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# Telling Victims from Criminals: Human Trafficking for the Purposes of Criminal Exploitation

SILVIA RODRÍGUEZ-LÓPEZ  
s.rodriquezl@udc.es  
Department of Criminal Law, University of A Coruña  
A Coruña, Galicia, Spain

## *Abstract*

Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims has expressly included the exploitation of criminal activities as one of the possible purposes of this crime. Consequently, not only was the concept of human trafficking broadened but also the difficulties in identifying victims, particularly in this type of exploitation in which many trafficked people are actually treated as criminals. This chapter will examine the wide variety of actions that can amount to human trafficking for criminal exploitation, using facts and cases reported by governmental and non-governmental organizations as key documents. These experiences will highlight the challenges of differentiating between criminals and trafficking victims, and will serve as a basis for suggesting some improvements in order to guarantee victims' protection.

## *Keywords*

human trafficking, exploitation, Forced criminality, non-punishment

## **1. Introduction. Broadening the concept of human trafficking.**

The definition of human trafficking provided by the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter Palermo Protocol) in 2000 has served as a basis to incorporate a concept of this crime into most national and supranational anti-trafficking legal instruments since then. The three elements (actions, means and purposes of exploitation) that, according to the United Nations, characterize human trafficking have been present in the vast majority of definitions all over the world. Its influence has been such that many criminal codes have almost literally reproduced the wording of the Palermo Protocol.

Although it continues to follow this tendency, the most recent European legislation on this matter has considerably broadened the scope of the international definition by including new forms of exploitation. In reality, nothing prevents States Party from expanding the concept of human trafficking in this way, since the Palermo Protocol itself expressly indicates that the catalogue of purposes of exploitation is just a list which has been kept "at a minimum". In fact, United Nations Model Law against Trafficking in Persons indicates that States may consider including other forms of exploitation in their criminal law, amongst them "the use of illicit or criminal activities [including the trafficking or production of drugs]" (United Nations 2010, p 26).

Thus, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims expressly incorporates "the exploitation of criminal activities" as one of the possible purposes of this crime (Article 2.3). The European text clarifies that "[t]he expression 'exploitation of criminal activities' 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” (Directive 2011/36/EU, Recital 11).

This explanatory note aims to clarify one of the most important questions raised by this provision: its range of application in practice. Strictly following this note, the new modality of exploitation requires two aspects: the activity must be penalized and it must have an economic nature. However, these assumed requisites have not been free from objections. The first element has been considered unable to clarify the concept and therefore unnecessary and redundant, since all *criminal* activities will by definition be subject to a penalty. On its part, the need to obtain financial gain can also be criticized, since it seems to exclude from the scope of human trafficking the exploitation of people in criminal activities that do not, at least directly, generate economic profit, such as the use of children in armed conflicts. In reality, this debate connects with a more general yet unresolved discussion: whether exploitation as a purpose of human trafficking should always have an economic nature. If that was the case, those cases in which the trafficker aims to obtain any other benefit or pleasure, even of a personal nature, would also be excluded (Borg Jansson 2015).

At this point, it is necessary to clarify that the inclusion of “the exploitation of criminal activities” amongst the purposes of trafficking does not necessarily mean that the exploitation of forced criminality should be automatically excluded in relation to human trafficking cases when it is not specifically foreseen in the law. Forced criminality can easily be included within the broad concept of forced services, providing that the unlawful activity has been exacted “under the menace of any penalty and for which the said person has not offered [themselves] voluntarily” (International Labor Organization, Forced Labor Convention, No. 29, 1930, Article 2; Skrivankova 2018). Therefore, even if, due to the requisites established by the explanatory of the Directive, some exploitative activities would be excluded from a restrictive concept of “forced criminality”, they could still amount to forced services, and ultimately to human trafficking. As Klara Skrivankova (2018) points out, the methods of coercion used in forced criminality are similar to those used to exploit workers in agriculture: victims are commonly not allowed to keep the profits and they are forced to carry out the activity against their will. However, in this case, it is necessary to take into account the special risks of the criminal activity, derived from the performance of the illicit work itself or from its criminalization (Skrivankova 2018).

