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The Face of Modern Slavery in East Asian and ASEAN Countries

**A Guide to International, Regional, and Domestic
Legal instruments with a focus on the PRC, Japan, and
the two Koreas**

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ABSTRACT

Sono quasi 40 milioni le vittime di tratta secondo alcuni dati raccolti dalla Walk Free Foundation, tra cui prevale un numero sempre maggiore di donne e bambini coinvolti in questa criminalità organizzata. Donne e bambini, ma anche uomini, costretti a chiedere asilo in un paese che non li appartiene, per poi sparire nel nulla nel mondo del racket della criminalità internazionale, donne e minorenni costrette ad entrare nel giro della prostituzione, della schiavitù, del matrimonio forzato, spesso vittime di violenze sessuali, spogliati dei loro diritti umani e della loro libertà. Le loro vite appartengono ai trafficanti, le loro grida di dolore non vengono udite e così dopo abusi, violenze e sottomissioni, la loro volontà viene spezzata, il loro sogno di una vita migliore di quella che hanno lasciato alle spalle si trasforma in un incubo senza via d'uscita.

Il presente lavoro vede affrontare il tema della tratta degli esseri umani, principalmente di donne e giovani costrette nel giro della prostituzione, dello sfruttamento sessuale e del matrimonio forzato focalizzandosi sui paesi est-asiatici, tra cui Cina, Giappone e le due Coree. Questa scelta non è casuale, anzi tutt'altro, è stata una decisione presa dopo svariate ricerche e letture sulla questione dello *human trafficking*, dato che la regione asiatica altro non è che l'epicentro per eccellenza della tratta di donne sia a livello internazionale che all'interno della regione stessa, questo non solo per via di fattori socio-economici legati alla povertà, alla mancanza di opportunità di lavoro, di educazione e di consapevolezza di tale sfruttamento, ma è anche dovuta alla scarsa considerazione che gli uomini hanno nei confronti della donna, una donna sottomessa al loro potere e ad una tradizione legata alla *pietà filiale*. Ciononostante, è curioso come gli unici materiali, articoli e pubblicazioni di ricerche sul traffico umano in questa parte di regione sono relativamente insufficienti o comunque pressoché poche; di conseguenza le fonti a cui questa tesi farà affidamento sono le ricerche delle varie agenzie delle Nazioni Unite, tra cui opere di professori, ricercatori ed esperti che si occupano della tratta degli esseri umani e del loro sfruttamento e testi derivanti da letterature e pubblicazioni di articoli da diverse fonti e autori. Di seguito la tesi è suddivisa in 3 capitoli anticipata da un'introduzione pertinente all'argomento sulla tratta in cui verranno spiegati i fattori che contribuiscono allo sfruttamento di esseri umani. Il primo capitolo si concentra sugli strumenti internazionali adottati dai vari paesi contro la lotta allo sfruttamento di esseri umani tra cui vedremo anche i primi accordi internazionali adottati contro la tratta degli schiavi e di condizioni servili. Il secondo capitolo invece avrà come principale obiettivo un'analisi delle convenzioni regionali, *in primis* in ambito Europeo e successivamente concernenti l'ASEAN, di cui si vedranno anche le differenze con il protocollo del Consiglio d'Europa. Il terzo e ultimo capitolo come già accennato si concentrerà sulle nozioni di tratta nei paesi est asiatici e sui propri strumenti nazionali nel contrastare il traffico di donne e bambine, introdotte mediante false promesse di vita migliore, in un contesto di sfruttamento sessuale e matrimonio forzato.

Lo sfruttamento o anche detta "tratta degli esseri umani" è il giro criminale più proliferante al mondo, terzo soltanto al traffico di sostanze stupefacenti e al contrabbando di armi da fuoco, essa la si può definire la forma più aberrante, tale da presentarsi come una "schiavitù moderna" che al tempo stesso richiama un

profitto esponenziale per le criminalità organizzate di decine di miliardi di dollari alimentata anche dalla domanda di uomini alla ricerca piaceri sessuali o di schiave del sesso. All'insorgere di questa crescente crisi, è indispensabile per i paesi potersi adoperare di accordi e strumenti internazionali a cui fare affidamento ed è proprio in questo contesto che il diritto internazionale e le ratifiche delle convenzioni internazionali si configurano come alcuni dei principali strumenti per la lotta contro questa pratica illegale e contro la lotta ai gruppi transnazionali. Di fatto, in ambito internazionale sono state approvate una serie di convenzioni *hard law* connessi al traffico globale di esseri umani, tra cui ritroviamo la *Convenzione delle Nazioni Unite contro la Criminalità Organizzata transnazionale* (nota anche come Convenzione di Palermo) e i suoi tre Protocolli addizionali. Di seguito la definizione della tratta di esseri umani del *Protocollo delle Nazioni Unite sulla Prevenzione, Soppressione e Persecuzione del traffico di Persone, in particolare di donne e bambini*, come:

il reclutamento, trasporto, trasferimento, l'ospitare o accogliere persone, tramite la minaccia o l'uso della forza o di altre forme di coercizione, di rapimento, frode, inganno, abuso di potere o di una posizione di vulnerabilità [...] a scopo di sfruttamento. Lo sfruttamento comprende, come minimo, lo sfruttamento della prostituzione altrui o altre forme di sfruttamento sessuale, il lavoro o i servizi forzati, la schiavitù o pratiche analoghe [...].

In questo quadro è possibile dedurre le molteplici violazioni in cui vengono posti questi individui, non solo a rischio sono i loro diritti inalienabili come il diritto alla vita, alla libertà, all'eguaglianza, alla dignità e alla sicurezza, alla non discriminazione o alla salute ma anche tutti i diritti che riguardano la tutela del lavoratore spesso vittime di violenza, abusi e trattamenti degradanti. È anche vero che recentemente le organizzazioni criminali dedite alla tratta di persone tendono a costruire un rapporto con la vittima in modo tale da poter così sviluppare un legame di fedeltà al fine di permettere a questi enti illegali di perpetuare una sorta di controllo e di conseguenza coinvolgere le vittime anche solo parzialmente nel disegno criminoso. Questa nuova modalità di condurre lo sfruttamento permette ai trafficanti di ridurre i rischi legali alla tratta, così come anche evitare che le vittime tentino di scappare o di cercare aiuto, e in caso di processo, ridimensionare la gravità della condotta.

C'è da dire, per altro, che una corretta distinzione tra tratta di esseri umani (*trafficking*) e favoreggiamento di immigrazione clandestina (*smuggling*) è essenziale per lo svolgimento di recupero e identificazione delle vittime del racket, perché una mancata e/o adeguata identificazione dello status dell'individuo creerebbe non solo un errato processo e di conseguenza un'insufficiente punizione dello *human trafficker*, ma rappresenterebbe anche un'inadeguata protezione e assistenza della vittima stessa. È proprio qui che dobbiamo porci la domanda, come possiamo allora riconoscere una vittima di tratta da un immigrato clandestino? Ebbene se nel primo caso le vittime vengono reclutate da soggetti criminali mediante forme di coercizione, rapimento, frode, inganno, abuso di potere e/o approfittamento di una situazione di vulnerabilità, lo *smuggling* si basa principalmente sul "consenso" dell'immigrato clandestino. È, tuttavia, sempre più diffusa anche la pratica che vede la trasformazione dello *human smuggling* in uno stato di *human*

trafficking dovuta all'inconsapevolezza da parte del migrante dell'elevata somma di denaro richiesto per il trasferimento da un confine all'altro e delle reali situazioni che deve affrontare durante il lungo tragitto. È proprio qui che le organizzazioni criminali si adoperano in modo da servirsi delle medesime modalità di trasferimento che possiamo ritrovare nella tratta di esseri umani, infatti non è insolito che le due attività convergono da produrre gli stessi principi di sfruttamento. Di conseguenza, il fattore del debito diventa un sistema di controllo che impedisce la vittima di fuggire dal perpetratore finché il prestito non viene estinto, pratica che in genere se coinvolge organizzazioni criminali non viene mai ripianata.

Sebbene gli strumenti internazionali e nazionali adoperati dai governi riescano a reprimere, condannare e punire certe condotte perpetrate dai trasgressori, è altrettanto significativo poter proteggere e assistere le vittime del traffico, affinché quest'ultime possano riprendersi sia fisicamente che psicologicamente. Malgrado essi siano semplicemente soggetti passivi, vittime del crimine, sempre più spesso vengono percepiti e trattati dai governi e dalla giurisdizione alla stessa stregua di coloro che speculano dalla loro condizione di sfruttamento. Per di più, sempre in tema di sfruttamento e traffico di persone va assolutamente presa in considerazione la questione del coinvolgimento di pubblici ufficiali, operatori di polizia o agenti di frontiera che altro non fanno se non agevolare il movimento di esseri umani nei paesi di origine e di transito dei flussi migratori. Il riconoscimento della corruzione come uno degli elementi proliferanti della tratta è di estrema importanza, poiché, ad esempio, la complicità e la corruzione permette a essa di divenire invisibile agli occhi dello Stato, ai trafficanti e tutti coloro coinvolti di rimanere impuniti e/o facilita la re-vittimizzazione delle vittime identificate. Per questo motivo è indispensabile che la tratta di esseri umani e corruzione vengano affrontate congiuntamente, anziché separatamente. È in questo quadro che l'OCSE ricopre un ruolo fondamentale nella lotta contro la corruzione tramite linee guida e l'adozione della *Convenzione sulla lotta alla Corruzione dei Pubblici Ufficiali stranieri nelle transazioni internazionali*.

