafficking it is necessary to clarify what is understood by 'exploitation' for the purposes of this paper. Neither the Palermo Protocol nor the EU Trafficking Convention or Directive define 'exploitation', instead they provide an open-ended list of exploitative practices. It is assumed that the definitions of some of these practices, such as forced labour or slavery, contained in other international instruments are applicable.³³ However, other practices, such as the exploitation of the prostitution or others, have not been internationally defined.³⁴ Thus, in the absence of definitions, the UNODC provides some general criteria to identify exploitation as imposing 'particularly harsh or abusive conditions of work' on someone, which are 'inconsistent with human dignity', taking '*unfair* advantage' of their situation or vulnerability.³⁵ Taking these guidelines into account, corporations' involvement in human trafficking can potentially include any type of exploitation, from sexual exploitation to removal of organs. However, there are certain economic sectors that are particularly prone to this crime. Due to the specific nature of the tasks performed, agriculture demands temporary labour, long working

²⁹ UNODC Case Law Database, *United States v. Marvin Chavelle Epps*, USA046.

³⁰ Organization for Security and Cooperation in Europe (OSCE), *Ending Exploitation. Ensuring Business do not Contribute to Trafficking in Human Beings: Duties of States and the Private Sector*, Occasional Paper Series no. 7 (Vienna, 2014), 16.

³¹ Global Migration Group (GMG), *Fact-Sheet on the Impact of the Economic Crisis on Trafficking in Persons and Smuggling of Migrants* (2009), 1.

³² See more about the abuse of a position of vulnerability in UNODC, *Abuse of a position of vulnerability and other 'means' within the definition of trafficking in persons* (New York, 2013).

³³ UNODC, *The Concept of 'Exploitation' in the Trafficking in Persons Protocol* (Vienna, 2015), 24. Thus, for instance, the International Labour Organization (ILO) Convention concerning Forced or Compulsory Labour, adopted in Geneva at the 14th ILC session on 28th June 1930, is generally taken into account to consider 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily' as one of this forms of exploitation (Article 2).

³⁴ *Ibid.*, 23.

³⁵ *Ibid.*, 21-26. Also UNODC, *Model Law against Trafficking in Persons*, UN Sales No. E.09.V.11 (2009).

hours and hard conditions. Furthermore, because of the tremendous competition over costs in the sector, employers tend to increasingly hire migrant workers, some of whom have an irregular status.³⁶ All these factors can make companies in the agricultural sector vulnerable to being involved in human trafficking. Similarly, companies are at risk of resorting to trafficked workers in the construction sector. Building cannot be outsourced and often involves arduous and dangerous work. On some occasions, workers (either domestic or migrants) are tied to one employer without the right to leave or are subject to unlawful deductions from their wages.³⁷ Other industries featured regularly in reports on human trafficking include mining, logging, textiles, hospitality, transportation and domestic service.³⁸

3. International and European Legal Response to Companies' Involvement in Human Trafficking

The idea that corporations should face liability for crimes related to human trafficking is not new. It goes back to the Nuremberg Trials, where the court explored the possibility of punishing German companies that used slave labour made available by the Nazis during the Second World War.³⁹ This dilemma has continued through the years while states have kept trying to find an adequate response to the diverse offences described in the previous section. Nowadays, there is increasing acceptance of the idea that corporations should be held somehow liable for human trafficking offences. This is the position held in international and European anti-trafficking instruments.

3.1 International Law

The first reference to corporate liability for human trafficking in an international legal treaty can be found in the United Nations Convention against Transnational Organized Crime (UNTOC), the provisions of which also apply to its supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).⁴⁰ Generally, corporate liability has been considered especially important in instruments

³⁶ Hunter/Kepes, *Human Trafficking* 2012 (n. 25), 16-17.

³⁷ *Ibid.*, 18.

³⁸ European Commission, *Study on Case-Law* 2015 (n. 6), 24-25; Parente, 'Human Trafficking' 2014 (n. 1) 151-152; Hunter/Kepes, *Human Trafficking* 2012 (n. 25), 19.