Thus, the first section of this chapter aims to clarify the scope of forced criminality by means of real experiences and cases reported by governmental and non-governmental organizations. This analysis will help us understand the real reach of this purpose of exploitation in practice, in order to offer more appropriate interpretations for this new legal provision. Once its potential range of application has been demarcated, the following section exposes the main difficulties in identifying victims of this modality of trafficking, who are often mistakenly criminalized for the offences they have been forced to commit. For this reason, the last section of this contribution highlights the importance of non-criminalization and/or non-punishment mechanisms, which should be correctly implemented in order to adequately protect victims of human trafficking for the purposes of forced criminality.

## **2. Forced criminality as a purpose of human trafficking**

Leaving aside the controversies exposed in the previous section, human trafficking for the purposes of forced criminality can be defined as the recruitment, transportation, transfer, harboring, reception, exchanging or transferring of control over a person, using coercive, fraudulent or abusive means, in order to exploit them by forcing them to commit criminal activities.

This modality of human trafficking is not a new phenomenon, although it has been identified as an increasing trend (RACE 2014). As is always the case with human trafficking, current data collection systems are inadequate for providing a complete and accurate idea of the true nature of this type of exploitation (RACE 2014). Nevertheless, data offered by some international organizations can give a general idea of the dimensions of this form of criminality. The most recent United Nations Office on Drugs and Crime Global Report on Trafficking in Persons states that cases of trafficking for the commission of illegal activity have been reported in Europe, Central Asia, South America and Africa (UNODC 2016). According to this report, about 1 per cent of the total number of detected victims in 13 countries were trafficked for forced criminality (UNODC 2016).

The United Kingdom (hereinafter UK) is one of the few countries that acknowledge criminal exploitation in official statistics about trafficking. Out of the 2,255 potential victims of trafficking identified there in 2012, 362 (16 per cent) were victims of forced criminality. The two most common activities for which victims were exploited were cannabis cultivation and petty crime (RACE 2014). Another State that offers specific data on this issue in national reports is the Netherlands. The Dutch National Rapporteur's office registered 18 potential cases of trafficking for forced criminal exploitation in 2012 (RACE 2014). Similarly, the Spanish Intelligence Centre against Terrorism and Organised Crime (CITCO) informed about the detention of 7 perpetrators and the identification of 15 victims of trafficking to commit criminal activities (CITCO 2016). Victims came originally from Bosnia Herzegovina, Romania and Croatia (CITCO 2016). Nevertheless, although the situation is improving, the vast majority of countries still do not recognize this form of exploitation and, consequently, do not take steps to address it (RACE 2014). Overall, this issue "is more widespread than is currently reported" (RACE 2014, p 8).

The few existing reports and research carried out on this topic show that this form of trafficking especially affects children (Council of the Baltic Sea States 2013; RACE 2014). In this sense, it is necessary to remember that no means are needed when the victims are minors. In general, regardless of whether they are children or adults, people exploited for the purposes of forced criminality are often engaged in activities that require a low level of expertise and which involve a high risk of detection by law enforcement authorities (EUROPOL 2016). A study by the *RACE in Europe* project (2014) found that trafficked people are being exploited for the following criminal activities across Europe:

- Theft (including pick-pocketing, ATM theft and shop-lifting)
- Benefit fraud
- Cannabis cultivation
- Drug trafficking/smuggling
- Counterfeit goods production (such as DVDs and cigarettes)
- Illegal charity bag collection
- Begging (criminalized in certain jurisdictions such as Romania and Bulgaria)
- Sham marriage
- Illegal adoption
- Metal theft
- Methamphetamine production (RACE 2014, p 64).

By means of real experiences that have been reported, the following subsections will provide a general overview of some criminal activities in which trafficked victims can be exploited.

## 2.1. Drug crimes

Human trafficking victims are usually forced to engage in the production and distribution of drugs in exploitative conditions. The use of trafficking victims in drug-related offences increases the profits obtained through this illicit activity, since more substances can be produced and distributed without having to pay to do so. At the same time, since they are more exposed to investigations, trafficked people serve as a shield that protects drug (and human) traffickers from detention and criminalization.