La necessità di rispondere allo sfruttamento e alla tratta di esseri umani su più fronti richiede l'accrescimento di cooperazioni con partner internazionali e locali e un migliore coordinamento tra le varie agenzie coinvolte nella lotta contro questa attività criminale anche attraverso programmi di sviluppo economico e sociale, contro lo sradicamento della povertà e la promozione dell'educazione come principale strumento di conoscenza e consapevolezza per i giovani che permetta anche di sviluppare un'ottica di solidarietà e aiuto per le vittime del traffico. Una delle principali sfide che le forze locali devono affrontare, in particolare in Asia orientale e nelle regioni dell'ASEAN, è la mancata capacità di dare priorità a questo problema, di provvedere ad un'adeguata formazione delle forze pubbliche e inefficienti meccanismi di coordinamento internazionale, nazionale e locale.

TABLE OF ABBREVIATIONS

ACTIP	– ASEAN Convention Against Trafficking in Persons
AMMCT	– ASEAN Ministerial Meeting on Transnational Crime
APA	– ASEAN Plan of Action
ASEAN	– Association
AWF	– Asian Women’s Fund
CAHTEH	– Ad Hoc Committee on Action against Trafficking in Human Beings
CATW	– Coalition Against Trafficking in Women
CCP	– Chinese Communist Party
CDA	– Contagious Diseases Acts
CEDAW	– Convention on the Elimination of All Forms of Discrimination against Women
CoE	– Council of Europe
COMMIT	– Coordinated Mekong Ministerial Initiative against Trafficking
COP	– Conference of Parties
CRC	– Convention on the Rights of the Child
DPRK	– Democratic People’s Republic of Korea
ECHR	– European Convention on Human Rights
ECOSOC	– Economic and Social Council
EU	– European Union
GA	– General Assembly
GAATW	– Global Alliance Against Traffic in Women
GR	– General Recommendation
GRETA	– Group of Experts on Action against Trafficking in Human Beings
HDI	– Human Development Index
HRC	– Human Rights Committee
ICC	– International Criminal Court
ICCPR	– International Covenant on Civil and Political Rights
ICESCR	– International Covenant of Economic, Social and Cultural Rights
ILO	– International Labour Organisation
KWAU	– Korean Women’s Association’s United
NGO	– Non-Governmental Organisation
OCP	– One Child Policy
OHCHR	– Office of the High Commissioner for Human Rights
OP-CEDAW	– Optional Protocol CEDAW
OSCE	– Organisation for Security and Co-operation in Europe

PRC – People’s Republic of China

ROK – Republic of Korea

SOMCT – Senior Officials Meeting on Transnational Crime

TIP – Trafficking in Persons

TVPA – Trafficking Victims Protection Act

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNACT – United Nations Action for Cooperation against Trafficking in Persons

UNCAC – United Nations Convention against Corruption

UNTOC – United Nations Convention against Transnational Organized Crime

UNDP – United Nations Development Programme

UNHCR – United Nations High Commissioner for Refugees

UNIAP -United Nations Inter-Agency Project on Human Trafficking

UNICEF – United Nations Children’s Fund

UNODC – United Nations Office on Drugs and Crime

WFF – Walk Free Foundation

INTRODUCTION

Trafficking thrives in the shadows. And it can be easy to dismiss it as something that happens to someone else, somewhere else. But that is not the case. Trafficking is a crime that involves every nation on earth, and that includes our own. — Hillary Rodham Clinton, US Secretary of State, 2009.

1. The issue of trafficking in persons

The purpose of this paragraph is to introduce and give a general understanding of the issue of human trafficking around the globe. Human trafficking has received a lot of attention in the last few decades, both in political and public sphere¹.

“Human trafficking” and “modern slavery” are terminologies used interchangeably and to describe illegal activities connected to the exploitation of human beings². Human trafficking represents a global problem and probably one of the most shameful crime committed throughout history, and yet is the most thriving illegal business in modern society, estimated to be the third most profitable business for organized crime after drugs and firearms trade³. Millions of people, between women, men, and children, are trafficked around the world forced in exploitative situations and deprived of their dignity. Although slavery and the slave trade were abolished in the 19th century, today we still see an occurrence of these actions. Accurate statistics over the magnitude of the problem is difficult due to its concealed nature, hidden economies, and the ability of traffickers to keep their work undetected, but studies came to the conclusion that modern human trafficking differs from the 19th century slave trade in numerous ways. Although, historical slave trade and current human trafficking share similarities in terms of meaning, they are characteristically different. In contemporary society, the industry of sexual exploitation is by far the most commonly identified form of human trafficking (79%) followed by forced labour (18%), whereas the scale of transatlantic slave trade engaged more on the exploitation of forced labour⁴. Another peculiarity of today's modern slavery is the geographical pattern that illegal syndicates follow, even though it still mainly occurs from developing countries to developed countries⁵. Albeit, victims of trafficking are not necessarily the poorest people in a country, evidence shows that the majority of the victims assisted by international organizations or NGOs come from some of the most impoverished states such as Nepal, Bangladesh, Cambodia, Thailand, and the rural areas of China⁶. Exploitation of human beings can be highly profitable not only for the agents who provide transportation or cross-border movement, but also for the employers who exploit these victims in

¹ Mary C. Burke, *Human Trafficking Interdisciplinary Perspectives*, Routledge Taylor & Francis Group, 2013, New York, p. 4.

² *Ibid.*

³ United Nations Regional Information Centre for Western Europe (UNRIC), Website, *Human Trafficking*, available at <https://www.unric.org/en/human-trafficking/27448-how-serious-is-the-problem>, accessed 01/07/2018.

⁴ Mary C. Burke, *op. cit.*,

⁵ Mary C. Burke, *op. cit.*,

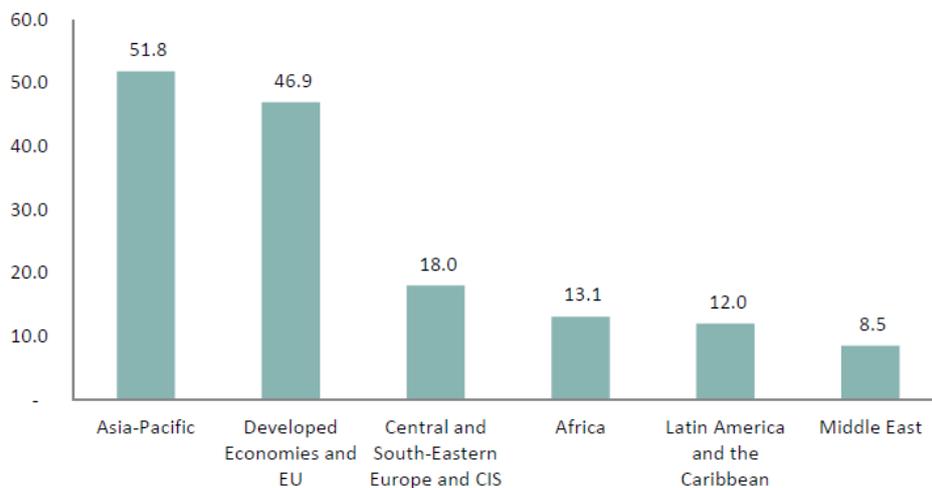
⁶ Alex A. Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings*, Praeger Publishers, 2009, London, p. 41.

the place of destination. According to the ILO, a roughly calculation of the total illicit revenues produced from trafficking in one year are estimated to be about US\$150.2 billion (table 1.1) with approximately more than one third generated in Asia (US\$51.8 billion) and developed countries (US\$46.9 billion)⁷, making it a considerable criminal business that preys on the most marginalised individuals⁸ (table 1.2).

Table 1.1 Estimated average annual revenues generated by human trafficking (Source ILO).

Region	Forced Sexual Exploitation	Domestic work	Non Domestic labour	Total
Asia-Pacific	31.70	6.30	13.80	51.80
Latin America and the Caribbean	10.40	0.50	1.00	12.00
Africa	8.90	0.30	3.90	13.10
Middle East	7.50	0.40	0.60	8.50
Central and South-Eastern Europe and CIS	14.30	0.10	3.60	18.00
Developed Economies and EU	26.20	0.20	20.50	46.90
World	99.00	7.90	43.40	150.20

Table 1.2 Annual profits of trafficking by region (US\$ billion) (Source ILO).



The UNODC Database on Human Trafficking Trends has reported approximately 127 countries of origin where victims are exploited and 137 as destination countries⁹. Although victims of trafficking have their individual characteristics, generally they follow the same pattern: abduction or recruitment in the country of origin, conveyance through transit regions and, then, exploitation in the destination country. In the event the victim is rescued she or he shall receive support in the country of transit or destination. However, either immediately or at some later point, victims might be repatriated to their origin country or in some cases,

⁷ International Labour Organization (ILO), *Profits and Poverty, The Economics of Forced Labour*, ILO, 2014, Geneva, p. 13.

