

## INTERNATIONAL LEGAL INSTRUMENTS ON HUMAN TRAFFICKING AND A VICTIM-ORIENTED APPROACH: WHICH GAPS ARE TO BE FILLED?

FEDERICO LENZERINI\*

### *I. Introduction*

Every year, a number of persons ranging from 700,000 to four million are introduced in the modern market of slavery as victims of human trafficking. About 80% of them are women, while half of them are less than 18 years old.<sup>1</sup> Inevitably, these statistics offer only a partial idea of the global dimension of the phenomenon of human trafficking, due to the clandestine modalities through which it is perpetrated. With the advent of the era of globalization this shame of the human 'civilization' has reached its highest peaks ever, affecting some thirty million individuals in the world.

Such an intolerable reality requires strong and immediate action by the international legal community. So far, although a number of pertinent international legal instruments have been adopted in a span of over a hundred years, they have not proven effective enough in order to adequately face the progressively growing dimension of trafficking in human beings. The reason of this is probably due to the fact that only in very recent times the relevant international action has turned to adopt a perspective based on a victim-oriented approach, while in the past the scourge of human trafficking was mainly addressed as a criminal issue and/or as a problem of public order.

The present contribution will first provide a description of the evolution of the international anti-trafficking legal action, with particular attention to the specific provisions aimed at ensuring victim protection. This article will attempt to explore which possible

---

\* Professor of Law, University of Siena, Italy.

<sup>1</sup> Federico Lenzerini, *Trafficking of Human Beings*, in HUMAN RIGHTS, CULTURE OF RIGHTS AND DIGNITY OF THE PERSON IN THE AGE OF GLOBALIZATION 1294, 1296 (M. Flores ed., 2007).

improvements could be adopted in order to make such an action more effective in the light of the contemporary characterization of the awful practice of trafficking in human beings.

*II. Evolution of International Action against Human Trafficking:  
Relevant International Instruments*

*A. Legal Instruments of Universal Character*

International action aimed at preventing and suppressing human trafficking started well before the development of the ‘wide’ human rights movement which took place in the immediate aftermath of the Second World War. Already in 1904, the *International Agreement for the Suppression of the White Slave Traffic*<sup>2</sup> was signed at Paris, binding States parties ‘to establish or name some authority charged with the coordination of all information relative to the procuring of women or girls for immoral purposes abroad,’ as well as ‘to have a watch kept, especially in railway stations, ports of embarkation, and en route, for persons in charge of women and girls destined for an immoral life.’<sup>3</sup> This early agreement was already inspired – although to a limited extent – by a victim-oriented approach, as parties were bound, ‘within legal limits, and as far as possible, to send back to their country of origin those women and girls who desire it, or who may be claimed by persons exercising authority over them.’<sup>4</sup> States parties were also requested to cover the cost for repatriating ‘the woman or girl [who] cannot herself repay the cost of transfer, and has neither husband, relations, nor guardian to pay for her.’<sup>5</sup>

In 1910, the *International Convention for the Suppression of the ‘White Slave Traffic’*<sup>6</sup> was also adopted. This Convention –

---

<sup>2</sup> *International Agreement for the Suppression of the “White Slave Traffic”*, May 18, 1904, 1 L.N.T.S. 83, *entered into force* July 18, 1905.

<sup>3</sup> *Id.* at art. 1, 2.

<sup>4</sup> *Id.* at art. 3.

<sup>5</sup> *Id.* at art. 4.

<sup>6</sup> *International Convention for the Suppression of the “White Slave Traffic”*, May 4, 1910, 211 Consol. T.S. 45 [hereinafter *ICSWT*].

amended in 1949<sup>7</sup> – was first of all aimed at ensuring punishment of whoever, ‘in order to gratify the passions of another person, has procured, enticed, or led away [. . .] for immoral purposes’ a woman or girl under age (even with her consent)<sup>8</sup> or a woman or girl over age (‘by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion’).<sup>9</sup> Another purpose of this Convention was to institute a system of cooperation between States parties in the fight against trafficking of women for prostitution purposes. The position of victims is not the object of particular attention – although the fact that traffic of women under age (*i.e.* less than 20 years old) is considered illicit irrespective of the victim’s consent denotes a certain sensibility by negotiators with respect to the psychological vulnerability of young girls. It is also to be noted that, even though the case of detention of a woman or girl in a brothel against her will is expressly left outside of the scope of the Convention –it being exclusively governed by domestic legislation – the negotiators did not miss to note that this was done ‘*in spite of its gravity*,’<sup>10</sup> thus showing that the consideration of the prejudice suffered by victims was not unknown to the drafters of the Convention.

The two aforementioned instruments were later supplemented by the 1921 *International Convention for the Suppression of the Traffic in Women and Children*.<sup>11</sup> This instrument mainly invited States to ratify the 1904 and 1910 agreements, reiterating some of their provisions. It also increased the age limit within which a girl was to be considered ‘under age’ to 21. The victim perspective was considered by the Convention at Article 6, through requesting States

---

<sup>7</sup> See Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 30 U.N.T.S. 23, 2 U.S.T. 1999, 30 U.N.T.S. 23, *entered into force* June 21, 1951 [hereinafter *Protocol White Slave Traffic*].

<sup>8</sup> *Id.* at art. 1.

<sup>9</sup> *Id.* at art. 2.

<sup>10</sup> See *Protocol White Slave Traffic*, *supra* note 7, at Final Protocol Attached ¶ D (emphasis added).

<sup>11</sup> M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 349 (2d rev. ed. 1999).

parties to adopt the necessary domestic measures in order to ‘ensure the protection of women and children seeking employment in another country.’ Also, according to Article 7, parties undertook ‘to make such regulations as are required for the protection of women and children travelling on emigrant ships [. . .] and to arrange for the exhibition, in railway stations and in ports, of notices warning women and children of the danger of the traffic and indicating the places where they can obtain accommodation and assistance.’

An additional treaty was then adopted in 1933, *i.e.* the *International Convention for the Suppression of the Traffic in Women of Full Age*.<sup>12</sup> The content of this instrument is similar to the 1910 Convention’s, with the particular characteristic that it concentrates its attention on women of ‘full age.’ However, no specific provision is included concerning the situation of the victim, with the only exception of the rule according to which – in line with Article 1 of the 1910 Convention – the consent of the victim is considered irrelevant for the production of the crime punished by the Convention.<sup>13</sup>

In the post-World War II period, the United Nations addressed the scourge of human trafficking in the very first years since their institution. In fact, in 1949, the General Assembly – with the purpose of ‘consolidating the [previous] instruments and embodying the substance of [a] 1937 draft Convention’<sup>14</sup> prepared by the League of Nations but never adopted – approved the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*,<sup>15</sup> which entered into force on July 25, 1951. This Convention mainly concentrated on the suppression of all forms of exploitation of prostitution, including its determining moment, that is trafficking of women for that purpose. For the purposes of the present writing, Articles 17 *et seq.* are of special significance, as they

---

<sup>12</sup> *Id.*

<sup>13</sup> *ICSWT*, *supra* note 6, at art. I.

<sup>14</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others ¶ 4, Dec. 2, 1949, G.A. Res. 317(IV), *entered into force* July 25, 1951.