Trafficking for the purposes of exploitation in cannabis cultivation has been detected in several countries in Europe. In 2009 three Vietnamese minors were arrested and convicted in the UK for working in cannabis production factories. Later on, in 2013, a sentence of appeal annulled that conviction for drug-related crimes, since those young people were actually victims of trafficking in human beings (*L, HVN, THN and T v R* [2013] EWCA Crim 991). Trafficking for the purposes of forced criminality has reportedly increased by 130 per cent between 2011 and 2012 in the UK, where the vast majority of victims (96 per cent) come originally from Vietnam, most of them being children (81 per cent) (RACE 2014). Cases of exploitation through cannabis cultivation have also been reported in official statistics in the Netherlands (RACE 2014). In Ireland, although no information is provided by the State, the Migrant Rights Centre identified in 2014 23 cases of potential victims trafficked for cannabis cultivation, coming primarily from Vietnam and China (RACE 2014). Similarly, in spite of the lack of official statistics, NGOs and the media have reported potential cases of trafficking for cannabis cultivation in the Czech Republic (RACE 2014) and Denmark (Council of the Baltic Sea States 2013).

Cannabis cultivation usually takes place in dog kennels, public houses, converted industrial warehouses and containers buried underground, usually located in suburban areas. These facilities are adapted and provided with the appropriate equipment to allow production: hydroponics systems, high intensity lighting, ventilation, extraction fans etc. (Tri.x 2017). Victims of exploitation in cannabis farms are usually deceived. They are often offered a job in a restaurant, but they are subsequently isolated, locked in the facilities where the plants are grown, and forced to work as gardeners of the cannabis plants (RACE, 2014). Both adults and children usually live in the place where cannabis is grown, forced to sleep on the floor or in cupboards (RACE 2014). Debt bondage is a common way of controlling victims. Debts can rise up to between 17,000 and 20,000 pounds (RACE 2014). An illustrative case was reported in the UK, where a 47-year-old Vietnamese woman, who had been forced into prostitution, was later on pressured into growing cannabis in order to “repay” the debt she had with those who transported her to the UK, since she was “unprofitable” due to her age (Burland 2017, p 7).

Liz Hales and Loraine Gelsthorpe (2012) analyzed 103 migrant women in prisons and immigrant detention centers in the UK and found that 43 of them had been victims of trafficking. Among the interviewees, they identified several cases of women who had been deceived to work in the production of cannabis and two cases of importation of drugs under duress. In a similar study, in which 45 migrant women held in two Spanish penitentiary centers were interviewed, Carolina Villacampa and Nuria Torres (2015) reported the existence of 10 potential victims of trafficking who had not been identified. Of these 10 women, 8 had been convicted for drug trafficking.

These studies show that trafficking can also occur for the purposes of exploitation in drug distribution. Adults, especially women, can be forced to become drug mules in order to repay their debts. The use of lover boys, that is, men posing as boyfriends to emotionally blackmail and trick women into drug smuggling, has also been reported (RACE 2014). As was the case with cannabis cultivation, this form of exploitation also affects children. The United States Department of State warned that organized criminal groups coerce children to work in the

production, transportation and sale of drugs in Mexico. Besides, a recent report by the UK Home Office has made available information about the use of children for criminal exploitation in county lines, that is, “urban gangs supplying drugs to suburban areas and market and coastal towns using mobile phone lines” (Home Office 2017, p 2). Gangs use children to deliver drugs because they are cheaper, easier to control, and less likely to be caught by the police (Home Office 2017; Sands 2018). In fact, “clean skins”, that is, children with no previous criminal records are especially targeted (Sands 2018).

## **2.2. Property crimes**

In a notification published in 2014, EUROPOL warned about the existence of children “trafficked to be forced to commit different types of property crime, such as burglaries, robberies, shoplifting, metal thefts, home-jackings or ATM theft” (EUROPOL 2014, p 2). Cases have been reported in the UK, the Netherlands, Germany, France, Sweden and Norway (Council of the Baltic Sea States 2013; United States Department of State 2014; RACE 2014).