⁸ UNODC, Website, *Transnational organized crime*, available at <https://www.unodc.org/toc/en/crimes/human-trafficking.html>, accessed 01/07/2018.

⁹ UNODC, *Trafficking in Persons: Global Patterns*, April 2006, Vienna, p. 17

relocated in a third country or, as unfortunately too often still happens, deported from destination or transit countries as illegal migrants¹⁰. What makes this business particularly thriving is that in the twenty-first century it is far easier and less expensive to purchase a person than in the past. There have been reports in Southeast Asia where victims of trafficking could be purchased for a low cost of 10 US\$, and an average cost of 90 US\$ worldwide (Free the Slaves)¹¹. Other specific forms of trafficking reported by countries include forced or sham marriages, domestic servitude, begging, benefit fraud, production of pornography and removal of organs¹². It is worth mentioning that human trafficking is the only area of transnational crime in which women are significantly represented – as victims, perpetrators, or as activists seeking to combat this illegal crime through non-governmental organizations and by developing prevention programmes and providing support to victims. As the ILO data indicates, women and girls are disproportionately the main victims of trafficking in human beings, more precisely for sexual exploitation, forced marriage, and forced labour¹³. The present work will be focused towards women and young girls trafficked throughout the Eastern Asia region, stressing on the issues regarding sex trafficking and bride traffic. It is fundamental to clarify that not only women and girls, but men and children of all ages and races can be trafficked for sexual and labour purposes. Although it is not possible to provide exact data, numerous researches on trafficking has delineated the Asian region as one of the most heavily affected geographic area. Commonly at risk of trafficking come from vulnerable populations including undocumented migrants, vulnerable young individuals and females or members of other oppressed or marginalised groups, and the poor, mostly due to the lack of resources and work options they are provided with, but also because they tend to be the easiest to control. Pimps and sex traffickers, for example, manipulate child victims using a combination of violence and affection in an effort to cultivate loyalty in the victim resulting in the so called, **Stockholm syndrome**, a psychological phenomenon wherein hostages experience and express empathy and positive feelings for their captors. This kind of experience is more likely to affect children rather than adults because of their natural vulnerability. This psychological manipulation reduces the victim's likelihood to defy against the trafficker, on the contrary, the victim sees the captor as its saviour¹⁴.

To tackle criminal organisations, while protecting and assisting trafficked victims and smuggled migrants, the challenge for all countries is to target the networks that profit from the exploitation of desperate people, many of whom bear difficulties beyond our understanding only in search for a better life¹⁵.

¹⁰ Ivi, p.57.

¹¹ Free the Slaves was founded in 2000 and today it is considered a leader and pioneer in the modern abolitionist movement. Available at <https://www.freetheslaves.net/about-slavery/slavery-today/>, accessed 01/07/2018

¹² UNODC, *Global Report on Trafficking in Persons 2016*, United Nations Publication, Sales no. E.16.IV.6, 2016, New York, p. 8.

¹³ ILO and Walk Free Foundation in Partnership with International Organization for Migration (IOM), *Global Estimates of Modern Slavery Forced Labour and Forced Marriage*, ILO Publications, Geneva, 2017, p. 10. See also Louise Shelley, *Human Trafficking A Global Perspective*, Cambridge University Press, 2010, p. 16.

¹⁴ Mary C. Burke, *op. cit.*, p.9

¹⁵ UNODC, *UNODC Annual Report Covering Activities During 2016*, Vienna, 2016, p.38.

2. Distinguishing between trafficking in persons and smuggling migrants

To completely understand the meaning of human trafficking it is fundamental to make a distinction between human trafficking and smuggling of migrants and the purpose of this paragraph is to provide such definition. Illegal movement of persons generally comprises two activities: smuggling of migrants and the exploitation of trafficking in persons. Smuggling and trafficking are illegal businesses where, generally, criminal organizations earn high profits at the expenses of other victims. Essentially, the two activities can involve the recruitment and conveyance of persons from an origin to a destination country. However, human trafficking, unlike smuggling migrants, is an offence that involves the exploitation of the individual for compelled labour or commercial sexual exploitation through the use of force, deception, coercion, or abduction. We can see this connotation mirrored in international law, more precisely in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol), the first global instrument to recognise the crime of human trafficking (further explained in *Chapter 1*). Though, according to the protocol, when a child (and this include all of those under 18 years of age) is abducted or induced to engage in commercial sex or pornography, it is a crime regardless force, fraud, or coercion is applied. The tremendous growth of globalisation and the economic market have considerably increased the demand for smuggling and trafficking in people, creating new opportunities for offenders to profit and simultaneously sustain other illicit business activities that involves the provision of sham documents, organized border crossing, and job brokering¹⁶. According to the Interpol, numerous migrants were documented to derive from the least developed countries of Africa, Latin America, Eastern and Western Europe, Australia, North America, and Asia¹⁷. Migrants can be distributed in two categories: the first are those from neighbouring rural areas who cross the border to benefit from agricultural work and seek the assistance of smugglers for transportation in order to avoid border patrols; the second category are the migrants who move to another country to find a job (e.g. construction, food processing, manufacturing, fishing sectors and so on) or for other reasons¹⁸. To erroneously confuse a trafficked victim as a smuggled migrant can be very severe for the victim leaving her or him without the required assistance and protection. It may be difficult to distinguish a situation of trafficking and a situation of smuggling for several reasons such as the fact that smuggled migrants may become victims of trafficking; traffickers may act as smugglers and use the same route for both trafficking and smuggling; or the inhumane conditions in which smuggled may be treated that it is unlikely to believe it was even consented¹⁹. We could say that human trafficking is the dark side of

¹⁶ Alex A. Aronowitz, *op. cit.*, p.24.

¹⁷ Interpol, website, *People Smuggling*, available at <https://www.interpol.int/Crime-areas/Trafficking-in-human-beings/People-smuggling/Background>, accessed 04/07/2018.

¹⁸ UNODC, *Transnational Organized Crime in East Asia and the Pacific a Threat Assessment*, April 2013, p.9.

¹⁹ UNODC, *Toolkit to Combat Trafficking in Persons Global Programme Against Trafficking in Human Beings*, United Nations Publication, New York, 2008, p. 4.

migration. The difference is that the traffickers exploit and subject trafficking victims to a slavery-like condition, whereas, smuggled migrants have a *consensual* relationship with their smugglers from the very beginning (smuggled and smugglers become partners during the time of onset till the destination). Fundamentally, the current trafficking and smuggling definitions orbits around the question of consent. Basically, *one consents to being smuggled but one is coerced into being trafficked*²⁰. Furthermore, smuggling involves illegal border crossing and entry into another country, while trafficking, even if it may suggest movement of people, can also be committed against an individual who has never left her or his hometown²¹. Moreover, many smuggled individuals are free at the end of their journey or after a period of agreed servitude. Another indicator is the source of the offender's profit, that means that smugglers generate profit from moving people, and traffickers accumulate profit through the exploitation of victims²². A further difference is given by the fact that trafficked persons are (or at least should be considered) victims and entitled in many countries to special protection. While illegal migrants, unless they are granted asylum, are considered violators of immigration law and subject to arrest and deportation. The growth in these two forms of illegal movement of people has been substantial and consistent, driving the international community to define the problem and initiate collective action to curtail these ubiquitous phenomena. In pursuance of addressing the issue of human smuggling and trafficking in 2000 the United Nations along with the United Nations Convention on Transnational Crime adopted the relevant protocols. Their adoption *in tandem* means that States finally recognise both human smuggling and trafficking as closely linked to transnational organized crime²³. The Smuggling of Migrants Protocol supplementing the UN Convention against Transnational Organized Crime defines the smuggling of migrants as follow:

*"the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident*²⁴."

²⁰ Benjamin S. Buckland, *'Human Trafficking & Smuggling: Crossover & Overlap'*, Strategies Against Human Trafficking: The Role of the Security Sector, National Defence Academy and Austrian Ministry of Defence and Sports, Vienna, 2009, p.149.

²¹ U.S Department of State, Website, *Human Trafficking & Human Smuggling: Understanding the Difference*, 2017, Available at <https://www.state.gov/j/tip/rls/fs/2017/272005.htm> , accessed 05/07/2018.

²² *Ibid.*

²³ Louise Shelley, *Human Trafficking A Global Perspective*, Cambridge University Press, New York, 2010.

²⁴ Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted by General Assembly resolution 55/25, entry into force 28th January 2004, art. 3. The Smuggling Protocol deals with the issue of organized criminal groups who smuggle migrants. Art. 3 adopts a wide approach to the notion of "migrant" that includes both voluntary and involuntary movements. In addition, art. 6 addresses the criminalisation of smuggling when committed intentionally and in order to obtain a financial or other material benefit and establish as aggravated circumstances offences that endanger the lives or safety of the migrants and that entail inhuman or degrading treatment of such migrants. The Protocol aims at preventing and combating the smuggling of migrants, as well as promoting cooperation among States parties, while protecting the rights of smuggled migrants and preventing the worst forms of their exploitation which often characterise the smuggling process.