<sup>15</sup> *Id.*

contemplate some specific provisions for the prevention of trafficking in women and children for prostitution purposes as well as to ensure victims protection. In particular, States parties have the duty to: ‘make such regulations as are necessary for the protection of immigrants or emigrants, and in particular, women and children, both at the place of arrival and departure and while en route;’<sup>16</sup> ‘take appropriate measures to ensure supervision of railway stations, airports, seaports and en route, and of other public places, in order to prevent international traffic in persons for the purpose of prostitution;’<sup>17</sup> ‘repatriate [victims] who desire to be repatriated or who may be claimed by persons exercising authority over them or whose expulsion is ordered in conformity with the law;’<sup>18</sup> make suitable provisions for the temporary care and maintenance of victims of international traffic in persons for the purpose of prostitution pending the completion of arrangements for the repatriation;<sup>19</sup> cover the cost of repatriation of the victims who ‘cannot themselves repay the cost of repatriation and have neither spouse, relatives nor guardian to pay for them;’<sup>20</sup> ‘take the necessary measures for the supervision of employment agencies in order to prevent persons seeking employment, in particular women and children, from being exposed to the danger of prostitution.’<sup>21</sup> In general terms, the 1949 Convention has not played a very significant impact on the international community, as its ratification rate has remained relatively limited (74 States are parties to it at present)<sup>22</sup> if compared to the number of accessions which usually characterize human rights treaties adopted under the aegis of the United Nations. This is due, in particular, to the fact that the Convention under

---

<sup>16</sup> *Id.* at art. 17, § 1.

<sup>17</sup> *Id.* at art. 17, § 3.

<sup>18</sup> *Id.* at art. 19, § 2 (adding that “Repatriation shall take place only after agreement is reached with the State of destination as to identity and nationality as well as to the place and date of arrival at frontiers”).

<sup>19</sup> *Id.* at art. 19, § 1.

<sup>20</sup> *Id.* at art. 19.

<sup>21</sup> *Id.* at art. 20.

<sup>22</sup> See United Nations Treaty Collection, Convention for Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *available at* <http://www.unhcr.ch/html/menu3/b/treaty11a.htm> (listing participants).

210 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 4

discussion unconditionally adopts an ‘abolitionist’ approach with respect to prostitution as such (in the sense that prostitutes are not punishable for their activity and no legal regulation of the phenomenon is allowed), that is unacceptable to many States by reason of their legal tradition on the subject.

After the adoption of the 1949 Convention, a temporal span of more than fifty years occurred before another specific legal instrument of universal character was adopted in the field of human trafficking. Nevertheless, this issue has been incidentally addressed by some extremely relevant international conventions adopted for the protection of those sectors of the civil society that are particularly exposed to the awful phenomenon. First, the 1979 *Convention on the Elimination of All Forms of Discrimination against Women*<sup>23</sup> includes a specific provision – Article 6 – concerning trafficking of women, stating that ‘States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’ A similar provision – specifically applying to children – is included in the 1989 *Convention on the Rights of the Child*,<sup>24</sup> according to which ‘States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.’<sup>25</sup>

Last but not least, in 1999 the International Labour Organization (ILO) General Conference adopted the *Worst Forms of Child Labour Convention (No. 182)*<sup>26</sup> at the ILO. This Convention was inspired by the *rationale* that it is first of all necessary to eradicate those forms of child labor which are absolutely incompatible with the dignity and the physical, psychological and social development of

---

<sup>23</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (December 18, 1979).

<sup>24</sup> Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (November 20, 1989).

<sup>25</sup> *Id.* at art. 35.

<sup>26</sup> See Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Nov. 19, 2000, I.L.O. No. 182, available at <http://www1.umn.edu/humanrts/instree/ilo182.html> [hereinafter *Convention Eliminating Child Labor*].

the child, while waiting that all countries of the world may achieve a level of social development sufficient for allowing them to meet the quite high standards fixed the 1973 *Minimum Age Convention (No. 138)*,<sup>27</sup> aimed at abolishing child labour in all its forms.<sup>28</sup> In other words, with this Convention the ILO General Conference strongly emphasized the fact that, while the time-needing action aimed at eradicating child labor as a whole is still in progress, certain worst forms of child labour are to be eliminated on an immediate basis. These forms include the sale and trafficking of children, which Article 3(a) explicitly qualifies as a ‘practice similar to slavery.’ In order to eradicate this awful practice, parties are *inter alia* required – pursuant to article 7 – to prevent the engagement of children in it; to provide the necessary and appropriate direct assistance for the rescue of child victims and for their rehabilitation and social integration; to ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all rescued child victims; to identify and reach out to children at special risk; to take account of the special situation of girls.<sup>29</sup>

In 2000, a new international instrument of universal character

---

<sup>27</sup> See Convention Concerning Minimum Age for Admission to Employment, Jun 26, 1973, I.L.O. No. 138, available at <http://www.un-documents.net/c138.htm>.

<sup>28</sup> See *Convention Eliminating Child Labor*, supra note 26, at Preamble (emphasizing the “need to adopt new instruments for the prohibition and elimination of the worst forms of child labour, as the main priority for national and international action, including international cooperation and assistance, to complement the Convention [...] concerning Minimum Age for Admission to Employment, 1973, which remain[s] [a] fundamental [instrument] on child labour.” In this respect, it may be interesting to note that, of the 169 States that at present have ratified the Worst Forms of Child Labour Convention, 113 of them had already acceded to it before the end of 2001, within the first two and half years after its adoption (June 17, 1999); see also Convention No. C182 Table, available at <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C182>. At the same time, the adoption of Convention No. 182 also gave new life to the 1973 Minimum Age Convention, as it is demonstrated by the fact that, of the 151 States which have ratified the latter at present, 73 have acceded to it after the adoption of the former; see also Convention No. C138 Table, available at <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C138>; this means that only 78 countries had ratified Convention No. 138 in the 26 years passing from its adoption to the approval of the Worst Forms of Child Labour Convention).

<sup>29</sup> *Id.* at art. 3.

addressing specifically the scourge of human trafficking was finally adopted, although its scope was limited to children. The *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*<sup>30</sup> has a very modern approach with respect to trafficking of children, especially in terms of victim protection and rehabilitation.

The Protocol defines the concept of ‘sale of children’ as ‘any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.’<sup>31</sup> The following acts are in particular prohibited and criminalized: offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child, transfer of organs of the child for profit or engagement of the child in forced labour; improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption; offering, obtaining, procuring or providing a child for child prostitution.<sup>32</sup>

The need of ensuring victim protection and reintegration in the society is addressed by Article 8 *et seq.*, which includes a very specific and detailed list of objectives that States parties are requested to pursue and realize. First of all, appropriate measures must be adopted in order to protect the rights and interests of child victims of the practices prohibited under the Protocol at all stages of the criminal justice process, in particular through:

- (a) *Recognizing* the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses;
- (b) *Informing* child victims of their rights, their role and the scope, timing and progress of the proceedings and of the

---

<sup>30</sup> Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Pornography and Child Prostitution, May 25, 2000, S. Treaty Doc. No. 106-37, GA Res. 54/263, U.N. GAOR, 54th Sess., U.N. Doc. A/54/49, available at <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm> [hereinafter *Optional Protocol on the Sale of Children*].

<sup>31</sup> *Id.* at art. 2(a).