³⁹ A. Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations', *Berkeley Journal of International Law* 91(20) (2002), 122.

⁴⁰ According to Article 1 of said Protocol, it supplements the UNTOC and both instruments should be interpreted together.

against organised crime, which has affected not only human trafficking but also other manifestations of this form of criminality such as environmental crimes, corruption and even terrorism.⁴¹ Thus, Article 10 of the UNTOC obliges each State Party to adopt the necessary measures to establish the liability of legal persons in three cases: for participation in serious crimes involving an organised criminal group; for offences established by States Parties as they implement Articles 5 (participation in an organised criminal group), 6 (money laundering), 8 (corruption) and 23 (obstruction of justice); and for any Protocol to which the state is or intends to become a party (Article 1, para. 3, of each Protocol). Therefore, human trafficking, as defined in Article 5 of the Palermo Protocol, is one of the offences for which legal persons may face liability.

According to the UNTOC, states' obligation to provide for the liability of legal entities is mandatory only to the extent that this is consistent with its legal principles. The UNTOC recognises that different legal systems adopt diverse approaches to the liability of legal persons. In some states corporate criminal liability may only apply to certain offences and in others it simply does not exist. Thus, there is no obligation to establish criminal liability, although such liability can also be civil or administrative.⁴² In any case, the discretion given to states is not absolute. On the one hand, they must guarantee that such liability shall be without prejudice to the criminal liability of the natural person who has committed the offence. On the other hand, whatever type of liability is chosen, it must ensure that legal persons are subject to effective, proportionate and dissuasive sanctions, whether they are criminal or not. In line with this, it has been pointed out that criminal liability is believed to have a more deterrent effect. This is partly due to the stigmatisation that follows criminal sanctions, which can be very costly, and partly because it can encourage companies to adopt more effective management and supervisory structures.⁴³

Given the high possibilities of private employment agencies engaging in human trafficking, as explained in the previous section, another international legal instrument is worth mentioning here. The ILO Convention concerning Private Employment Agencies (No. 181)⁴⁴ compels Member States to adopt measures in order to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory.⁴⁵ In addition, it forbids

⁴¹ M. Mattar, 'Corporate Criminal Liability: Article 10 of the Convention against Transnational Organized Crime', *Journal of International Affairs* 66(1) (2012), 108-109.

⁴² UN, Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime (New York, 2004).

⁴³ *Ibid.*, para. 240; Pierce, 'Turning a Blind Eye' 2011 (n. 7), 597-598.

⁴⁴ Adoption: Geneva, 85th ILC session (19 June 1997).

⁴⁵ Article 8.

private companies from charging direct or indirect recruitment fees,⁴⁶ which are alleged to increase vulnerability to trafficking and exploitation.⁴⁷ Overall, this treaty offers guidance for states to design a legal framework that includes penalties (administrative or criminal) for abusive practices, and ultimately avoid risks of trafficking.⁴⁸

Although both international instruments could be seen as a positive advance at the time of adoption, when human trafficking was not even criminalised as such in many national legislations, they are not enough to tackle the challenges posed by this form of criminality nowadays. First, because their scope of application is more limited than the reality of cases. The ILO Convention No. 181, besides not having been widely ratified, applies only to registered recruitment agencies.⁴⁹ The Palermo Protocol, for its part, is limited to transnational offences in which an organised criminal group is involved,⁵⁰ so it could not apply to domestic trafficking. Moreover, the obligation to find corporations liable for human trafficking is too general and leaves many questions open. The following European legal instruments have tried to lighten the legal response to this phenomenon.

3.2 European Law

Both the Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention) and Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (EU Trafficking Directive) require Member States to establish liability of legal persons for human trafficking.⁵¹ Again, the form of liability imposed on corporations can be criminal, civil or administrative, but it must ensure that sanctions are effective, proportionate and dissuasive.⁵² Both European legal instruments clarify that the offence has to be committed by a natural person, acting either individually or as part of an organ of the legal person, for the benefit of the company. A natural person can be someone with a leading position within the legal person, or another person, without a managerial position, acting under the authority of the former. In the first case, the person must have power of representation or authorisation to take decisions

⁴⁶ Article 7.