Currently, evidence shows that at least 2.5 million migrants were smuggled around the world in 2016 for \$5.5-7 billion in term of illegal economic revenue²⁵. In addition, it has been detected numerous criminal networks providing smuggling services to circumvent border and migration controls or visa requirements. Due to stricter and more efficient border-controls security, migrants rely on the assistance of organized smugglers. Like human trafficking, migrant smugglers tend to adjust their routes and *modus operandi* according to changed settings, and while the only expensive service are fraudulent documents or visa-smuggling²⁶, smugglers tend to adopt low cost methods exposing the safety of the smuggled migrants. In response to combat the crime of migrant smuggling, the UNODC assists countries in the implementation of the Smuggling of Migrants Protocol while also promoting an inclusive response²⁷. Although the phenomena of human smuggling and trafficking are properly defined at international level, in reality the situation is often not as clear as we might think. Why is that so? Well, smuggled victims most of the time are extremely vulnerable to human trafficking, abuse, and other crimes, as they are illegally crossing the border of another country and often indebted them to owe large sum of moneys to their smugglers. However, as the U.S Department of State has affirmed “*not all smuggling cases involve human trafficking, nor do all cases of human trafficking begin with migrant smuggling*”²⁸. Furthermore, when dealing with the issue of smuggling little attention is payed to human rights aspect. In fact, because migrants are often labelled as criminals, it is common for many people to think they do not have or deserve rights, even though the Smuggling Protocol explicitly defines their rights and further pronounces they are not criminals for having been the object of smuggling. Despite not being migrants seen as victims in the Protocol, but rather States being victims of the crime because of state sovereignty violation, the Smuggling Protocol has useful human rights. From this perspective, all migrants, regardless of their legal status, have certain inalienable rights in international human rights, humanitarian, and refugee law. The Smuggling Protocol asserts that, even though it is not a human rights treaty, none of the rights, abovementioned, should be compromised while implementing anti-smuggling measures²⁹. States parties are required to take all appropriate measures when there is need to protect smuggled migrants in cases involving death, torture or any other inhuman and degrading treatment

²⁵ UNODC, *Global Study on Smuggling of Migrants 2018*, United Nation Publication, Sales No. E.18.IV.9, New York, June 2018, p. 5.

²⁶ UNODC, Website, *Migrant Smuggling*, Available at <https://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html> , accessed 04/07/2018.

²⁷ *Ibid.*

²⁸ U.S. Department of State, Website, *Human Trafficking and Human Smuggling*, 2017 Available at <https://www.state.gov/j/tip/rls/fs/2017/272005.htm> , accessed 05/07/2018.

²⁹ GAATW, *Smuggling and Trafficking: Rights and Intersections*, Bangkok (Thailand), 2011, p.24.

or punishment³⁰, including violence³¹; States parties are also required to assist any person who has been smuggled³² and, therefore, provide her or his safe return while preventing refoulement³³. In this vein, the existence of international specialised agencies or NGOs are extremely important to comprehend the nature of these phenomena, and significant works carried out in addressing human smuggling and trafficking can attribute to the GAATW³⁴ who is increasingly concerned with immigration measures that criminalise migrants and badly affect trafficked people.

3. What contributes to human trafficking

a. Push and Pull Factors

The practise of trafficking has been intensifying in an epidemic scale and the causes may differ from one country to another. There are, however, many elements that are drawn to be common to trafficking, for starter, the desire of “potential” victims to migrate and their reasons to leave their country of origin (*push factors*) often match, whether using legitimate or criminal networks. Countries of origin are, traditionally, developing nations or those in a state of transition. Some of the common *push factors* that make people want to migrate in search of a secure life are the lack or non-existent government assistance and local conditions: poverty, oppression, lack of human rights, discrimination whether be it ethnic, gender, or class, lack of social or economic opportunity, of basic education, dangers from conflict or instability and similar conditions. Political or military uproar, civil or internal armed conflicts, and natural disasters tend to influence trafficking³⁵. For example, economic crises were the cause to led to numerous migrations from countries like Russia, Central and Eastern Europe, and Asia; as well as regional conflicts in places such as Kosovo, the former Yugoslavia, the Congo, Darfur, and Sudan; and even political and religious oppression became major factors of migration from China and Russia³⁶. War and civil conflict may lead to massive displacement of populations increasing the *vulnerability* to possible exploitation of many individuals, particularly of orphans and street children³⁷. Poverty is perhaps the principal cause of human trafficking from and within countries of origin and

³⁰ United Nations, Protocol Against the Smuggling Of Migrants By Land, Sea And Air, Supplementing The United Nations Convention Against Transnational Organized Crime, 2000, art. 16 (1) also available at https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf, accessed 06/07/2018.

³¹ *Ivi*, art. 16 (2)

³² *Ivi*, art. 16 (3)

³³ *Ivi*, arts. 18 (5) and 19 (1)

³⁴ The Global Alliance Against Traffic in Women (GAATW) is an Alliance of more than 80 non-governmental organizations from Africa, Asia, Europe, LAC and North America. The GAATW International Secretariat is based in Bangkok, Thailand and coordinates the activities of the Alliance, collects and disseminates information, and advocates on behalf of the Alliance at regional and international levels. More information on the official website <http://www.gaatw.org/about-us>, accessed 06/07/2018.

³⁵ Alex A. Aronowitz, *op. cit.*, p.11.

³⁶ *Ivi*, p.12.

³⁷ UNODC, *Toolkit to Combat Trafficking in Persons Global Programme Against Trafficking in Human Beings*, United Nations Publication, New York, 2008, p.423.

primary one of the cause of adults' entry into *debt bondage*³⁸. Human trafficking is also fostered by *pull factors*. Through many research and studies, we can find among the *pull factors* increased ease of travel (for instance, cheaper and faster travel opportunities or easier access to passports); higher salaries and standard of living in larger cities and countries abroad (education or job opportunity); continuous demand for migrant workers in destination countries combined with the aid of recruitment agencies and persons willing to facilitate jobs and travel; and greater expectations of opportunities in developed countries enhanced by mass media and access to the Internet³⁹. While it is truth that poverty and the need to improve their own economic situation are the major causes of trafficking from and within origin countries, they do not fully explain the frequency of trafficking in women and young girls. In this case, gender inequality plays a major role in TIP. As Cullen Du-Pont states, in less developing countries, girls have no access to education or women are denied employment, inheritance rights, or property. As a result, with fewer resources than men, they are attracted by traffickers' false promises for a better and secure life⁴⁰. Gender inequality and the preference of a male child over a baby girl is leading many Eastern and ASEAN countries to sex-selective abortions. Although illegal, these procedures are happening frequently enough to change the ratio of live female births to live male births, especially in countries such as Mumbai, India, Caucasus States, Taiwan, South Korea, and most frequently in China⁴¹. The abortion of infant girls (in which most cases the phenomenon of unborn girls is also known as *missing girls*⁴²) or given up after birth because of financial crises or debt, has led to an increase in bride selling and forced marriage, commonly when local women are unavailable or scarce.

b. Supply and Demand

Trafficking, whether for sexual or labour exploitation, cannot be fully understood without looking at the equation of *supply* and *demand*. Countries are either a source, transit, or destination country, meaning that traffickers obtain their supply of human beings (generally from a developing country) transport them through a variety of places, to ultimately sell them into servitude in the destination country. In other cases, trafficking victims never leave their countries of origin or are sold from one poor country to another. Some nations might also be a combination of source, transit, and destination⁴³. If we concentrate on the *demand* side of the industry, it is unquestionable how the *demand* has always existed in the commercial sex market. Besides, as wages increased in developed nations, there has been a consistent growing demand for cheap labour in every sector of the economy — agricultural, industry, domestic service, construction, and so on. It has been

³⁸ Kathryn Cullen Du-Pont, *Global Issues: Human Trafficking*, Infobase Publishing, New York, 2009, p.23.

³⁹ Alex A. Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings*, Praeger Publishers, 2009, London, p.12.

⁴⁰ Cullen Du-Pont, *op. cit.*, p. 25

⁴¹ Mary C. Burke, *Human Trafficking Interdisciplinary Perspectives*, Routledge Taylor & Francis Group, 2013, New York, p.79.

⁴² This term also includes girls that are born but are neglected, deserted, and left to die.