<sup>32</sup> *Id.* at art. 3 ¶ 1.

disposition of their cases; (c) *Allowing* the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law; (d) *Providing* appropriate support services to child victims throughout the legal process; (e) *Protecting*, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims; (f) *Providing*, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; (g) *Avoiding* unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.’<sup>33</sup>

In addition, all appropriate assistance to victims is to be ensured, ‘including their full social reintegration and their full physical and psychological recovery,’<sup>34</sup> as well as that all child victims ‘have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.’<sup>35</sup> States parties are also bound to ‘ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim,’<sup>36</sup> as well as ‘that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.’<sup>37</sup>

The problem of the particular vulnerability of the child victim is taken into special account by the Protocol, *e.g.* through recommending States parties to adopt ‘measures to ensure

---

<sup>33</sup> *Id.* at art. 8 ¶ 1.

<sup>34</sup> *Id.* at art. 9 ¶ 3.

<sup>35</sup> *Id.* at art. 9 ¶ 4.

<sup>36</sup> *See Optional Protocol on the Sale of Children, supra* note 30, at art. 8 ¶ 2.

<sup>37</sup> *Id.* at art. 8 ¶ 3.

appropriate training, in particular legal and psychological training, for the persons who work with [child] victims' of human trafficking,<sup>38</sup> or to devote particular attention, in relevant domestic legislation, to the need of protecting children 'who are especially vulnerable to trafficking.'<sup>39</sup> The Protocol considers the problem of trafficking in children in all its comprehensiveness, trying to address every single aspect suitable of being involved in the complex operation aimed at ensuring rehabilitation of victims; in this respect, a significant provision is included recommending States parties to 'adopt appropriate measures in order to protect the safety and integrity of those persons and/or organizations involved in the prevention and/or protection and rehabilitation of victims.'<sup>40</sup> The need of building a social background suitable of facilitating prevention and repression of trafficking in children as well as victim rehabilitation is then addressed. In particular, States parties are called to 'promote awareness in the public at large, including children, through information by all appropriate means, education and training, about the preventive measures and harmful effects of the offences' contemplated by the Protocol.<sup>41</sup> Appropriate measures must also be taken with the purpose of 'effectively prohibiting the production and dissemination of material advertising the offences described in the Protocol.'<sup>42</sup> Finally, emphasis is placed on the requirement to promote and strengthen international cooperation, including cooperation to 'assist child victims in their physical and psychological recovery, social reintegration and repatriation'<sup>43</sup> as well as to 'address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.'<sup>44</sup>

A similar sensibility for the aspect of victim protection and

---

<sup>38</sup> *Id.* at art. 8 ¶ 4.

<sup>39</sup> *Id.* at art. 9 ¶ 1.

<sup>40</sup> *Id.* at art. 8 ¶ 5.

<sup>41</sup> *Id.* at art. 9 ¶ 2.

<sup>42</sup> *See Optional Protocol on the Sale of Children, supra* note 30, at art. 9 ¶ 5.

<sup>43</sup> *Id.* at art. 10 ¶ 2.

<sup>44</sup> *Id.* at art. 10 ¶ 3.

rehabilitation is shown by the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (Palermo Protocol),<sup>45</sup> also adopted in 2000. As emphasized by its Preamble, the Protocol has the purpose of being the first ‘universal instrument’ regulating its subject matter, in light of the fact that, ‘in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected.’<sup>46</sup>

The declared purposes of the Protocol are: ‘(a) to prevent and combat trafficking in persons, paying particular attention to women and children; (b) to protect and assist the victims of such trafficking, with full respect for their human rights; and (c) to promote cooperation among States Parties in order to meet those objectives.’<sup>47</sup>

‘Trafficking in persons’ is defined as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs [. . .] [t]he consent of a victim of trafficking in persons to the intended exploitation [. . .] shall be irrelevant where any of the means set forth [above] have been used.<sup>48</sup>

Assistance to and protection of victims is realized, pursuant to

---

<sup>45</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, G.A. Res 55/25, U.N. Doc. A/RES/55/25 (January 8, 2001) *entered into force* December 25, 2003, *available at* <http://www.unodc.org/pdf/crime/ares55/res5525e.pdf> [hereinafter *Protocol to Punish Trafficking Persons*].

<sup>46</sup> *Id.* at preamble.

<sup>47</sup> *Id.* at art. 2.

<sup>48</sup> *Id.* at art. 3.

216 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 4

Article 6, as it follows: a) in appropriate cases and to the extent possible under domestic law, protection of the privacy and identity of victims is to be ensured, 'including, inter alia, by making legal proceedings relating to such trafficking confidential';<sup>49</sup> b) each State Party 'shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases' citation, information on available courts and administrative proceedings as well as assistance 'to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence';<sup>50</sup> c) each State Party 'shall consider implementing measures to provide for the physical, psychological and social recovery of victims,' including the provision of appropriate housing, counselling and information (in particular with respect to victims' legal rights, in a language that the victims can understand), medical, psychological and material assistance as well as employment, educational and training opportunities;<sup>51</sup> d) age, gender and special needs of victims shall be taken into account, 'in particular the special needs of children, including appropriate housing, education and care';<sup>52</sup> e) each State Party 'shall endeavour to provide for the physical safety of victims while they are within its territory';<sup>53</sup> f) each State Party 'shall ensure that its domestic legal system contains measures that offer victims the possibility of obtaining compensation for damage suffered';<sup>54</sup> g) each State Party 'shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases' (devoting appropriate consideration to humanitarian and compassionate factors);<sup>55</sup> h) return of the victim to his/her home State will be facilitated through the means appropriate, possibly

---

<sup>49</sup> *Id.* at art. 6. ¶ 1.

<sup>50</sup> *Id.* at art. 6. ¶ 2.

<sup>51</sup> *Protocol to Punish Trafficking Persons*, *supra* note 45, at art. 6. ¶ 3.

<sup>52</sup> *Id.* At art. 6 ¶ 4.

<sup>53</sup> *Id.* at art. 6. ¶ 5.

<sup>54</sup> *Id.* at art. 6. ¶ 6.

<sup>55</sup> *Id.* at art. 7.

taking into account the will of the person concerned.<sup>56</sup>

Various measures for the prevention of trafficking in persons and to protect victims – especially women and children – from revictimization are also contemplated, including (but not limited to): a) research, information and mass-media campaigns; b) cooperation with non-governmental organizations and the civil society; c) bilateral or multilateral cooperation at the interstate level (especially in order ‘to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity’); d) measures ‘to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking’;<sup>57</sup> e) information exchange and training (especially concerning the strategies and methods used by traffickers in order to perpetrate their shameful practice as well as the best practices for the prevention of human trafficking);<sup>58</sup> f) strengthening of border and visa controls (‘[w]ithout prejudice to international commitments in relation to the free movement of people’);<sup>59</sup> g) measures anti-alteration and falsification of travel documents.<sup>60</sup>

### *B. Legal Instruments of Regional Character*

At the regional level, there are in particular three instruments specifically dealing with human trafficking that are worth analyzing. The first – in chronological order – is the *Inter-American Convention on International Traffic in Minors*,<sup>61</sup> adopted at Mexico City in 1994. It is basically a private international law instrument, the purposes of which are: a) to ‘ensure the protection of minors in consideration of their best interests;’ b) to ‘institute a system of mutual legal assistance among the States Parties, dedicated to the prevention and

---

<sup>56</sup> *Id.* at art. 8.

<sup>57</sup> *Protocol to Punish Trafficking Persons*, *supra* note 45, at art. 9.

<sup>58</sup> *Id.* at art. 10.

<sup>59</sup> *Id.* at art. 11.