⁴⁷ UNODC, *The Role of Recruitment* 2015 (n. 20), 7.

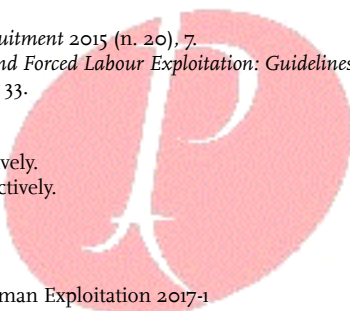
⁴⁸ ILO, *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislation and Law Enforcement* (Geneva, 2005), 33.

⁴⁹ As defined in Article 1.

⁵⁰ Article 4.

⁵¹ Articles 22 and 5, respectively.

⁵² Articles 23.2 and 6, respectively.



or exercise control within the legal person.⁵³ In the second situation, the crime must have been made possible by a lack of supervision or control by the person in a leading position.⁵⁴

Thus, the system adopted by the EU instruments against human trafficking includes elements of both the vicarious liability⁵⁵ and the identification models.⁵⁶ It follows the identification model because the company is criminally liable for the acts committed by managers, directors and other employees with certain responsibilities. Nevertheless, the vicarious liability model, or *respondeat superior*, is also present since the legal entity is liable for the criminal acts committed by any of its employees or agents, as long as they have acted within the scope of their employment, and for the benefit of the company. In any case, the vicarious liability model is moderated by the idea of supervision. In order to find a corporation liable for human trafficking, the offence must have been committed due to a lack of supervision or control by the person in a managerial position. This connects with the third model of attribution, the organisation model, which bases criminal liability on the deficits in the organisational structure of the legal person or its business ethics.

Furthermore, both instruments require States Parties to consider criminalising ‘the use of services which are the object of exploitation [...] with the knowledge that the person is a victim of trafficking in human beings’.⁵⁷ Thus, companies could be prosecuted for their involvement in human trafficking when it cannot be demonstrated that they have directly committed the crime.

The EU Trafficking Directive offers one clear advantage over previous legal instruments. It defines what a legal person is for the purposes of applying liability for human trafficking offences. The definition offered is consistent with other EU instruments approximating rules in relation to criminal corporate liability. They simply indicate that a legal person is any entity having such status

⁵³ Articles 22.1 and 5.1, respectively.

⁵⁴ Articles 22.2 and 5.2, respectively.

⁵⁵ According to the vicarious liability model or *respondeat superior*, the corporation is liable for the criminal acts committed by any of its employees or agents, as long as they have acted within the scope of their employment, and for the benefit of the company. For more about attribution models in the EU, see G. Vermeulen et al., *Liability of Legal Persons for Offences in the EU*, European Commission, IRCP-series vol. 44 (Apeldoorn: Maklu Publishers, 2012), 58. Thus, for example, if an agent recruits workers to be subject to labour exploitation within the company, abusing their position of vulnerability, the legal person would also be punished for human trafficking.

⁵⁶ According to the identification model, the acts committed by managers, directors and other employees with certain responsibilities are actually considered acts of the corporation. See, for instance, Vermeulen et al., *Liability of Legal Persons 2012* (n. 55), 11. This means that if the directors of a company commit or tolerate human trafficking, the corporation would also be held liable.

⁵⁷ Articles 19 and 18, respectively.

under the applicable national law, except for states or other public bodies in the exercise of state authority and for public international organisations. Hence, Member States' definitions of a legal person in their domestic legal systems will determine when and how corporations can be held criminally liable for trafficking. It has been suggested that a wider definition of 'legal persons' with regards to liability for trafficking offences should be reconsidered to include public legal persons.⁵⁸ This would be consistent with many Member States' domestic legal systems, which do consider public entities to be legal persons subject to criminal responsibility, and, more importantly,⁵⁹ with the EU trafficking instruments that recognise public sector complicity in trafficking as an aggravated circumstance.