⁴³ Kathryn Cullen Du-Pont, *Global Issues: Human Trafficking*, Infobase Publishing, New York, 2009 p. x.

claimed that the demand of such services is related to the questions of supply and vulnerability, this means that the supply of trafficked victims generate demand and not vice versa⁴⁴. Art. 9 of the UN Trafficking Protocol emphasises the need for State Parties to take measures to discourage the demand side that fosters exploitation and, as a result, this issue has become an international focus over the last two decades⁴⁵, especially, when it concerns the context of sexual exploitation. The problem of global sex trafficking will not diminish unless those who create the demand for prostitution are addressed and prosecuted. In this respect, few examples of model legislation law tackling the *demand side of trafficking* can be found by the Swedish Parliament⁴⁶ that criminalise the purchase or the attempted purchase of “a temporary sexual relationship”. Norway introduced a law criminalising the purchase of sex in 2008, so did Iceland in 2009. This approach has also been adopted in Northern Ireland, Canada, France, and most recently, Ireland⁴⁷.

c. Globalisation

Connected to the prevalence of human trafficking, globalisation has been playing a significant role in modern day slavery. Globalisation is generally defined in economic terms. It is described as a process of interaction and communication around the world, achieved through the deregulation of trading opportunities. While global migration is not new, the speed at which it is occurring and the dynamics are. If we consider the nature of globalisation, market liberalisation, and privatisation, we can perceive how these phenomena have created an unprecedented disequilibrium between class, forcing families, mostly of poor areas, to migrate into the global workplace. Ironically speaking, just as globalisation has made it possible to trade legitimate goods and items across oceans, it has also helped the trade of illicit items such as drugs, weapons, and humans⁴⁸. Consequently, traffickers or smugglers can manoeuvre victims into criminal activities or enslavement under conditions of coercion. Behind the vulnerable and isolated victims or “commodities”, there is often an elaborate communications system that connects traffickers with the global market⁴⁹, allowing criminal activities to take place internationally. One of the effects of globalisation, has also brought to what is called *economic marginalisation*. This effect is created when there are economic differences among countries. For

⁴⁴ Alex A. Aronowitz, *op. cit.*, p.25.

⁴⁵ Molly Dragiewicz, *Global Human Trafficking Critical Issues and Contexts*, Routledge Taylor & Francis Group, New York, 2015, p.155.

⁴⁶ The Swedish Model or Nordic Model refers to a legal approach to prostitution which criminalises the customer and anyone who profits from prostitution, such as brothel owners, pimps, landlords, etc. as accountable for the offense, but decriminalises the sex worker. This law was introduced in Sweden in 1999. The principles behind the law is that, in Sweden, prostitution is regarded as violence against women and children, harmful not only to victims per se, but to society at large, and represents a major barrier to the achievement of full gender equality. A fundamental component of the Swedish model is the implementation of initiatives and empowerment strategies that aim to support and provide opportunities to exit the industry.

⁴⁷ Nordic Model Now, Website, Available at <https://nordicmodelnow.org/what-is-the-nordic-model/> , accessed 08/05/2018.

⁴⁸ Jinius R. Rodriguez, *Slavery in the Modern World: A History of Political, Social, Economic Oppression*, ABC-CLIO, LLC, California, 2011, p.41.

⁴⁹ Louise Shelley, *Human Trafficking A Global Perspective*, Cambridge University Press, New York, 2010, p.41.

instance, some countries reap the benefits of free markets and free trade while others suffer as a result of such system. Thus, for those who live in countries that suffer as a result of globalisation, or more specifically from extreme poverty, criminal activity becomes one of only few options to make a living. After considering the high profit margin and low risks for international criminal ventures, individuals may choose to enter the illegal trade of goods. Economic marginalisation or economic disparity has greatly contributed to what sociologists refer to as the *feminisation of poverty*. The feminisation of poverty is the result of the dire economic circumstances that mostly affects women and girls, especially in developing countries, when there are a precise number of jobs available. Thus, women become suitable targets for deceptive employment ventures or, at times, become desperate victims willing to take a chance on such underground markets in order to survive⁵⁰.

d. Corruption

Transparency International surveys have demonstrated that a critical element to TIP, in many Eastern and ASEAN region borders as well as in Latin America, Africa, Eurasia, and the Middle East ⁵¹, is that governmental controls are corrupted and, basically, crime groups and smugglers are the dominant powers. An extraction of this system can be drawn in the Golden Triangle region, in which human trafficking from Cambodia, Laos, Myanmar, and southern China flows into northern Thailand. Other examples of this dynamic are Bangladesh, India and Nepal border areas, where an entire domain of human smuggling and organized crime has developed. The same pattern exists on parts of the Afghan border, where drug smuggling rings have been adapted for human smuggling and trafficking⁵². Several studies have identified corruption at various stages of the trafficking process, beginning with a victim's recruitment and transport throughout the entire process of exploitation⁵³. There are two types of corrupt behaviour in trafficking: active involvement (which might include institutional violation, acceptance or transfer of bribes, and facilitation of transactions) or passive involvement (such as to overlook or not to investigate a possible crime)⁵⁴. In toto, the Council of Europe provides a general overview of professionals at risk of corruption ranging from public officials such as police, customs and embassy officers, to border control, immigration services, local officials, intelligence or security

⁵⁰ *Ivi*, p.42.

⁵¹ Transparency International (TI) established in 1993 is a global civil society organization fighting against corruption. It brings people together in a powerful worldwide coalition to end the devastating impact of corruption on men, women and children around the world. Its mission is to create change towards a world free of corruption. TI has played a lead role in improving the lives of millions around the world by building momentum for the anti-corruption movement. TI raises awareness and diminishes apathy and tolerance of corruption, devises and implements practical actions to address it. More information available on the official website <https://www.transparency.org/>, accessed 09/07/2018.

⁵² Louise Shelley, *Human Trafficking A Global Perspective*, Cambridge University Press, New York, 2010, p.44.

⁵³ Anti-slavery, Transparency International and UNODC, *The Role of Corruption in Trafficking in Persons*, at the Third Session of the Conference of State Parties to the UN Convention against Corruption, November 2009.

⁵⁴ *Ibid*.

forces and armed forces (national or international) to persons, groups, and parties with “influence”⁵⁵. *Perceived corruption* also must be taken into account when dealing with control of traffickers over a victim. Therefore, the recognition of corruption in facilitating trafficking is highly valuable. International frameworks such as the UNTOC and the UN Convention against Corruption (UNCAC) have provisions to deal with corruption, trafficking and criminal networks on their own. While the former together with its three protocols aim to prevent, suppress and punish trafficking, the latter has provisions to criminalise and prosecute active and passive bribery, money laundering, and obstruction of justice⁵⁶.

4. ASEAN and Eastern Asia: trafficking flows and data collection

Currently defined and accessible statistic data about human trafficking in the ASEAN and Eastern Asia region are still not available because traffickers, victims, and the clients of trafficked victims belong to what it has been defined as *hidden populations* whose peculiarity are neither easily identifiable nor easily found and often involve stigmatisation or the commission of illegal acts. As stated by the author M. Lee:

“We cannot see and we cannot count a hidden population; we cannot know its size or its exact characteristics. What we see or know is only a part of the entire population, probably just the tip of the iceberg”⁵⁷.

Approximate estimates, provided by the UNODC in collaboration with the International Labour Organization (ILO) and Walk Free Foundation, found, from 2012 to 2014, more than 500 different trafficking flows. Most of the detected victims exploited to Western and Southern Europe come from 137 different citizenships, mostly from Sub-Saharan Africa and East Asia⁵⁸. Albeit, most of the victims are still women, over the last 10 years, the profile of detected trafficking victims has slowly changed, having children and men take larger portions of the actual number of victims. According to ILO and WFF, in 2016 approximately 40.3 million people became victims of modern slavery⁵⁹. Of these victims, 24.9 million were being forced to work under threat or coercion by private individuals and groups or even state authorities as domestic workers, in numerous factories, camps or as fishermen, and most of all in the sex industry. Modern slavery also includes 15.4 million people living in a forced and not consented marriage. In many instances, they lose their sexual autonomy and often are forced to offer sexual pleasure to clients under the pretence of marriage⁶⁰. ASEAN and Eastern Asia are the most notorious region for this industry and they can be defined as an assemble of

⁵⁵ OECD Public Governance Review, *Trafficking in Persons and Corruption Breaking the Chain*, OECD Publishing, Paris, 2016, p.36.

⁵⁶ *Ibid.*

⁵⁷ Maggy Lee, *Human Trafficking*, Willan Publishing, USA and Canada, 2007, p.53.

⁵⁸ UNODC, *Global Report on Trafficking in Persons 2016*, United Nations Publication, Sales No. E.16.IV.6, 2016, New York, p.5.