<sup>60</sup> *Id.* at art. 12.

<sup>61</sup> *See generally* The Inter-American Convention on International Traffic in Minors, March 18, 1994, 1994 WL 417293, 33 I.L.M. 721.

punishment of the international traffic in minors, as well as adopt related administrative and legal provisions to that effect;’ c) to ‘ensure the prompt return of minors who are victims of international traffic to the State of their habitual residence, bearing in mind the best interests of the minors.’<sup>62</sup> The purpose of victim protection is mainly pursued through provisions structured so as to indicate the results to be achieved leaving States parties free to choose the means to be used in order to accomplish such results. For example, Article 6 affirms that ‘States Parties shall protect the minor’s interests with a view to ensuring that all procedures applied pursuant to the present Convention shall remain confidential;’<sup>63</sup> similarly, Article 14 establishes that ‘steps shall be taken to ensure the immediate return of the minor, and where necessary, to ensure his or her care, custody or provisional guardianship, depending on the circumstances, and, as a preventive measure, to bar the minor from being wrongfully removed to another State.’<sup>64</sup> Also, Article 16 states that ‘[h]aving confirmed that a victim of traffic in minors is present within their jurisdiction, the competent authorities of a State Party shall take such immediate measures as may be necessary for the minor’s protection, including those of a preventive nature to ensure that the minor is not improperly removed to another State.’<sup>65</sup> Finally, adoption and custody of a minor may be revoked if they had ‘their origin or purpose in international traffic in minors.’<sup>66</sup>

In 2002, the *South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*<sup>67</sup> was adopted. As emphasized by Article II, the purposes of this Convention are to ‘promote cooperation amongst Member States’ – in order to favor prevention,

---

<sup>62</sup> *Id.* at art. 1.

<sup>63</sup> *Id.* at art. 6.

<sup>64</sup> *Id.* at art. 14.

<sup>65</sup> *Id.* at art. 16.

<sup>66</sup> *Id.* at art. 18.

<sup>67</sup> See generally SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Jan. 5, 2002, available at [http://www.unicri.it/wwd/trafficking/legal\\_framework/docs/saarc\\_convention\\_on\\_preventing\\_and\\_combating.pdf](http://www.unicri.it/wwd/trafficking/legal_framework/docs/saarc_convention_on_preventing_and_combating.pdf).

interdiction and suppression of trafficking in women and children as well as to favor 'repatriation and rehabilitation of victims of trafficking and prevent the use of women and children in international prostitution networks, particularly where the countries of the SAARC region are the countries of origin, transit and destination.'<sup>68</sup> Article VIII contemplates the 'measures to prevent and interdict trafficking in women and children,'<sup>69</sup> which include training and strengthening of law enforcement agencies, establishment of a 'Regional Task Force [...] to facilitate implementation of the provisions of this Convention and to undertake periodic reviews,'<sup>70</sup> bilateral cooperation (including 'cooperation to interdict trafficking in women and children for prostitution'),<sup>71</sup> exchange of relevant information, supervision of employment agencies, awareness-raising of the problem of trafficking in women and children within the civil society. Article IX is devoted to the issue of 'care, treatment, rehabilitation and repatriation' of victims. The main measures contemplated to these purposes are the following: a) modalities for the repatriation of victims to their country of origin are to be negotiated by States parties; b) pending the completion of arrangements among States parties for the repatriation of victims of cross-border trafficking, 'the State Parties to the Convention shall make suitable provisions for their care and maintenance' (including the provision of 'legal advice and health care facilities');<sup>72</sup> c) 'protective homes or shelters for rehabilitation of victims' (also with the help of authorized non-governmental organisations) will be established;<sup>73</sup> d) ad hoc provisions shall also be adopted 'for granting legal advice, counselling, job training and health care facilities for the victims.'<sup>74</sup>

How has this affected the people that it is intended to protect? There is an understanding that the gaps need to be filled, but the legal

---

<sup>68</sup> *Id.* at art. II.

<sup>69</sup> *Id.* at art. VIII.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at art. IX.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

application does not come across clearly enough. Perhaps a grass roots example would better serve the application in effect. In terms of victim protection, the most advanced regional legal instrument concerning human trafficking is undoubtedly the 2005 *Council of Europe Convention on Action against Trafficking in Human Beings*.<sup>75</sup> One of the main purposes of this Convention is – in addition to prevent and combat trafficking in human beings and to promote international cooperation to this end – to ‘protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution.’<sup>76</sup> The ‘modernity’ of the Convention under discussion is testified, for example, by Article 6, which contemplates specific measures to ‘discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking,’<sup>77</sup> including ‘research on best practices, methods and strategies,’<sup>78</sup> ‘raising awareness of the responsibility and important role of media and civil society,’<sup>79</sup> target information campaigns involving public authorities and policy makers as well as preventive measures, including educational programmes for boys and girls during their schooling.

The part of the Convention dealing with the measures aimed at protecting and promoting the rights of victims – covering the entire Chapter III – is particularly comprehensive. In applying these measures, particular attention is to be devoted to guarantee respect for gender equality.<sup>80</sup> They include:

a) identification of the victims, taking into account the special situation of women and child victims. To this purpose, ‘if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person

---

<sup>75</sup> Convention on Action against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197 [hereinafter *Action Against Trafficking*].

<sup>76</sup> *Id.* at art. I ¶ 1(b).

<sup>77</sup> *Id.* at art. 6.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Action Against Trafficking*, *supra* note 75, at art. 17.

shall not be removed from its territory until the identification process as victim [. . .] has been completed [. . .] and shall likewise ensure that that person receives [due] assistance.’<sup>81</sup> Also, ‘when the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age;’<sup>82</sup>

b) protection of private life, including measures to ensure ‘that the identity, or details allowing the identification, of a child victim of trafficking are not made publicly known, through the media or by any other means, except, in exceptional circumstances, in order to facilitate the tracing of family members or otherwise secure the well-being and protection of the child;’<sup>83</sup>

c) assistance to victims, particularly for their physical, psychological and social recovery. Such assistance shall include, at least, standards of living capable of ensuring their subsistence (*e.g.* through such measures as appropriate and secure accommodation, psychological and material assistance), access to emergency medical treatment, translation and interpretation services, counselling and information, assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders, access to education for children, access to the labor market, to vocational training and education. It is also necessary ‘to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness,’ and special consideration is to be devoted to the special needs of persons in a vulnerable position and to the rights of children in terms of accommodation, education and appropriate health care;’<sup>84</sup>

d) recovery and reflection period – lasting no less than 30 days – ‘when there are reasonable grounds to believe that the person concerned is a victim,’<sup>85</sup> to allow this person ‘to recover and escape

---

<sup>81</sup> *Id.* at art. 10.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at art. 11.

<sup>84</sup> *Id.* at art. 12.

<sup>85</sup> *See Action Against Trafficking, supra* note 75, at art. 13.