European law has further developed the general obligation contained in international law, and has established minimum standards concerning liability of legal persons that Member States must comply with. An analysis of the implementation of these legal texts in national legislations is beyond the scope of this paper. However, GRETA reports are useful instruments to depict levels of compliance.⁶⁰ In summary, GRETA urges Albania and Ukraine to modify their legislation, welcomes the efforts made by Belgian authorities, and overall stresses the need for involving businesses in anti-trafficking action.⁶¹ This is also the general suggestion made by the European Commission in the EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, which proposes the establishment of a private sector platform, the so-called European Business Coalition against human trafficking, which would develop guidelines in cooperation with businesses and other stakeholders, to reduce demand and prevent human trafficking in high-risk areas.⁶²

4. Main Obstacles Applying Criminal Liability to Legal Persons Involved in Human Trafficking

As stated before, the prosecution of legal persons is a relatively recent issue that brings about a wide range of difficulties that are being exten-

⁵⁸ A. Saraiva-Leao, 'Corporate Criminal Liability' 2015 (n. 10), 32-33.

⁵⁹ Vermeulen et al., *Liability of Legal Persons* 2012 (n. 55), 40-46.

⁶⁰ GRETA, *5th General Report on Greta's Activities* (Strasbourg, 2016); GRETA, *Compilation of relevant extracts from GRETA Reports concerning the implementation of the Convention on Action against Trafficking in Human Beings*, Working document, 23 June 2014.

⁶¹ *Ibid.*, 18, 55-57.

⁶² European Commission, *EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*, COM (2012) 286 final (Brussels, 2012), 8.

sively tackled by law makers and academic literature. This section will focus on those specific obstacles that are more likely to arise in human trafficking cases.

4.1 Problems Derived from Subcontracting and Complex Corporate Structures

The main challenge of applying criminal liability to legal persons in the context of human trafficking is represented by the complicated structure adopted by corporations nowadays. Many corporations have tried to increase their profits by producing more and cheaper products, and to do so, they have resorted to outsourcing, offshoring and subcontracting practices, both nationally and abroad.⁶³ Corporations normally operate through several separate units: a parent company that has control over the management and operations of another/other companies; and secondary companies, subsidiaries or subcontractors of the former entity. Usually, the subsidiaries do not act for themselves but as directed by the parent company.⁶⁴ In such contexts, it is difficult to demonstrate the connection between the parent corporation and the agent who committed the crime, who might have been directly hired by one of the subsidiary companies.⁶⁵ In fact, most EU Member States recognise parent-subsidiary structures in their national laws, but not all of them have the legal possibility to hold the parent companies criminally liable for the activities of the subsidiary.⁶⁶

One possible solution to overcome this difficulty is applying new liability theories to allow courts to examine the dependency factors and establish the connections between the employee and the parent company.⁶⁷ The so-called 'economic realities test', originally used in labour law, has been suggested as a new theory in order to determine if the corporation could be liable as a joint employer, together with the contractor. This test evaluates factors of actual dependency based on true economic reality factors, instead of limited indicia of control and authority of the employer over the employee.⁶⁸

Several courts all over the world have had to deal with this problem and have used different reasonings to find both the corporation and the subcontractor

⁶³ J. Konov, 'Piercing the Veil's Effect on Corporate Human Rights Violations & International Corporate Crime', *Munich Personal REPEC*, archive no. 35714 (Goettingen, 2012), 8-13; N.G. Bang, 'Unmasking the Charade of the Global Supply Contract: A novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases', *Houston Journal of International Law* 35(2) (2013), 286; Hoff/McGauran, *Engaging the Private Sector* 2015 (n. 15), 18.

⁶⁴ Bang, 'Unmasking the Charade' 2013 (n. 63), 275.

⁶⁵ Pierce, 'Turning a Blind Eye' 2011 (n. 7), 590.

⁶⁶ Vermeulen et al., *Liability of Legal Persons* 2012 (n. 55), 44-46.