The exploitation of trafficking victims through property crimes has been identified as an increasing trend, closely linked to the activity of organized crime groups (Crocker, Skidmore et al. 2017). It usually affects foreign nationals, both adults and children, in situations of vulnerability (Crocker, Skidmore et al. 2017). Victims of this form of trafficking are usually transported in small groups to places where they are forced to steal handbags from people, as well as cosmetics, telephones, USB sticks, GPS systems and other electronic devices in shops (Council of the Baltic Sea States 2013). They are tactically sent out to commit shoplifting or pickpocketing until they receive their second police caution, when they are moved to another place or sent back to their country (Crocker, Skidmore et al. 2017).

This type of exploitation often comes together with other forms of forced labor. Individuals made to work long hours on farms with very low wages are also forced to steal to pay their “debts” (Crocker, Skidmore et al. 2017, p 7). Similarly, cases of women trafficked for sexual exploitation being forced to steal their clients’ property, such as wallets or phones, have also been reported (RACE 2014). The profits derived from these illicit activities are surrendered to the traffickers, although in some cases, victims are allowed to keep part of it as a reward or in order to pay the debts they owe the traffickers (Schloenhardt and Markey-Towler 2016).

## **2.3. Violent crimes**

As has been shown in the introduction, it is debated whether human trafficking for the purposes of criminal activities includes the exploitation of individuals to commit violent crimes that do not necessarily produce economic profits. Some official reports already include violent crimes when talking about this form of trafficking. Eurostat, for example, includes terrorism, together with drug trafficking and petty crimes, in the list of criminal activities that may constitute the purpose of trafficking (Eurostat 2015). Equally, a report published by the United States Department of State mentioned “terrorism and murder”, as well as “theft, illicit drug production and transport, [and] prostitution” in the catalogue of offences that trafficked individuals might be forced to commit “in the course of their victimization” (United States Department of State 2014, p 1). This subsection will analyze previous studies in which people who were forced to commit violent crimes have been considered victims of trafficking for criminal exploitation.

The forced participation of women and children in armed conflicts has been long studied. The United States Department of State in 2013 warned of the existence of Afghan and Pakistani children serving as suicide bombers. Moreover, a couple of recent pieces of research carried out in Colombia addressed the possibility of considering these facts as human trafficking (Hurtado et al. 2017; Villacampa and Flórez 2017). These papers show that people were forced to perform

different tasks. Some of them were neither crimes nor directly related to the armed conflict, such as cooking and cleaning. However, the women and children interviewed had also been forced to take part in combat, plant landmines, kill, kidnap, and perform other essential tasks in the context of war (Hurtado et al. 2017; Villacampa and Flórez 2017). In the case of women, labor and criminal exploitation was accompanied by sexual exploitation, forced abortion or the administration of medicines to induce abortion in other women (Villacampa and Flórez 2017).

Villacampa and Flórez (2017) concluded that 16 out of 20 women interviewed (80 per cent of the entire sample) who were serving sentences in a Colombian prison for crimes committed within the *guerrilla* were actually victims of human trafficking for the purposes of criminal exploitation. Their interviews show that the three elements of the crime had been fulfilled. First, they were recruited and transferred from rural areas to the jungle, where they were completely separated from their social environment with no possibility of communication. The recruitment, transportation and reception for the purposes of exploitation had been achieved by means of violence, deception and the abuse of a position of power or vulnerability. Ultimately, if we consider that the tasks they carried out are the exploitative purpose of trafficking, the third element would be satisfied.

The commission of violent crimes together with other types of exploitation can also occur outside the context of an armed conflict. An illustrative example has been reported in the Netherlands, where a girl who had been trafficked from India to be kept in a situation of almost total serfdom, being completely isolated and constantly beaten up, was instructed under duress by her captors to kill a boy (Dettmeijer-Vermeulen and Esser 2017). She was not only not considered a victim of human trafficking, but also faced criminal charges for manslaughter.

These examples show that, in practice, exploitation does not refer exclusively to obtaining profit, but should also extend to situations in which the traffickers aim to obtain political utility or mere personal satisfaction (Hurtado et al. 2017).

#### **2.4. Human Trafficking**

“There is evidence that, particularly in the field of trafficking for sexual exploitation, many former victims are at some point offered the opportunity of recruiting new victims or serving as a ‘madam’” (UNODC 2016). That has been one of the explanations given for the high percentage of women convicted of human trafficking (Broad 2015; Siegel and De Blank 2010).