222 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 4

the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities.’<sup>86</sup> No expulsion order will be enforceable against the victim during this period, and the victim shall be entitled to the protective measures contemplated by Article 12;<sup>87</sup>

e) residence permit, as it may be necessary in light of the victim’s personal situation or for the purpose of his/her co-operation with the competent authorities in investigation or criminal proceedings. When the victim is a child and this residence permit is legally necessary, it must be issued ‘in accordance with the best interests of the child;’<sup>88</sup>

f) compensation and legal redress. This includes: access to information on relevant judicial and administrative proceedings in a language that the victim can understand; right to legal assistance and to free legal aid; right to compensation from the perpetrators (possibly complemented by ad hoc State measures, for example the establishment of a fund for victim compensation);<sup>89</sup>

g) repatriation and return of victims, with due regard for their rights, safety and dignity. States parties must take the appropriate measures to this end, but return should preferably be voluntary. Repatriation programmes must be established (‘involving relevant national or international institutions and non governmental organisations’), aimed at preventing re-victimisation. States parties should make their best efforts to favour the ‘reintegration of victims into the society of the State of return, including reintegration into the education system and the labor market.’<sup>90</sup> Children must be allowed to enjoy the right to education as well as ‘adequate care or receipt by the family or appropriate care structures.’<sup>91</sup> Return of child victims must only be implemented when it corresponds to the best interests of the child.<sup>92</sup>

---

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at art. 14.

<sup>89</sup> *Id.* at art. 15.

<sup>90</sup> *Id.* at art. 16.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

This provision deals with the delicate issue of protection of victims, witnesses and collaborators with the judicial authorities. In this respect, the necessary measures to grant ‘effective and appropriate protection of victims and witnesses from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators’ must be taken (also through cooperation among States parties). They may include, when necessary, members of the family of the persons referred to above. These measures may include physical protection, relocation, change of identity and assistance in finding a job. Child victims shall be afforded special protective measures shaped on the basis of their best interests.

The Convention also includes specific provisions contemplating, *inter alia*, the following principles: the persons or entities entrusted with the implementation of the provisions of the Convention must be ‘specialised in the fight against trafficking and the protection of victims’ and must possess ‘the necessary independence . . . in order for them to be able to carry out their functions effectively and free from any undue pressure;’<sup>93</sup> the necessary measures are to be taken in order to ensure, during judicial proceedings, ‘the protection of victims’ private life and, where appropriate, identity,’ as well as ‘victims’ safety and protection from intimidation’ (with special attention for the special needs of children).<sup>94</sup> Last but not least, States parties are requested to develop international cooperation and cooperation with civil society,<sup>95</sup> to exchange relevant information useful for the implementation of the Convention<sup>96</sup> as well as to establish a specific monitoring mechanism, called ‘Group of experts on action against trafficking in human beings’ (GRETA).<sup>97</sup>

---

<sup>93</sup> *Id.* at art. 29 ¶ 1.

<sup>94</sup> *See Action Against Trafficking*, *supra* note 75, at art. 30.

<sup>95</sup> *Id.* at arts. 32 and 35.

<sup>96</sup> *Id.* at art. 34.

<sup>97</sup> *Id.* at art. 36 ¶ ff.

*C. Trafficking of Human Beings as a Contemporary Form of Slavery*

An additional profile concerning the international legal action against the topic under discussion is offered by the circumstance that trafficking in human beings can definitely be subsumed within the concept of enslavement (and – in the event that the victim is sold by a trafficker to another trafficker or to the final exploiter – within the notion of ‘slave trade’).

The internationally recognized definition of slavery corresponds to ‘*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.*’<sup>98</sup> It is clear that, when and to the extent that a person is forcibly subject to human trafficking for purposes of exploitation of prostitution, transplantation of organs, forced begging, or equivalent awful and intolerable aims, there are no reasonable doubts that ‘any or all of the powers attaching to the right of ownership’ are exercised to his/her prejudice. The person concerned is thus to be considered as a victim of the crime of enslavement. In light of the absolute intolerability of treatments amounting to slavery, this applies irrespective of a possible consent apparently offered by the victim to such a treatment, which is thus to be considered as invalidly given.<sup>99</sup>

---

<sup>98</sup> See Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 L.N.T.S. 253; see also Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Apr. 30, 1957, 226 U.N.T.S. 3.; The same definition has also been accepted in the context of customary international law; see also Federico Lenzerini, ‘*La definizione internazionale di schiavitù secondo il Tribunale per La Ex-Iugoslavia: un caso di osmosi tra consuetudine e norme convenzionali*’ [The International Definition of Slavery according to the International Tribunal for the Former Yugoslavia. Osmosis between Customary International Law and Treaty Law], 84 RIVISTA DI DIRITTO INTERNAZIONALE 1026 et seq. (2001).

<sup>99</sup> The position taken in the text is coherent with the one adopted by the 2000 Palermo Protocol, which, in providing the definition of ‘trafficking in persons’, expressly affirms that “[t]he consent of a victim of trafficking in persons to the intended exploitation . . . shall be irrelevant where any of the means set forth [in the first part of the definition] have been used.” See *Protocol to Punish Trafficking Persons*, supra note 45; The same position is confirmed in Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, 16.V.2005 [henceforth *Palermo Protocol*].

There would be no need to elaborate much on this issue, as the coincidence between most situations of human trafficking and enslavement is crystal clear.<sup>100</sup> However, authoritative confirmation of this position is offered by relevant international practice. For example, Article 7 of the *Rome Statute of the International Criminal Court*, adopted on 17 July 1998,<sup>101</sup> in defining enslavement as a crime against humanity, explicitly affirms that it is ‘the exercise of any or all of the powers attaching to the right of ownership over a person and *includes the exercise of such power in the course of trafficking in persons, in particular women and children*’.<sup>102</sup> Also, the International Criminal Tribunal for the Former Yugoslavia, in its 2001 judgement concerning the case of *Prosecutor v. Kunarac, Kovac and Vukovic*,<sup>103</sup> affirmed that ‘indications of enslavement include . . . human trafficking’.<sup>104</sup> One may further mention the 2000 *Charter of Fundamental Rights of the European Union*,<sup>105</sup> which includes explicit prohibition of trafficking in human beings in Article 5, entitled ‘[p]rohibition of slavery and forced labor.’<sup>106</sup> Last but not least, the UN Working Group on Contemporary Forms of Slavery has constantly maintained the position supported herein as well,<sup>107</sup>

---

<sup>100</sup> See The Miami Declaration of Principles on Human Trafficking (Feb. 10, 2005), available at [www.humantrafficking.org/uploads/updates/miami\\_041405declarationofprinciples\\_onht.doc](http://www.humantrafficking.org/uploads/updates/miami_041405declarationofprinciples_onht.doc). [hereinafter *Miami Declaration*].

<sup>101</sup> Rome Statute of the International Criminal Court, Jul. 17, 1998, U.N. Doc. A/CONF. 183/9, available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

<sup>102</sup> Emphasis added.

<sup>103</sup> *Prosecutor v. Kunarac, Kovac & Vukovic*, Case No. IT-96-23, Judgment, (Feb. 22, 2001), available at <http://www.un.org/icty/foca/trialc2/judgement/index.htm>.

<sup>104</sup> *Id.* at ¶ 542.

<sup>105</sup> European Union, Official Journal of the European Communities, *Charter of Fundamental Rights of the European Union*, C364 at 1, December 18, 2000, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en\\_pdf](http://www.europarl.europa.eu/charter/pdf/text_en_pdf).

<sup>106</sup> *Id.* at art. 5.

<sup>107</sup> See, e.g., *Report of the Working Group on Contemporary Forms of Slavery*, 23<sup>rd</sup> Sess., Recommendation 4, U.N. Doc. E/CN.4/Sub.2/1998/14 (1998), (“transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights”); see also *Report of the Working Group on Contemporary Forms of Slavery*, 26<sup>th</sup> Sess., ¶15, U.N. Doc. E/CN.4/Sub.2/2001/30 (2001).

with no UN member State ever raising any objection or even expressing hesitation on this point.