⁶⁷ Bang, 'Unmasking the Charade' 2013 (n. 63), 275.

⁶⁸ *Ibid.*, 256-322.

liable. The paradigmatic case with regard to the joint liability of legal persons for trafficking offences is the so-called *Carestel* case.⁶⁹ Carestel Motorway Services, a company based in Belgium, subcontracted Kronos sanitärservice, a German company, to hire employees to clean toilets in a motorway rest area. These workers, irregular migrants who came from Eastern Europe and could not speak Dutch, English, French or German, worked fifteen hours per day, seven days a week for several weeks in a row, without breaks, receiving a very low salary. An employee from Kronos would drive them to a rest area in the morning and pick them up in the evening to take them back to the house where they lived, which belonged to the company. The Court found that these facts constituted human trafficking according to Belgian law, and convicted four agents of Kronos, as well as both legal entities: Kronos and Carestel. In this case, Carestel was sanctioned even though the natural persons who committed the crime were not its direct employees. The Court considered that a commissioning company, which has outsourced tasks to third parties, and at a certain point becomes aware of the unacceptable working conditions that are imposed on the workers of this third party, yet does not decide to end the contract, is an accomplice to this exploitation.⁷⁰

4.2. Extraterritorial Application of Corporate Criminal Liability

In such a context of global and complex structures of subsidiaries and subcontractors, companies usually operate beyond the limits of national jurisdictions. Human trafficking might be committed in the developing countries where the subsidiaries or the recruiters work, thousands of kilometres away from the parent company.⁷¹ Furthermore, there may be multiple victims, as well as suspects, across various regions and countries, which might hinder prosecution. This legal challenge, described as a ‘governance gap’ by the International Corporate Accountability Roundtable (ICAR), creates an environment in which corporations are able to commit human trafficking with little accountability for doing so.⁷²

The EU Trafficking Directive establishes that, in order to ensure effective prosecution of international groups whose centre of activity is a Member State and which carry out human trafficking in third countries, jurisdiction should be established when the offender is a national of a Member State, and the offence is committed outside the territory of that Member State. Jurisdiction *could* also

⁶⁹ Decision of the First Instance Court of Gent, 19th Chamber, on 5 November 2012. Case No. 2012/3925.

⁷⁰ *Ibid.*

⁷¹ UNODC, *The Role of Recruitment* 2015 (n. 20), 15.

⁷² ICAR, *The Corporate Crimes Principles* 2016 (n. 9), 9.

be established when the offender is a habitual resident of a Member State, and when the victim is a national or a habitual resident of a Member State.⁷³ Moreover, aware of the links between trafficking and corporations, the Directive gives states the opportunity to extend jurisdiction over offences committed outside its territory if the offence is committed for the benefit of a legal person established in its territory.⁷⁴

It is worth mentioning at this stage, from a comparative perspective, the US Trafficking Victims Protection Act (TVPPA), which constitutes one of the most influential anti-trafficking legal instruments. Although the TVPPA did not provide for extraterritorial application when it was first passed in 2000, it has been subsequently amended in 2005 to expand jurisdiction for offences committed by US government personnel and contractors in a foreign country, and in 2008 to US citizens who travel abroad to commit, attempt to commit or conspire to commit human trafficking crimes. Since 2008 the TVPPA applies to corporations that financially benefit from trafficking, even if the violation occurred abroad or was perpetrated by a subcontractor.⁷⁵

Allowing states to punish corporations that benefit from human trafficking offences committed abroad is undoubtedly a positive measure to prevent and fight against this crime. However, several aspects related to the extraterritorial jurisdiction of legal persons still remain. For instance, the Directive does not clarify whether non-EU companies that benefit from trafficking abroad can be prosecuted in Europe if the natural person (the company's agent) who perpetrated the crime to benefit the company is a national of a Member State. Similarly, it does not explain whether jurisdiction can be asserted over non-EU companies, managed by non-EU nationals, which traffic European victims. Above all, the main shortcoming is the lack of a binding provision that obliges states to prosecute legal persons involved in human trafficking.