⁵⁹ International Labour Organization and Walk Free Foundation in Partnership with International Organization for Migration (IOM), *Global Estimates of Modern Slavery Forced Labour and Forced Marriage*, ILO Publications, Geneva, 2017, p.10

⁶⁰ *Ibid.*

host, source, and transit stage for human trafficking⁶¹. At the present, the only available sources of information are the US Department of States TIP report; UN reports, including publications by the UNODC; and NGOs, such as Coalition Against Trafficking in Women (CATW), and the Protection Project. According to the US State Department, trafficking mostly thrives in Southeast and East Asian countries like Thailand, Myanmar, Laos, China, and India. It is also in this region where the worst human rights violations are pursued⁶². Factors such as poverty, corruption, and globalisation, as previously mentioned, amongst Asian countries all feed the human trafficking machine. Between 2012-2014 East Asian trafficking flows were detected within the region, as well as in North America, the Middle East, and in different countries in Western and Central Europe. Victims from East Asia have also been detected, although in smaller numbers, in Eastern Europe and Central Asia, and in Central and South America⁶³. Exploitation takes on various forms but trafficking for sexual exploitation remains the most common form of trafficking, this was true for more than 60 per cent of the 7,800 or so exploited victims detected between 2012 and 2014. Other frequently reported types of forced labour can be traced in the fishing industry detected in Indonesia, Cambodia, and Thailand. Again, a clear majority of victims of trafficking for forced labour and other purposes were females. Another common form of exploitation is forced marriage, accounting for 4 per cent of the victims detected in East Asia and the Pacific from 2012 to 2014⁶⁴, mainly in the Mekong area, Cambodia, Myanmar, Vietnam, and the PRC. Generally, it involves the recruitment of young women and girls to be placed on the market as brides⁶⁵. In addition, most of the victims are trafficked from and within the region of East Asia and the Pacific. This also holds true for victims trafficked into developed countries like Australia and Japan⁶⁶. They were also exploited from South Asian region, mostly from Bangladesh and India. In a reduced number can be found victims belonging to South-East Asian ethnic minorities, whose members are often deprived of citizenship (such as the case of Rohingya Muslim and other Minorities in Myanmar)⁶⁷. The complexity of trafficking in persons in East Asia has always been a difficult perspective to analyse and very often poorly studied, however, in the past few decades it has drawn much more attention than before. The end of the cold war, the onset of economic development in China, the rapid growth of a market-driven intraregional migration, meant that

⁶¹ Louise Shelley, *Human Trafficking A Global Perspective*, Cambridge University Press, New York, 2010, p.149.

⁶² Yang, Ethan, *Human Trafficking in South East Asia and Economic Empowerment*, Trinity College Digital Repository, Hartford, CT, 2016, available at <https://digitalrepository.trincoll.edu/fypapers/69>, accessed 09/07/2018

⁶³ UNODC, *Global Report on Trafficking in Persons 2016*, United Nations Publication, Sales No. E.16.IV.6, 2016, New York, p.46.

⁶⁴ Maizura Ismail, website, *ASEAN: Epicentre of human trafficking*, The ASEAN Post, 31th July 2018, article available at <https://theaseanpost.com/article/asean-epicentre-human-trafficking>, accessed 31 July 2018. See also Maizura Ismail, website, *Cry for help for Myanmar's trafficked brides*, The ASEAN Post, 8 December 2018, article available at <https://theaseanpost.com/article/cry-help-myanmars-trafficked-brides>, 15 December 2018

⁶⁵ UNODC, *op. cit.*, p.103.

⁶⁶ Maizura Ismail, *op. cit.*

⁶⁷ A/HRC/32/18, Human Rights Council, Situation of human rights of Rohingya Muslims and other minorities in Myanmar: Report of the United Nations High Commissioner for Human Rights (Advance Edited Version), 28 June 2016.

the more developed parts of Eastern Asia, including Hong Kong, Japan, South Korea, and Taiwan started to experience severe labour shortages. These governments, in general, do not allow permanent settlement per se and have fairly restrictive immigration policies as well, and if coupled with the governments lack of capacity to manage migration, the illegal private sector sees remunerative exploitative opportunities. Thus, countries with well-developed sex industries, including Japan, South Korea, and Hong Kong become destinations for women from the Philippines, Thailand, several Commonwealth of Independent States, Eastern European and South American countries. Whereas, rural Chinese women and children in Southern China are trafficked in neighbouring countries (Thailand and Malaysia) for the sex market⁶⁸. Victims from Cambodia, Indonesia, Mongolia and Vietnam have been repatriated from China, and victims from Indonesia, the Philippines and other countries in South-East Asia have been detected in or repatriated from the area of Taiwan. In addition, victims from China have been detected in the Pacific Islands, in Japan most of the victims were from South-East Asia, and in Australia some of the detected victims were from the Republic of Korea⁶⁹. There is also increased movement between Asia and other regions: labourers from Vietnam and China are exploited in the Far East parts of Russia, and Chinese women are found in the brothels of Pakistan; IOM field offices report Moldovan and Romanian women in Cambodia, Peruvian women in South Korea, and Colombian women in Thailand, and even Sri Lankan migrants stranded in Central Asia⁷⁰. Furthermore, trafficking of children in the East and Southeast Asian region is even more present, children are found in the sex industry because customers seek to avoid AIDS. Minors in India are injured so they can be more effective beggars. Young boys are transferred from Pakistan and Bangladesh to the United Arab Emirates (UAE) to work as camel jockeys⁷¹. They not only are trafficked for economic profit, but also as soldiers in conflict regions such as Sri Lanka, Myanmar, and the Philippines⁷². In authoritarian Asian countries, leaders are more interested in maintaining political power than in serving their citizens and providing for their welfare. In democratic societies like Japan, the failure to address trafficking is explained more by enduring cultural norms and an unwillingness to recognise the extent of the *shameful* problem and intimidation by the *yakuza*⁷³. For example, women are imported into the Japanese sex industry by the *yakuza* from Thailand and other Southeast Asian countries (further details on countries are provided in *Chapter 3*). Southeast and Eastern countries have more recent legislative frameworks for the criminalisation of trafficking in persons compared to other regions. Before the entry into force in 2003 of the UN Trafficking Protocol, half of the countries

⁶⁸ IOM, June JH Lee, 'Human Trafficking in East Asia: Current Trends, Data Collection, and Knowledge Gaps', Data and research on human trafficking: A global survey, Offprint of the Special Issue of International Migration Vol. 43 (1/2) 2005, IOM, Geneva, p.165.

⁶⁹ *Ibid.* p.106.

⁷⁰ June JH Lee, *op. cit.*, p.166.

⁷¹ Louise Shelley, *Human Trafficking A Global Perspective*, Cambridge University Press, New York, 2010, p.143.

⁷² *Ivi*, p.144.

⁷³ *Ivi*, p.145.

considered, either had no specific trafficking legislation, or a situation where cases of trafficking in persons could be prosecuted under a combination of other offences⁷⁴.

5. Purpose of the essay

The main purpose of this study is to explore the variants of human trafficking especially in the industry of commercial sexual exploitation of women and young girls and the brides' market. The attempt is to provide a comprehensive examination and coverage of the legal and legislative responses to human trafficking by various geographic regions of the world with a particular focus on Eastern Asia and ASEAN. In order to maintain focus in the research it is necessary to limit the material used in this thesis. It does not, however, mean that research in other countries and regions other than those we are going to study are ignored, but rather that it is impossible to include and present all research done on anti-trafficking efforts. In an attempt to cover the main aspects of TIP, the essay will be divided as follows: first, *Chapter 1* lays out the international legal frameworks that address human trafficking, the aim is to provide a foundation of the basic international laws adopted by the international community on the issue of trafficking in human beings specifically the adoption of the initial Slavery Convention, followed by the ILO Convention, and finally the UN Protocol to prevent, suppress and punish Trafficking in Persons, especially women and children; secondly, *Chapter 2* focuses on the legal national response of human trafficking particularly in South-East Asia. It will first provide the national legislation adopted by the Council of Europe Convention on Action against Trafficking in Human Beings in 2005 and, second, the regional framework of the ASEAN Convention established to assure a regional approach in combatting human trafficking in Southeast Asia as well as the difference between the two Regional Conventions; finally, *Chapter 3* discusses trafficking in the region of East Asia specifically of China, Japan, and the two Koreas. It determines the illegal market-production of trafficked women and young girls on specific issues, for instance, related to bride selling and sex trafficking, providing the relative domestic trafficking policies and actions.

⁷⁴ UNODC, *Global Report on Trafficking in Persons 2016*, United Nations Publication, Sales No. E.16.IV.6, 2016, New York, p.111.

CHAPTER 1: ADDRESSING THE PROBLEM: INTERNATIONAL LEGAL FRAMEWORK

1. Historical Background

Before analysing the international legal framework, we are going to briefly look at slavery in a historical context. Let us begin by saying that even though slaves have always been subject to physical and sexual exploitation, the discussion of human trafficking only received international attention in these last few decades⁷⁵. First of all, the word *slave* originates from *Slav*⁷⁶ a term used to describe people sold into slavery to the Muslims of southern Spain and North Africa during the Middle Ages who come from the Slavic regions of eastern Europe. In every major civilisation until the modern period, unfree labour was considered advantageous and acceptable rather than an illegal action. For centuries, human beings have served as tradable merchandise for local and global traders, even when there were periods in which slaves were not economically needed⁷⁷. Substantially, the continual demand for cheap labour (for instance, agriculture, mining, domestic servitude, manufactures, military defence) contributed to the creation of multiple slave systems with the purpose to extract the maximum amount of profit from unwilling labourers and use young women and girls for sexual and reproductive purposes⁷⁸. To meet the increasing demand for involuntary bonds-persons to serve as human chattels, most slave-systems relied intensively upon war prisoners, so that societies with well-functioning slave systems ensured that their bondsmen and women had to be at the mercy of their owners and the new community in which they found themselves. Chattel slavery could, then, be perceived more as an act of benevolence rather than a life imprisonment⁷⁹. Following the connection of slavery, the earliest form can be traced with the African slave trade or in the Muslim world for the exploitation in plantations, pearl diving, and mining. Even in medieval times, chattel slavery was conducted legally and openly, and it was commonly acknowledged both by the nobles and the bourgeoisie. For example, commercial slave trading networks extended from the Caspian Sea to London from the eighth to the eleventh centuries, whilst the trans-Saharan slave trading network prevailed from the seventh throughout the twentieth centuries. However, the most notorious and infamous enslavement trade network was the transatlantic slave trade that took place among Europe, the Americas, and Africa from the early 1500s to the early 1800s, transporting approximately 13 million African slaves to Europe and the Americas. The

⁷⁵ Kristiina Kangaspunta, website, *A Short History of Trafficking in Persons*, Freedom from Fear Magazine, UNICRI, available at <http://f3magazine.unicri.it/?p=281>, accessed 11/09/2018.