The coincidence between human trafficking and slavery opens very interesting scenarios in the context of the fight against the former not only at the international, but also at the national level. In particular, with respect to the former, no doubt exists that human trafficking amounts to a breach of not only customary international law, but also of *jus cogens*.<sup>108</sup> With regard to the latter, for example, slavery being a crime against humanity, the principle of universality of jurisdiction is in principle applicable to instances of trafficking of human beings<sup>109</sup> (although, in general terms, domestic courts are usually very hesitant to apply the principle of universal jurisdiction, except when a provision of domestic law explicitly attributes this competence to them).

### *III. Fostering a Victim-Oriented Approach:*

#### *Are Relevant International Instruments Effectively Adequate to Ensure Victim Protection?*

It is only in the most recent pertinent instruments that the international community has finally matured to a full conscience that the fight against human trafficking is to be carried out through devoting primary consideration to a victim-oriented approach. In fact, less recent treaties mainly concentrated their efforts to ensure criminalization of the prohibited acts and fostering cooperation among States parties in this respect (*e.g.* in terms of extradition or exchange of information), while the perspective of the victim was relegated to a secondary position. However, the change of approach that is clearly apparent in the most recent instruments – particularly the Palermo Protocol supplementing the United Nations Convention against Transnational Organized Crime, the 2000 Protocol to the Convention on the Rights of the Child and the 2005 Council of Europe Convention – is certainly to be welcomed. What is important, in particular, is that due consideration for a human rights approach to

---

<sup>108</sup> See *Miami Declaration*, *supra* note 100, at ¶ 3.

<sup>109</sup> *Id.*

human trafficking<sup>110</sup> has finally proved able to pierce the traditional State approach of considering the problem of human trafficking almost exclusively under a perspective of criminal law and *ordre public*.

The change of approach just noted has made possible the inclusion in pertinent instruments of a significant number of victim-oriented provisions, which – considered as a whole – notably improve the international action in the field. For example, the intensity and quality of inter-State cooperation has been remarkably expanded. Strengthening of this cooperation – the importance which was however already well perceived by the early relevant instruments – is in fact crucial in order to efficiently fight human trafficking, which has usually a transnational characterization.

There are a number of specific provisions included in the instruments just referred to demonstrating the modernity of their approach in terms of victim protection. For example, Article 19 of the 2005 Council of Europe Convention, which calls for criminalization of the use of services of victims citation (*i.e.* the use of services which are the object of the kind of exploitation to which human trafficking is predetermined, *e.g.* prostitution) shows that the drafters of the Convention took conscience of the fact that a formidable way to prevent traffic in persons consists in intervening on the demand for the ‘services’ provided by victims, in the absence of which traffickers would have no more reasons for perpetrating their crime.

The measures aimed at ensuring protection of victims and witnesses have also been notably reinforced, especially through safeguarding the privacy and identity of victims and taking measures to avoid the inappropriate dissemination of information that could lead to identification of victims,<sup>111</sup> through providing for the safety of victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation,<sup>112</sup> as well as through

---

<sup>110</sup> See TOMOYA OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH* (2006).

<sup>111</sup> *Palermo Protocol*, *supra* note 99, at art. 6.

<sup>112</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale

adopting measures to ensure the physical, psychological and social recovery of victims.

Another positive approach taken by relevant instruments consists in granting residence permits for victims and witnesses. For example, Article 14 of the 2005 Council of Europe Convention provides that a residence permit is to be granted 'as it may be necessary owing to the victim's personal situation or for the purpose of his/her co-operation with the competent authorities in investigation or criminal proceedings.'<sup>113</sup> This certainly increases the chances of success of these proceedings; in the past due to their status of illegal immigrants, victims were usually expelled from the State as soon as they were identified, with paradoxical consequence of depriving the judge of the only element of proof that could allow to demonstrate the exploiters' guilt. It is to be noted, however, that these permits are usually contemplated by relevant instruments only on a temporary basis, as they are usually limited to the time that criminal proceedings against perpetrators last.

Pertinent instruments also ensure identification and adequate assistance to victims, which is not made conditional (at least by Article 12 of the 2005 Council of Europe Convention) on their willingness to act as witness. To a similar extent, special consideration is usually devoted to the particular needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.<sup>114</sup> Furthermore, the right of victims to legal assistance and to free legal aid as well as the right to compensation from the perpetrators is also provided.<sup>115</sup>

Proper education and training of State officials entrusted with the implementation and enforcement of the relevant anti-trafficking

---

of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, at art. 8, U.N. Doc. A/RES/54/263 (May 25, 2000), *entered into force* Jan. 18, 2002 available at <http://www.unhchr.ch/html/menu2/dopchild.htm> [hereinafter *Child Prostitution Protocol*].

<sup>113</sup> *Palermo Protocol*, *supra* note 99, at art. 14.

<sup>114</sup> *Id.* at art. 6 ¶ 4.

<sup>115</sup> *Id.* at art. 15.

provisions is also contemplated. As emphasized by Article 10 para. 2 of the Palermo Protocol, this training ‘should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues’.<sup>116</sup> Appropriate training, especially of legal and psychological nature, is also granted in favor of the persons who work with victims.<sup>117</sup>

Last but not least, the provisions calling for dissemination of information and awareness raising within all fields of the civil society<sup>118</sup> are of special importance, as in the long term this kind of action may represent a formidable means for favoring prevention of the odious crime.

In sum, most recent pertinent instruments have led to a very significant improvement of the international action against human trafficking in terms of effectiveness of victim protection. However, it would probably be incorrect to consider them as the point of arrival in the international fight against trafficking in human beings; on the contrary, they should be considered as an excellent starting point in the “new era” in which this fight has finally been oriented toward a victim-oriented approach. As any starting point concerning whatever matter, it would need to be followed and complemented by additional ruling, aimed at filling the gaps still remaining in the existing international regulation of the subject.

#### *IV. Which Gaps Should Be Filled through Additional International Regulation?*

In general terms, international legal instruments are always perfectible. If it is true that perfection is a quality which barely exists in the real world, this is particularly evident in international treaties, the imperfection of which is usually an inherent

---

<sup>116</sup> *Id.* at art. 10 ¶ 2.

<sup>117</sup> *Id.* at art. 29 ¶ 1.

<sup>118</sup> See *Child Prostitution Protocol*, *supra* note 112, at art. 9 ¶ 2.

230 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 4

consequence of the compromise they must realize among the different (and often conflicting) exigencies of the various States of the world. The existing treaties regulating the subject of human trafficking do not escape this factual situation. Therefore, without any pretension of completeness, it may be useful to try to define the possible improvements that could further enhance the international action against trafficking in human beings, which, however, has already been hugely boosted – in terms of victim protection – by the relevant instruments adopted since the beginning of the 21<sup>st</sup> Century

First of all, it would be necessary to strongly affirm – in the form of a State obligation – that victims are to be treated as victims of a crime (through, *inter alia*, granting them the rights resulting from this position) and that trafficked persons should neither be criminalized for possible illegal activities committed as a result of their condition nor re-victimised or re-traumatised. In fact, it is evident that the possibility of being criminalized represents a huge disincentive for victims to cooperate with the authorities in order to bring the traffickers and exploiters to justice. At present, this need is only perceived by the 2005 Council of Europe Convention, Article 26 of which affirms that States parties ‘shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.’<sup>119</sup> This provision, however, appears quite weak, as it is expressed in the mere form of recommendation and the decision of whether or not it is to be implemented is consequently left to the free choice of States parties.