Sometimes female traffickers are pressured by male counterparts to recruit other women or otherwise engage in trafficking. They feel compelled to do so as a way of escaping their own situation of exploitation, in order to avoid situations of violence and abuse, or so as to repay their debt to traffickers (Broad 2015). In a case reported in Argentina, a criminal group used women who had been previously trafficked to recruit other victims from the Dominican Republic by means of deception regarding the working activities they would perform at the destination country. In this case, the court gave a lighter sentence to these women, since they recognized that they were victims themselves (UNODC 2016). However, this is not always like that. In these cases it is especially difficult to draw the line between victims and perpetrators. Discourses of perpetration and deviance are usually given more prevalence than experiences of victimization in criminal justice processes (Broad 2015).

### **3. Specific difficulties related to victim identification**

Despite the express inclusion of trafficking for forced criminality in the definition contained in Directive 2011/36/EU, the identification of this crime is defective. A study that analyzed the

identification of child trafficking for criminal exploitation in Lithuania, Norway, Poland and Sweden reported that minors exploited in criminal activities get in contact with authorities repeatedly without being identified (Council of the Baltic Sea States 2013). As a consequence, prosecutions of traffickers are very rare. For instance, nobody in the UK has ever been convicted of trafficking people for the purposes of cannabis cultivation, although trafficking victims have been sanctioned instead (Burland 2017).

Victims of this crime are often not identified as such, but rather prosecuted as criminals (RACE 2014; United States Department of State 2014). On many occasions, they are completely invisible to law enforcement authorities until the crimes they have been forced to commit are noticed. Particularly in the case of shoplifting or pickpocketing, trafficked people perform tasks that are more exposed to criminal investigations, and therefore they are more likely to be caught and arrested than traffickers (Skrivankova 2018). For this reason, victims' first contact with the professionals who can formally identify them usually occurs in a police station (or at the airport in the case of mules), after they had been arrested (Villacampa and Torres 2017). In the absence of an appropriate protocol for the detection of these victims, they end up being punished for the crimes they committed during their exploitation. When trafficked people are migrants they often face detention in immigration removal centers following the completion of a prison sentence with the strong possibility of deportation (Burland 2017).

Thus, human trafficking victims suffer a double victimization: one caused by those who trafficked and exploited them, and another inflicted by the State. This institutional victimization has two aspects. On the one hand, the lack of identification means that the victims are deprived of the rights and protection granted by this status. On the other hand, to make matters worse, they are forced to serve sentences, including imprisonment, for crimes committed as a result of trafficking. In addition, the inability to identify victims means that traffickers continue to exploit individuals and benefiting from the criminal activities with impunity.

Several factors can explain the lack of identification of victims of human trafficking for criminal exploitation:

**- Lack of awareness and prevalence of stereotypes about trafficking**

Firstly, since this modality of crime is new, there is little awareness of what it is, and victims are mistakenly viewed as having chosen to engage in criminal behavior (Sands 2018). Trafficked women serving sentences for drug crimes have reported that law enforcement authorities barely asked about their personal circumstances at the time they committed the offence so as to analyze if they had been trafficked or not, but rather focused on finding more people guilty of smuggling illicit substances (Villacampa y Torres 2015). Moreover, it is frequent that various different agencies in charge of identifying trafficking victims work with distinct interpretations of the definition of this crime (Council of the Baltic Sea States 2013).

Besides, when it comes to identifying victims, authorities are still too centered on sexual exploitation and on stereotypical constructions of ideal or innocent victims of trafficking, which undermines the successful identification of people trafficked for forced criminality (Burland 2017; Council of the Baltic Sea States 2013). A qualitative study carried out in Spain, in which 37 criminal justice professionals and victim service providers were interviewed, showed that "trafficking for criminal exploitation was only clearly identified as a form of trafficking in 15 of the interviews (40%)" (Villacampa and Torres 2017, p 398). Therefore, if law enforcement authorities do not know what trafficking for criminal exploitation is, and are not familiar with its red flags, the vast majority of cases will remain unreported.