⁷⁶ According to the online English Oxford Living Dictionaries, the term slave is composed by “*shortening of Old French esclave, equivalent of medieval Latin sclava (feminine) ‘Slavonic (captive)’: the Slavonic peoples had been reduced to a servile state by conquest in the 9th century*”. More information available on the Oxford dictionary at <https://en.oxforddictionaries.com/definition/slave>, accessed 11/09/2018.

⁷⁷ Mary C. Burke, *Human Trafficking Interdisciplinary Perspectives*, Routledge Taylor & Francis Group, 2013, New York, p. 26

⁷⁸ *Ivi.*, p.27

⁷⁹ *Ivi.*, p.29

transatlantic slave trade is considered not only the biggest deportation in history, but one of the more brutal and exploitative episodes in human history. African captives of all ages were sold as trade tools to European merchants in exchange for firearms, textile, alcohol and many other goods. During their shipping to South America (primarily Brazil and the Caribbean islands) or in Central and North America, they would be crammed in overcrowded spaces of slave ships and forced to endure a long and often lethal voyage across the Atlantic — known as the “Middle Passage”⁸⁰. Those who survived were toiled under race-based laws that recognised neither an enslaved person’s right to self-determination⁸¹ nor the legitimacy of the person family ties⁸². Starting in the 1780s, organized abolitionist campaigns sought to criminalise the transatlantic slave trade in Africans and end the practice of human bondage. The purpose of these anti-slavery advocates was to achieve the legal abolition of slave trading and slavery itself. The major role played by Great Britain, from the 1780s to the 1880s, gradually allowed to put a stop to the transatlantic slave trade and the slave system. The transatlantic slave trade ended in 1807 but the process of legal abolition of the institution required most of the century, after international pressure, legislative actions, religious efforts and moral petitions. The first international condemnation of the slave trade was contained in the Declaration of *Universal Abolition of the Slave Trade* annexed to the Act adopted during the Congress of Vienna of 1815, stating that the slave trade is against any “*principles of humanity and universal morality*”⁸³. Even with the adoption of the international convention approved by the League of Nations in 1926, demanding for the prohibition of slavery and the implementation of *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention* adopted by the UN in 1948, chattel slavery continued during the last quarter of the 20th century. Among the last countries to sign the documents to end legal slavery in their countries were Qatar (1952), Oman (1970), and Mauritania (1980)⁸⁴. Under the guidance of the League of Nations, the Convention defines slavery as any status or condition in which a person or more exercise the power of ownership over another individual⁸⁵. Parties to the Convention agreed “*to prevent and suppress the slave trade*” as well as to abolish “*slavery in*

⁸⁰ *ivi*, p.39.

⁸¹ The principle of self-determination is embodied in art. 1 of the UN Charter. It was incorporated into the 1941 Atlantic Charter and the Dumbarton Oaks proposals (evolved into the UN Charter). Its inclusion marks the universal recognition of the principle as fundamental to the maintenance of friendly relations and peace among states. It is recognised as a right of all peoples in the first article common to the ICCPR and the ICESCR (both entered into force in 1976). Art. 1 (1) affirms: “*All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*”

⁸² Kathryn Cullen Du-Pont, *Global Issues: Human Trafficking*, Infobase Publishing, New York, 2009, p.6.

⁸³ Vienna Congress Treaty, adopted 9 June 1815, Act XV, Declaration relative to the Universal Abolition of the Slave Trade, adopted 8 February 1815, 63 CTS 473 (Vienna Declaration). Art. 1 of the Additional Articles of the Peace Treaty of Paris signed in 1814 by France and Great Britain already mentioned the need to abolish the slave trade and contained the promise by France to abolish it within five years. See also in Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, Oxford University Press Inc., New York, 2008, p. 42.

⁸⁴ Kathryn Cullen Du-Pont, *op. cit.*, p.7.

⁸⁵ UNHR, Slavery Convention, signed at Geneva on 25 September 1926, Entry into force 9 March 1927, in accordance with article 12, art. 1

*all its forms*⁸⁶. Although the Convention does not define the nature of these *forms*, it does contain a qualified call for States to adopt preventive measures against compulsory labour or any other status that might develop into activities analogous to slavery⁸⁷, while also stressing the need to cautiously identify the resemblances among several forms of human bondage⁸⁸. The lack of an analytical definition of *slavery in all its forms* eventually deemed necessary a further round of deliberation following WWII, culminating in the 1956 *United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*. Over the past half-century, the correlation between slavery and other forms of servitude was progressively reevaluated. Chattel slavery is not, anymore, a separate category but is one of many forms of “contemporary” or “modern” slavery. In addition, the 1956 Supplementary Convention took a significant step in associating “four practices and institutions” with chattel slavery: debt bondage, serfdom, servile marriage, and transfer of a child for the purpose of exploitation. This formula represents a major expansion in anti-slavery obligations under international law and it also places slavery at the core of human rights abuses. Modern representations of trafficking historically refer to the nineteenth century campaigns against prostitution and sexual servitude, particularly by the work of the feminist Josephine Butler, leader of the abolitionist movement, who condemned the systems of regulating prostitution and strongly advocated the abolition of this practice with the goal of repealing the Contagious Diseases Acts (CDAs)⁸⁹. Alas, early *white slavery* campaigns resulted in a series of inefficient international agreements (such as the 1904 *International Agreement for the Suppression of “White Slave Traffic”* the first international agreement on human trafficking, the 1910 *International Convention for the Suppression of the White Slave Trade*, the 1921 *International Convention for the Suppression of Traffic in Women and Children*, and the 1933 *International Convention for the Suppression of the Traffic in Women of the Full Age*), which were eventually replaced by the legally binding 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* entered into force in 1951. It aims to prohibit internal or cross-border practices of trafficking, procurement, and exploitation of human beings, irrelevant of the victim’s age and consent. It declares both trafficking and prostitution to be “*incompatible with the dignity and worth of the human being*” and a menace to “*the welfare of the individual, the family and the community*”⁹⁰. The Convention does not explicitly define human trafficking, but it introduces further provisions against prostitution. States Parties to

⁸⁶ *Ivi*, art. 2

⁸⁷ *Ivi*, art. 5

⁸⁸ Gad Heuman and Trevor Burnard, *The Routledge History of Slavery*, Routledge Taylor & Francis Group, New York, 2011, p.333.

⁸⁹ Donna Hughes, website, *Combating Sex Trafficking: A History*, Fair observer Make Sense of the World, 6th October 2018, available at https://www.fairobserver.com/region/north_america/combating-sex-trafficking-history/, accessed 11/09/2018. See also Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, Oxford University Press Inc., New York, 2008, p.50.

⁹⁰ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Approved by General Assembly resolution 317 (IV) of 2 December 1949, Entry into force 25 July 1951, in accordance with article 24, at Preamble. See also Anne T. Gallagher, *op. cit.*, p. 59

the Convention are required to punish whoever, intended to *gratify the passions of another, procures, entices, or leads away for the purposes of prostitution or exploits the prostitution* of another individual, even if it is consented by that interested part⁹¹. In addition, States Parties are also compelled to punish any person involved in the keeping, managing, or financing of brothels⁹² and to abstain from any system of registration or supervision of prostitutes⁹³. Despite its advocacy stance, the Convention does not prohibit prostitution nor demand its criminalisation, instead, it requires States Parties to take only social and economic measures meant to prevent prostitution⁹⁴. This conflictual situation was a strategy to increase consensus and obtain the widest possible ratification between the countries that outlawed prostitution and those that tolerated it under certain conditions. Since 1949, the Convention maintained its status as the last official word on trafficking in international law until the 1990s when trafficking began to be considered from perspectives other than human rights. A peculiarity was the established connection between trafficking and the recently identified international threats of migrant smuggling and transnational organized crime. These changes led to the codification of a new treaty, acknowledged by States to be “*the principal legally binding instrument*” in the fight against trafficking⁹⁵. Proposals for an international treaty on transnational organized crime were first inspected in November 1994 at the World Ministerial Conference on Organized Transnational Crime, Naples. Henceforth, in 1997 an intergovernmental group of experts was established by the UN General Assembly to prepare a preliminary draft⁹⁶, who, eventually, decided to establish an intergovernmental Ad Hoc Committee to elaborate a comprehensive international convention against transnational crime, the trafficking in women and children as well as smuggling in migrants by air, land, and sea⁹⁷. The UNCTOC is the pillar of the international community and its Convention is supplemented by three additional treaties (Protocols), dealing respectively with smuggling of migrants; trafficking in persons, especially women and children; and trafficking in firearms. The three Protocols were adopted by the General Assembly in November 2000 and opened for signature at a high-level intergovernmental conference convened in Palermo, Italy, in

⁹¹ *Ivi*, art. 1

⁹² *Ivi*, art. 2

⁹³ *Ivi*, art. 6: “[e]ach Party ... agrees to take all the necessary measures to repeal or abolish existing law, regulation or administrative provision by virtue of which persons who engage in or suspected of being engaged in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification”

⁹⁴ *Ivi*, art. 16: “[t]he Parties ... agree to take or to encourage, through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offences referred to in the present Convention”

⁹⁵ Conference of Parties to the United Nations Convention on Transnational Organized Crime, Decision 4/4, Trafficking in Human Beings, *Report of the Conference of Parties to the UNCTOC on its fourth session*, Vienna, 8 - 17 October 2008, UN Doc. CTOC/COP/2008/19, 1st December 2008, at para. (d) (Anne T. Gallagher, *op. cit.*, p. 68).