Also, a further step forward should be made with respect to the way in which the situation of victims is managed. In particular, victims should not be simply protected, but also encouraged to denounce their exploiters through offering them real incentives, for example *effective access* to a job or a *permanent residence permit*<sup>120</sup>

---

<sup>119</sup> *Palermo Protocol*, *supra* note 99, at art. 26

<sup>120</sup> Victims of Trafficking and Violence Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, (Oct. 8, 2000), *available at* <http://www.state.gov/documents/organization/10492.pdf> (in the context of

in the host country. In fact, the general rights to be ‘authorised to have access to the labour market, to vocational training and education’<sup>121</sup> or to obtain ‘assistance in obtaining jobs’<sup>122</sup> may not be enough to persuade the victim to cooperate with justice, as a number of social obstacles may exist in the territory concerned which prevent such a right to be translated into effective access to a job. The possibility of obtaining a job is crucial as it is indispensable that the victim attains economic independence, because dependence on others – in all its forms – is one of the main reasons leading a person to become a victim of trafficking in human beings. Similar considerations may be drawn, *mutatis mutandis*, with respect to the provision of a temporary residence permit, as the prospect of being repatriated – although at a later moment – may in fact represent a disincentive for many victims, who in the end may prefer to remain in a condition of exploitation in a country where living conditions are generally good rather than returning in a poor country where life expectations are limited and the chance of being re-trafficked exists. This point is timidly addressed by Article 7 para. 1 of the 2000 Palermo Protocol, according to which ‘each State Party *shall consider adopting* legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or *permanently*, in appropriate cases’<sup>123</sup> (devoting

---

domestic law, this need had been perceived by the United States); *see also* Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, Pub. L. No. 108-193, 117 Stat. 2876, (Dec. 19, 2003) *available at* <http://www.state.gov/g/tip/rls/61130/htm> ; *see also* Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005, Pub. L. No. 109-164, 119 Stat. 3558, (Jan. 10, 2006) *available at* <http://www.state.gov/g/tip/rls/61106.htm> (the TVPA allowed victims who participated in the investigation against, and prosecution of, their traffickers to apply for T non-immigrant status [T-visa] and permanent residency as well as to receive other special benefits and services. However, to be eligible for a T-visa, victims of trafficking in human beings had to satisfy certain requirements, including the circumstance of having suffered ‘extreme hardship involving unusual or severe harm upon removal’ from the United States).

<sup>121</sup> *See Palermo Protocol, supra* note 99, at art. 12 ¶ 4.

<sup>122</sup> *Id.* at art. 28 ¶ 2.

<sup>123</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 7 ¶ 1, *adopted in* G.A. Res. 55/25, ¶

## 232 INTERCULTURAL HUMAN RIGHTS LAW REVIEW [Vol. 4

appropriate consideration to humanitarian and compassionate factors). This is clearly not enough, especially on account of the hortatory character of the provision in point. On the contrary, a *causal relationship* between the fact of cooperating in the action of justice against perpetrators and a permanent residence permit – as a prize for the cooperation – should be established. As emphasized by the 2002 *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*,<sup>124</sup> ‘[i]n view of the increased level of risk that will exist after the provision of evidence by a victim, there should be no forced return unless the victim has expressed a desire to return or a thorough risk assessment has been conducted that concludes that it is safe to do so.’

The fact that information is provided in a language comprehensible only in *linguistic terms* is usually not enough. It must also be understandable *culturally*. It is therefore essential that sufficient attention is paid to the psychological aspects of each situation of trafficking, through providing victims with adequate *cultural* assistance. For example, in the late 1990s in Italy there was a huge presence of girls trafficked from certain African countries, especially Nigeria, for prostitution purposes. These girls were kept tied to their exploitation by a ‘*spiritually-perceived*’ link which worked much better than any physical constraint. They were in fact subject to initiation rites of religious character, after which they were convinced that, if they tried to break the ties that had been established through those rites, they would trigger the rage of gods. The result of this was that they were even terrified by the possibility of being approached by social workers. In cases like the one just exemplified, assistance should be provided by professionals who must be able to deal with victims with the right cultural approach. Thus, for instance, the Nigerian girls involved in the practice described above had to be shown that they had been deceived by their exploiters, as the ties to which they were bound were not in line with their genuine religious beliefs. In no way these kinds of situations must be treated as the result of superstition, and it is

---

2, U.N. GAOR (Nov. 15, 2000).

<sup>124</sup> Brussels Declaration on Preventing and Combating Trafficking in Human Beings, 2003 O.J. (C 137) 17.

essential that all preconceptions on victims of human trafficking are abandoned by competent assistance providers.

In terms of prevention, a key point rests in the need of removing the *social and cultural circumstances* which contribute to encourage the demand for the ‘services’ usually performed by the victims of human trafficking. This need is in part perceived by the 2005 Council of Europe Convention, at Article 19<sup>125</sup> and at Article 6, contemplating a number of legislative, administrative, educational, social, cultural or other measures ‘to discourage the demand,’<sup>126</sup> including ‘research on best practices, methods and strategies,’ ‘raising awareness of the responsibility and important role of media and civil society in identifying the demand as one of the root causes of trafficking in human beings,’ setting up of appropriate information campaigns and educational programmes.<sup>127</sup>

On a parallel basis, action should be promoted in order to remove the *material circumstances* encouraging trafficking in human beings. Sometimes very simple measures may represent a particularly efficient deterrent to the exploitation of victims in the activities for which they are usually trafficked to a given country. In this respect, excellent lessons may be drawn from domestic law. For example, in 1992, a law enforcement unit – the Central Unit Network on Illegal Immigration and Illegal Employment – was set up in Belgium in order to fight trafficking of girls from Eastern Europe in order to feed the local sex market. Until 1992, special ‘artist’ contracts were used in order to allow entry of foreign women into Belgium, while most of those women were in reality destined to be

---

<sup>125</sup> Council of Europe Convention on Action against Trafficking in Human Beings art. 19, May 16, 2005, C.E.T.S. No. 197.

<sup>126</sup> *Id.* at art. 6.

<sup>127</sup> According to which “[p]reventive measures should include, as a minimum: 1) programs promoting the empowerment of women and their full participation to the economic and social life of their countries of origin; 2) policies promoting education, social protection, and economic development; 3) measures to reduce the demand for prostitution, other commercial sexual services, cheap labor, and any other activity that could foster trafficking in persons; 4) measures to survey migration patterns and ensure legal and safe labor migration.” See *Miami Declaration*, *supra* note 100, at ¶ 33.

exploited as prostitutes; for example, in the year 1990 almost 2,000 temporary work permits of that kind had been released. The Belgian authorities, therefore, decided to establish new simple requirements to be satisfied in order to obtain such a permit, with the view of preventing forced prostitution of women working under ‘artist’ contracts. First, the woman concerned had to go in person before the relevant authorities to obtain her work permit; this facilitated the task of the women who desired to denounce their traffickers and/or exploiters, allowed the competent authorities to keep them under control and prevented the employers from threatening the women to denounce them as illegal workers in order to force them to accept their condition of prostitutes. Second, the women had the right to be offered a decent residence by their employer, which could not be in the same building in which they performed their work; the right that all the conditions of work and salary stated in their employment contract were respected, without being requested to perform any additional service – particularly of sexual nature – in addition to those explicitly provided by the contract; the right of being paid by their employer the expense for the return trip to their country of origin after the expiration of their contract. In this respect, they were provided a booklet, written in several languages, explaining their rights and the conditions of employment they were entitled to enjoy. Third, the women were provided with the names and addresses of NGOs that could help them for any need. After 1993, as result of these few simple measures, the request of artist permits for foreign women virtually ceased. In the same period, similar measures were also taken in the Netherlands and in some Swiss cantons.<sup>128</sup>