Even when there are grounds for exerting jurisdiction over offences committed abroad, law enforcement authorities may be reluctant to do so, since they would have to overcome certain additional procedural hurdles before prosecution.⁷⁶ The ICAR points out that, when it is legally or practically impossible to assert jurisdiction, law enforcement authorities should refer the case to appropriate authorities in another relevant jurisdiction as soon as possible, and cooperate and offer support to the investigation.⁷⁷

73 Para. 16.

74 Article 10.2b.

75 18 U.S.C. §§ 1589, 1595-96 (2012).

76 ICAR, *The Corporate Crimes Principles 2016* (n. 9), 9-10.

77 *Ibid.*, 11.

4.3 Evidentiary Issues

One of the reasons why law enforcement authorities might be reluctant to prosecute corporations for human trafficking cases are the difficulties in investigating and gathering evidence. Apart from the general difficulties in prosecuting human trafficking and corporate crime separately, there are some specific evidentiary challenges that arise in these cases. When the legal person's role in human trafficking is limited to the recruitment stage (for example, labour agencies), or when the actual exploitation does not occur, it is very difficult to prove that the corporation's agent knew about the intended exploitation.⁷⁸ Consequently, it is difficult to demonstrate that human trafficking existed.

The lack of inter-institutional and cross-border cooperation and coordination, the inadequate training of practitioners, the lack of resources, the difficulty in locating and identifying victims, and corruption are some of the factors that impede an adequate evidence-gathering process that allows for corporations to be held accountable for trafficking.⁷⁹ In order to solve these problems, practitioners should try to use evidence other than victims' testimonies, such as the testimonies of other persons, documentary evidence, and evidence gathered by special investigative techniques.⁸⁰

Moreover, when multinational corporations are involved it might be necessary to analyse complex corporative documents and large amounts of data, which are difficult to navigate. ICAR points out that it is necessary to counteract the imbalance between corporate actors, who are unwilling to cooperate and difficult to penetrate evidentially, and who have better financial, legal and technical resources, and law enforcement agencies seeking to hold them accountable.⁸¹

4.4 Sanctions

As explained above, the UNTOC and the European Trafficking Convention simply establish that the sanctions against legal persons must be effective, proportionate and dissuasive. The EU Trafficking Directive goes one step further by establishing that those sanctions shall be fines, and may be other measures including: '(a) exclusion from entitlement to public benefits or

⁷⁸ UNODC, *The Role of Recruitment* 2015 (n. 20), 16.

⁷⁹ *Ibid.*, 56.

⁸⁰ *Ibid.*, 73.

⁸¹ ICAR, *The Corporate Crimes Principles* 2016 (n. 9), 53.

aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) judicial winding-up; (e) temporary or permanent closure of establishments which have been used for committing the offence'.⁸²

The only compulsory penalty is a monetary fine. Other possible sanctions are optional, considering the particular case and the prominence of the legal person's role in trafficking. In order to modulate the penalty, judges should evaluate the effectiveness of the sanction in deterring the crime, and its social and economic consequences, particularly for the legal person's employees. According to these criteria, judicial winding-up, which means totally losing legal personality and the ability to carry out any kind of activity, should only be imposed in the most serious cases.

The most frequently used sanction is a fine, which is sometimes characterised as criminal, sometimes as non-criminal and sometimes as a hybrid.⁸³ The monetary fine chosen is usually proportional to the benefits that the company obtained from the criminal activity. The extensive use of proportionate fines has been justified in order to confiscate the huge profits generated by human trafficking, aiming to eliminate the incentives that lead companies into these practices. Nevertheless, it cannot be forgotten that this should not be the main objective of a fine, since other law enforcement measures like seizures specifically suit this purpose. Moreover, determining the exact amount of the fine might be challenging, since the proportional fine sentence requires quantifying the illicit benefits obtained. Normally, the benefits from trafficking are obtained from exploitation, not directly from trafficking, since trafficking can occur even if the intended exploitation does not actually exist. Therefore, when the exploitation does not take place or when it is carried out by a third party, the proportional fine should be replaced by a day fine.⁸⁴

Beyond that, the very use of the fine as the preminent sanction for legal persons, regardless of its category, has been criticised for its inability to incentivise corporations to change their internal organisation and implement measures to prevent crimes in the future.⁸⁵ Hence the importance of non-monetary

⁸² Article 6.