### **- Lack of victims' self-identification**

Especially in this modality of trafficking, victims do not self-identify as such (Sands 2018; Villacampa y Torres 2017). Stereotypical conceptions of what a trafficking victim should be also play a determinant role here. Many victims still understand trafficking as being “sold” and “taken”, usually by means of violence, and unless these elements are made obvious, they are unlikely to see themselves as trafficked people (RACE 2014, p 76). Besides, trafficking victims, particularly children, may develop strong emotional links with their traffickers (Council of the Baltic Sea States 2013). This makes them experience a sense of protection, usefulness and power that prevents them from realizing that they are actually being exploited.

Individuals trafficked to commit crimes not only are not aware of their status as victims, but also perceive themselves as offenders (Villacampa and Torres 2017). Since they are aware of having participated in the commission of a crime, they are afraid of being detained and are unwilling to tell their story to the police due to shame or fear. This situation is exacerbated by traffickers, who may threaten victims with being reported to the authorities if they try to escape (Council of the Baltic Sea States 2013). Moreover, there is some evidence that traffickers train victims to “handle” contacts with the police, by instructing them to refuse to speak (Sands 2018, p 5).

### **- Lack of trust in the police**

Their inability to express themselves as victims comes together with “a high level of fear and mistrust of the authorities and of the police, both in victims [sic] home countries and in destination countries” (RACE 2014, p 76). The lack of trust in authorities is aggravated by their failure to recognize trafficking indicators, as explained above (RACE 2014).

Traffickers also contribute and take advantage of this situation. They tell the victims they will be punished because authorities will not identify nor assist them. They are also told that officials are corrupt and cannot be trusted. Again, victims assume these statements are true because “they have seen corruption first-hand or are aware of other victims who have been prosecuted for illegal entry or for other offences they may have been forced to commit as victims of trafficking” (Schloenhardt and Markey-Towler, 2016, p 23). They are, in sum, convinced that if they are identified, the victimization process will continue (Villacampa y Torres 2017).

For these reasons, it is crucial that law enforcement authorities who are in a position to identify victims of this form of trafficking are appropriately trained to look for the “crime behind the crime” (Skrivankova 2018, p 116; United States Department of State 2014). In order to identify victims, law enforcement authorities need to be aware of the possibility of this type of trafficking existing, which is not often the case (Skrivankova 2018). Previous studies have confirmed that the number of victims identified increases when professionals receive training (Renzetti et al. 2015; Villacampa and Torres 2017). Moreover, it is important that they are familiar with indicators of this form of criminality. For instance, the following aspects have been suggested as examples of red flags that should be used to detect child criminal exploitation:

- Evidence of vulnerability
- Lack of supportive/caring adult
- Evidence of children moving between different locations
- Persistently going missing from school or home
- Regularly being found away from the home area
- Unexplained acquisition of money, clothes, or mobile phones
- Excessive receipt of texts / phone calls
- Relationships with controlling / older individuals or groups

- Leaving home / care without explanation
- Suspicion of physical assault / unexplained injuries
- Significant decline in school results / performance
- Self-harm or significant changes in emotional well-being (Sands 2018, p 6)

#### **4. Non-punishment of victims of human trafficking for the purposes of forced criminality**

As we have seen before, individuals can be trafficked so as to be used and exploited in the commission of criminal activities. However, the risk of criminal offending linked to trafficking expands beyond this. Schloenhardt and Markey-Towler (2016) offer the following categorization of offences that human trafficking victims may commit:

- *Status Offences*: These are offences committed “as a direct result of their status in the place to or through which they have been trafficked” (p 13). When trafficking involves the crossing of borders, victims are likely to enter, stay or exit the destination country in violation of existing migration and border requirements, and consequently could be apprehended and prosecuted for immigration-related offences. These offences committed in the process of being trafficked are also called “causation-based offences” (Villacampa and Torres 2017, p 394).
- *Consequential offences*: These are offences committed as a direct consequence of trafficking, because victims were coerced or forced by the traffickers to do so. The victims are used as instruments to commit crimes. The experiences mentioned in the above sections (drug trafficking offences, property crime, violent crimes, human trafficking...) would be included in this category. They may also called “duress-based offences” (Villacampa and Torres 2017, p 394).
- *Liberation offences*: These are offences committed while trying to free themselves or trying to improve their situation. “In most cases, these offences would be directed against the traffickers, their associates, or their property, or involve offences committed to acquire weapons, other instruments, or documents needed to leave the trafficking situation and perhaps, the host country” (p. 15).