A more specific point, also inherent to the aspect of prevention, relates to the opportunity to establish a connection between trafficking in persons and the right of asylum. When a real risk of being trafficked exists in the country of origin, this should be considered by the competent authorities of other States as a form of

---

<sup>128</sup> See generally International Organization for Migration, *Trafficking and prostitution: the growing exploitation of migrant women from Central and Eastern Europe*, TRENDS IN ORGANIZED CRIME JOURNAL (May 1995), available at [http://ec.europa.eu/justice\\_home/daphnetoolkit/files/projects/1997408/intiomtraffickingprostitutionmigrant1995.pdf](http://ec.europa.eu/justice_home/daphnetoolkit/files/projects/1997408/intiomtraffickingprostitutionmigrant1995.pdf).

persecution pursuant to Article 1A(2) of the 1951 Refugee Convention.<sup>129</sup> The persons who have already been victims of trafficking in the past, or who ‘simply’ face this form of persecution should be granted refugee status as belonging to the ‘particular social group’ composed by the (potential) victims of trafficking in human beings.<sup>130</sup> This would also entitle the potential or actual victims of human trafficking to benefit – pursuant to both the 1951 Refugee Convention<sup>131</sup> and customary international law – of the application of the principle of *non-refoulement*.

Finally, certain long-term measures should be endorsed in order to foster prevention of human trafficking. In this respect, international agreements could be promoted by countries of destination of trafficked persons providing for commercial and economic support in favor of the countries of origin of the victims, including ad-hoc clauses establishing that this support will be revoked if the latter countries do not adopt effective measures to prevent that their citizens become victims of trafficking in persons. Of course, the actual respect of this condition should be constantly monitored, in order to prevent that the action against human trafficking at the national and local level being carried out without ensuring due respect for the principle of legality and for the right of

---

<sup>129</sup> A refugee is a person who, ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it’. Convention Relating to the Status of Refugees, art. 1a(2), 189 U.N.T.S. 2545, 6 I.L.M. 78 *opened for signature* July 28, 1951 *as modified by the Protocol Relating to the Status of Refugees*, 19 U.S.T. 6223, 606 U.N.T.S. 267, *opened for signature* Jan. 31, 1967.

<sup>130</sup> *See Miami Declaration*, *supra* note 100, at ¶ 21 (declaring that “[S]tates should allow victims of trafficking to apply for a protective status allowing them to remain in the states’ territory, and if found to be valid, states should grant the relief”).

<sup>131</sup> Convention Relating to the Status of Refugees, G.A. Res. 429 (V) at art. 33 ¶1, (July 28, 1951) (demanding that contracting states refuse return of certain refugees to areas where their life or freedom is threatened because of their membership in a particular social group or political opinion).

due process. Also – although it may appear rhetorical – a formidable means for the prevention of trafficking in human beings would consist in improving the socio-economic conditions of the countries of origin of the victims, particularly through fighting poverty and gender discrimination. In reality, this aspect is already emphasized by relevant international instruments. For example, Article 10 of the 2000 Protocol to the Convention on the Rights of the Child recommends States parties to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.<sup>132</sup> Also the 2005 *European Union Plan on best practices, standards and procedures for combating and preventing trafficking in human beings* emphasizes that ‘anti-poverty strategies should be an integral part of anti-trafficking strategies’.<sup>133</sup> It is a fact that the actual realization of a more socially and economically equitable world would lead to resolve *ipso facto* many human-rights-related problems. In addition, the economic ‘sacrifice’ that industrialized States would bear in order to ensure assistance to developing countries for the prevention of human trafficking would be balanced by the resources they would save in comparison to those that they need to spend at present for protecting citizens and public order against the threats triggered by trafficking in persons, for ensuring enforcement of anti-trafficking laws as well as for the protection and repatriation of victims.

#### V. Conclusion

The current debate on human trafficking is first of all a ‘philosophical’ dispute, concerning the best approach to be adopted in order to make the fight against this phenomenon. On the one hand, those supporting a criminal law approach base their position on the need to focus on the criminal action aimed at ensuring the punishment of traffickers and exploiters and restoring the safety of

---

<sup>132</sup> See generally *Optional Protocol on the Sale of Children*, *supra* note 30, at art. 10.

<sup>133</sup> *Official Journal of the European Union*, Council Information and Notices 2005/C311/01, ¶ 4 (x), 2005 O.J. (C311) 1 (Dec. 9, 2005).

public life threatened by human trafficking. On the other hand, a human rights approach is endorsed by those who see the need of restoring the human dignity of victims as the main goal to be pursued in the context of the fight against trafficking in human beings. Although the two approaches are strictly intertwined and complement with each other, a victim-oriented (human rights) approach is undoubtedly to be preferred. This is not only suggested by ideological reasons, *i.e.* the worth of human dignity, which is the supreme value to be defended in whatever circumstance,<sup>134</sup> but also by a simple practical consideration. In fact, only through a victim-oriented approach it is possible to create the conditions for allowing the victim to perceive a feeling of serenity and safeness suitable to lead her to cooperate with justice as a witness in order to make prosecution of her traffickers and exploiters for their horrific crimes actually possible, as well as – at the same time – to prevent recurrence of the crime and revenge by those criminals against the victim herself. The aspect of criminal law is therefore dependent and consequential to the correct realization of a victim-oriented

---

<sup>134</sup> This position is endorsed by international jurisprudence. For example – with specific respect to the prohibition of torture or cruel, inhuman or degrading treatment – the European Court of Human Rights has recently reiterated its long-lasting practice according to which the need of ensuring protection of human dignity against intolerable violations of human rights may in no way be balanced with the public interest of protecting the society from the dangers arising from the terrorist attitude of the potential victim of such violations, thus (re-)proclaiming the pre-eminence of the value of human dignity over any consideration linked to the protection of public order or national safety. *See* Saadi v. Italy, Appl. No. 37201/06, Eur. Ct. H.R. (Feb. 28, 2008) available at <http://www.unhcr.org/refworld/docid/47c6882e2.html>. In the *Saadi* case, Italy and the United Kingdom tried to persuade the Court that, since Mr. Saadi was an Islamic terrorist whose dangerousness was indubitable, the obligation of Italy to *non-refouler* him to a country in which he faced torture had to be balanced with the need of protecting public order from the dangers resulting from his presence in the Italian territory. The Court refuted this position, reiterating that the absolute prohibition of torture and inhuman or degrading treatment or punishment ‘enshrines one of the fundamental values of democratic societies’ (*id.* at ¶ 127), and that, *a fortiori*, ‘an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment [exists]. As the Court has repeatedly held, there can be no derogation from that rule [...] the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account’ (*id.* at ¶ 138).

238 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 4

approach, which is thus to be further valued in order to make the international action against human trafficking really adequate to achieve the goals it is aimed to reach.