⁸³ UN, *Legislative Guide 2004* (n. 42), para. 257.

⁸⁴ A day fine is calculated according to a convicted individual's financial status.

⁸⁵ In this sense, for instance, John C. Coffee considers that corporations will not always refrain from engaging in criminal activities fearing the economic loss caused by fines. He argues that, when the corporate managers seek to maximise their individual positions rather than the company's benefits, a monetary fine is far less of a deterrent than would be expected. Therefore, non-pecuniary penalties that threaten the managerial autonomy of those controlling the firm are supposed to have more deterrent and 'rehabilitative' benefits. See J.C. Coffee Jr., 'Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions', *American Criminal Law Review*, 17 (1980), 469-70.

sanctions. The closure of establishments which have been used for committing the offence, at least temporarily, is particularly welcome, since it prevents companies from engaging in or perpetuating human trafficking, for example for the purposes of sexual exploitation in the hotel, restaurant and entertainment industries. Furthermore, alternative sanctions should also be explored, such as publishing the sentence,⁸⁶ prohibiting the legal person from advertising activities or products related to the crime, compelling it to engage in community services to repair the damage caused and prevent similar offences,⁸⁷ or imposing some sort of corporate probation.⁸⁸

5. Conclusions

Human trafficking is a complex crime that can occur in multiple ways. Likewise, corporations' involvement in trafficking can also be very diverse. This paper has shown that legal persons can potentially commit any of the acts of trafficking, using any of the foreseen means, and for any kind of exploitation. Aware of this reality, the most recent international and European anti-trafficking instruments include, for the first time, provisions to find legal persons liable for human trafficking offences. Although the legal instruments that have been studied in this paper mainly establish general obligations or guidelines for states, they represent a much needed first step in order to punish companies that are involved in the so-called modern day slavery business.

These legal provisions, which might seem simple in a preliminary analysis, lead to multiple obstacles when applied to real cases. This may explain why, despite the fact that most Member States foresee corporate liability for human trafficking, prosecutions are still very rare. Difficulties in prosecuting legal persons for human trafficking are accentuated in the current context where most companies operate globally and through complex structures. In addition, even when the legal person is actually found guilty, it is difficult to find an adequate sanction that incentivises the company to change its practices and prevent human trafficking in the future.

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- ⁸⁶ Concerning the pros and cons of publicity as a sanction on corporations, J. Andrix, 'Negotiated Shame: An Inquiry into the Efficacy of Settlement in Imposing Publicity Sanctions on Corporations', *Cardozo Law Review* 28(4) (2007), 1857-90.
- ⁸⁷ R. Gruner, 'Beyond Fines: Innovative Corporate Sentences under Federal Sentencing Guidelines', *Washington University Law Review* 71(2) (1993), 261-328.
- ⁸⁸ M.H. Levin, 'Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?', *Fordham Law Review* 52 (1983), 637-62.

States have an obligation, an opportunity and a challenge to overcome these difficulties when implementing the guidelines set out in intentional and European legal instruments in national legislations. Regardless of the nature of the sanction imposed, which can be administrative, civil or criminal, they must pursue a common rationale: if companies risk any kind of loss for their involvement in human trafficking and exploitation, they will be more cautious, and the demand for trafficked workforce will drop. In doing so, they need to take into account that criminal liability may be one possible way of punishing the most serious cases. However, not only criminal law, but also civil law, migration law and human rights law have a very important role to play in order to deal with these practices. Essentially, there is a crucial need to recognise the role that companies play, not only as perpetrators of human trafficking, but also as preventers, in order to guarantee that trading in people's dignity and freedom is no longer a worthwhile and profitable business.

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