As stated before, punishing victims for any of the abovementioned offences constitutes a double victimization: first criminally and then institutionally. For this reason, not punishing victims for trafficking-related offences, particularly for consequential ones, is the most convenient answer from a criminal-political point of view. On the one hand, it would not be coherent to condemn the trafficker for the recruitment, transportation or receiving of an individual in order to exploit them in the commission of criminal activities and, at the same time, punish the victim too for the offences they have been forced to perform. This is, in fact, one of the reasons behind the non-punishment clause: “even if a victim of trafficking deliberately commits an offence, they cannot be charged and prosecuted for that offence if they lacked true autonomy or agency at that time.” (Schloenhardt and Markey-Towler 2016, p 19). The point is not offering blanket immunity to victims, but balancing offences committed against them with others committed by the victims (Schloenhardt and Markey-Towler 2016).

On the other hand, avoiding punishment serves as a way to enhance victims’ trust in the justice system. This way they will be more likely to exit the trafficking situation and cooperate freely with law enforcement authorities in the investigation and prosecution of traffickers (Schloenhardt and Markey-Towler 2016).

Aware of these advantages, some anti-trafficking legislation already foresees provisions in this line. Although the Palermo Protocol does not say anything in this regard, the United Nations Model Law against Trafficking in Persons (2010) recommends States the adoption of either non-liability, non-punishment, or non-prosecution of victims (p 32).

- *Non-liability*: it is the broadest term. If adopted, criminal liability simply does not arise, that is, “offences committed by victims of trafficking are not illegal and do not require prosecution and punishment” (Schloenhardt and Markey-Towler 2016, p 32). This provision is not used in any binding international instrument (Schloenhardt and Markey-Towler 2016).
- *Non-prosecution*: in this case, the offences committed as a direct consequence of the trafficking situation would still be illegal, but prosecutors would refrain from pressing charges against victims. This option is foreseen in the OSCE Action Plan to Combat Trafficking in Human Beings, decision 557/Rev.1, 7 July 2005. This provision impedes trafficking victims being held in detention centers or prisons at any time before, during or after all civil, criminal or administrative proceedings (United Nations 2010). It can be problematic in civil law jurisdictions where authorities have a duty to prosecute (Schloenhardt and Markey-Towler 2016).
- *Non-punishment*: it is the narrowest provision, according to which States only refrain from imposing penalties for the victim’s involvement in illicit activities they have been compelled to commit as a consequence of the trafficking situation. It is foreseen in the Council of Europe Convention on Action against Trafficking in Human Beings, as a *possibility* that States Party should consider, in accordance with the basic principles of their legal systems (Article 26). Directive 2011/36/EU gives Member States the possibility of choosing between non-prosecution or non-punishment, also in accordance with the principles of their legal systems (Article 8).

Despite non-prosecution and non-punishment clauses being widely adopted, victims of trafficking for the purposes of criminal exploitation continue to be punished. “In 24 out of 28 Country Reports, GRETA [Group of Experts on Action against Trafficking in Human Beings] calls for the adoption and full transposition of non-punishment provisions, or calls for further steps to be taken to ensure its full Implementation” (RACE 2014, p 77). In a study about people trafficked for cannabis cultivation in the UK, Burland (2017) provides several examples of real cases in which judges recognized that the defendants were “an example of modern day slavery”, and that they “had been used by others”, but they were nevertheless sent to prison (Burland 2017, p 11-12). “Judges expressed sympathy and remorse for what they described as the desperate and sad circumstances of the defendants”, but “they lacked recognition and understanding of the possibility of the laws protecting the defendants they identified as trafficked and enslaved from being found guilty and sent to prison” (Burland 2017, p 11).

Non-punishment provisions have also been outlined as a rationale for overturning convictions when it is subsequently demonstrated that those convicted were actually victims of trafficking for the purposes of forced criminality. The most paradigmatic case in this sense occurred in the UK in 2013 (*L, HVN, THN and T v R*). In this case, three convictions of minors for drug-related offenses and one conviction of a woman of legal age for possession of false identity documents were annulled, given that these individuals had been victims of trafficking and that the criminal activities committed were integrated into the exploitation suffered. The court considered that, when assessing whether the offenses committed by the victims are part of the exploitation

situation, it is not necessary to be prescriptive, and three types of situations must be distinguished:

1. In the first place, there will be cases, such as those of the judgment in question, in which the facts will show that the trafficked person acted under duress ("under levels of compulsion") and guilt will be completely extinguished.
2. In other cases, culpability decreases but does not disappear, so that only the application of some mitigation will proceed. In order to reduce or eliminate the guilt, it will be necessary to take into account not only the age (a relevant factor in the case of minors), but also the fact that the victim had no realistic alternative other than obeying the mandates of the trafficker. It is important to note that this second criteria is but one of the elements of human trafficking: the existence of a situation of vulnerability that is abused by the trafficker.
3. Finally, on certain occasions the commission of crimes does not arise from victimization and, therefore, immunity would not proceed at all.

These criteria used by the British court could be useful to shed light on the application of non-punishment principles in practice, since there is not yet a uniform criteria recognized in international law or widely adopted in national legislations (Schloenhardt and Markey-Towler 2016). Different texts use different expressions in order to establish a causal connection between the offences committed and the position of the victim (Schloenhardt and Markey-Towler 2016). Therefore, it is not clear whether leniency affects only consequential offences or also status and liberation ones. The United Nations Working Group on Trafficking in Persons (2015) stated that "in practice [...] it appears clear that crimes committed incidentally in the course of an individual's exploitation are more readily overlooked than crimes committed as a direct manifestation of the exploitative purpose, particularly where there is some indication of possible consent in the latter case. In such cases the threshold for disregarding apparent consent appears to be higher and courts have been less willing to accept broad interpretations of subtler means (such as abuse of a position of vulnerability) as a justification for disregarding apparent consent to involvement in criminal activities" (p 7).

## 5. Summary

- ❖ The definition of human trafficking provided by the Palermo Protocol has been broadened by more recent anti-trafficking instruments to include, amongst other changes, new modalities of exploitation, such as forced criminality.
- ❖ Human trafficking for the purposes of forced criminality can be defined as the recruitment, transportation, transfer, harboring, reception, exchanging or transferring of control over a person, using coercive, fraudulent or abusive means, in order to exploit them by forcing them to commit criminal activities.
- ❖ According to Directive 2011/36/EU, forced criminality 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. It is contested whether forced criminality can also include offences that do not necessarily yield economic benefits, such as murder, terrorism or participation in armed conflicts.
- ❖ A review of existing literature on this form of criminality shows that adults and children are trafficked for the purposes of being exploited in drug production, particularly

cannabis cultivation, drug smuggling and distribution, as well as property crimes such as pickpocketing, shoplifting and counterfeiting. Some studies highlighted that individuals can also be trafficked to commit violent offences, including killing, kidnapping or planting landmines. Finally, it is also common that victims of trafficking for the purposes of sexual exploitation are forced to recruit new victims.

- ❖ The identification of human trafficking for the purposes of forced criminality is still defective. This is mainly due to authorities' lack of awareness of this modality of trafficking, prevalence of stereotypes about trafficking, victims' lack of self-identification as such and lack of trust in the police. Training and capacity-building plans for authorities in a position to identify victims are much required in order to improve this situation.
- ❖ Victims of human trafficking for forced criminality are often punished for the offences they have been compelled to commit. Thus, they are doubly victimized: firstly by the traffickers and later on by institutions, which do not give them the protection their victim status should grant.
- ❖ Many anti-trafficking legislations include either non-prosecution or non-punishment provisions, according to which States can refrain from pressing charges or imposing penalties for victim's involvement in illicit activities they had been compelled to commit as a consequence of the trafficking situation. However, judges still lack awareness of the possibility of applying them. Further steps need to be taken in order to ensure their full implementation.

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