⁹⁶ UN General Assembly, “*Follow-up to the Naples Political Declaration and Global Action Plan against Organized Transnational Crime*”, UN Doc. A/RES/52/85, 12th December 1997. See also Anne T. Gallagher, *op. cit.*, p.69.

⁹⁷ UN General Assembly, “*Transnational Organized Crime*,” UN Doc. A/RES/53/111, 20th January 1999. See also Anne T. Gallagher, *op. cit.*

December 2000. The Convention finally entered into force on 29th September 2003 and the Trafficking Protocol on 25th December 2003⁹⁸.

2. Human Rights and Human Trafficking

A human rights approach to trafficking means prioritising the protection of victims' rights while implementing anti-trafficking policies, so that the victim's rights are protected regardless of the form they are trafficked into⁹⁹. These policies should reflect the gendered nature of trafficking and possibly compensate for any gender-based discrimination in relation to aid and justice access. Each victim has the right to equally access aid, protection, and justice, as well as the choice to access these services whenever and in the way that is suitable to their situation. Although it is well known that trafficking in persons is a violation of the victim's right to life, freedom and security, current state-level policies do not view trafficking as a human rights issue, but rather prioritise detention, prosecution, and deportation of trafficked persons for offenses related to their status, including violation of immigration laws, prostitution, or organized crime. These policies further *victimise the victim* leading to other human rights violations and vulnerabilities that may result in re-trafficking¹⁰⁰. For instance, human rights international frameworks include the fundamental individual right to life, liberty and security of person reflected in art. 3 of the *Universal Declaration of Human Rights* (UDHR) and art. 6 of the *International Covenant on Civil and Political Rights* (ICCPR). The UDHR, the ICCPR and its two Optional Protocols, and the International Covenant on Economic Social and Cultural Rights, are collectively known as the International Bill of Rights. In order to comprehend the international instruments adopted by the UN to combat trafficking it is essential to briefly touch on these two specific instruments which make reference to the abolition of slavery. However, there are also a number of other international instruments that have relevance in preventing human rights breaches caused by trafficking, including the *Convention on the Elimination of All Forms of Discrimination Against Women* (further discussed in the following section). Other important documents are the Convention on the Rights of the Child, its two Protocols on *the Sale of Children, Child Prostitution and Child Pornography and on the Involvement of Children in Armed Conflicts* and *the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.

⁹⁸ Anne T. Gallagher, *op. cit.*, p.70.

⁹⁹ Janina Pescinski, website, *A Human Rights Approach to Human Trafficking*, Our World brought to you by United Nations University, 20/02/2015, available at <https://ourworld.unu.edu/en/a-human-rights-approach-to-human-trafficking>, accessed 13/09/2018.

¹⁰⁰ Kara Napolitano, website, *Human Trafficking: A Human Rights Violation, Laboratory to Combat Human Trafficking*, 10th December 2016, available at <https://combathumantrafficking.org/2016/12/human-trafficking-human-rights-violation/>, accessed 13/09/2018.

2.1 Universal Declaration of Human Rights

The Universal Declaration on Human Rights (UDHR) adopted by the UN General Assembly on 1 December 1948 was the first international Act to acknowledge in its Preamble that the *“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”*¹⁰¹. The Declaration consists of a preamble and 30 articles, advancing human rights and fundamental freedoms conferred to women and men without any discrimination. In addition, the General Assembly proclaims that every single individual and body of a society shall educate and teach to promote the *“respect for these rights and freedoms”* and to secure, both at national and international, *“their universal and effective recognition and observance”*¹⁰². Art. 1 also clarifies that *“all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”*. The principle of slavery, slave trade and servitude are none other than criminal and illegal actions, in which human beings are restricted from enjoying the right to liberty and equality. Therefore, art. 4 and 5 of the UDHR respectively state that no individual should be held in slavery or a servile status and that any of its practice or trade of such practice should be forbidden *“in all their forms”* and *“no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”*. In its 1984 Report, the Special Rapporteur on Slavery, Benjamin Whitaker, emphasised that this provision is the formal acknowledgment by the UN that slavery still exists regardless of the new and different forms it has evolved into and stresses the need for the UN to consider slavery as primarily concern¹⁰³. Finally, art. 13 (1) of the UDHR further comments, in response to trafficking, that everyone has the right to freedom of movement and residence within the border of any State and art. 23 (1) declares the right to freely choose employment and to obtain fair and favourable conditions of work. The UDHR document is the first common standard of achievements for all peoples and all nations and it defines, for the first time, fundamental human rights to be universally protected.

2.2 International Covenant on Civil and Political Rights

The ICCPR, adopted in 1966, was built on the prohibition of slavery, servitude and the slave trade contained in art. 4 of the UDHR, including the interdiction of compulsory labour. Art. 8 of the ICCPR¹⁰⁴ contains the same provision on slavery provided in art. 4 of the UDHR, but it also stresses the issue related to the performance

¹⁰¹ Universal Declaration of Human Rights, UNGA Res. 217 A (III), adopted 10 December 1948. See also Silvia Scarpa, *op. cit.*, p.85.

¹⁰² United Nations, *Universal Declaration of Human Rights*, 2015, p.3

¹⁰³ ECOSOC, *Slavery Report*, Benjamin Whitaker, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, updating the Report on Slavery submitted to the Sub-Commission in 1966, UN Publication, Sales No E.84. XIV.1 [120], 1984.

¹⁰⁴ International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with art. 49. Further information is provided at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> , accessed 13/09/2018.

of forced or compulsory labour (art. 8 (3)). In this vein, the term compulsory or forced labour is excluded when it comprises of:

1. any work or service activity performed by an individual who is under detention or conditional release lawfully ordered by the court;
2. any military and national service as long as *conscientious objection* is recognised by the country;
3. any service requested when emergency or calamity threatens the life or well-being of the community;
4. any work related to civil obligations¹⁰⁵.

The ICCPR recognises the dignity of each individual and undertake the responsibility to promote conditions within states and the protection of civil and political rights enshrined in the treaty. Countries that have ratified the Covenant are obliged to protect basic human rights by taking necessary judicial, administrative, and legislative measures, and to provide an adequate remedy¹⁰⁶. Furthermore, there are two optional Protocols to the ICCPR: the first optional protocol¹⁰⁷ recognises, under art. 1, the competence of the Human Rights Committee (HRC) to receive and consider communications from inter-States complains¹⁰⁸ and from individuals claiming to be victims of violations by the State of any of the rights explained in the Covenant. Individuals who make such allegation, and who have exhausted all available domestic remedies, are entitled to submit a written communication to the Committee¹⁰⁹; while, the aim of the Second Optional Protocol¹¹⁰ is the abolition of the death penalty. Following art. 1, States parties to the Covenant are forbidden to execute any convicted criminal within their own jurisdiction. Moreover, an important step is pursued under art. 3 of the Protocol requiring States parties to include in the reports, submitted to the HRC, information on measures taken to give effect to the Protocol¹¹¹.

2.3 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

In 1979, the UNGA adopted the CEDAW and entered into force on 3 September 1981 obliging States Parties to take suitable legislative measures to “*suppress all forms of traffic in women and exploitation of the*

¹⁰⁵ *Ivi*, (art. 8 (3) (c))

¹⁰⁶ Canadian Civil Liberty Association, *Summary: International Covenant On Civil And Political Rights (ICCPR)*, 27 October 2015, <https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr/>, accessed 13/09/2018.

¹⁰⁷ The first Optional Protocol to the International Covenant on Civil and Political Rights entered into force simultaneously with the Covenant. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 9, website available at <https://www.ohchr.org/en/professionalinterest/pages/opccpr1.aspx>, accessed 13/09/2018.

¹⁰⁸ Regulated by art 41 of the ICCPR.

¹⁰⁹ Regulated by art. 2 of the Optional Protocol

¹¹⁰ The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989 and entered into force on 11 July 1991, website available at <https://www.ohchr.org/en/professionalinterest/pages/2ndopccpr.aspx>, accessed 13/09/2018.

¹¹¹ OHCHR, *The International Bill of Human Rights*, Universal Declaration of Human Rights (art. 1), adopted by General Assembly resolution 217 A (III) of 10 December 1948, Fact Sheet No.2 (Rev.1), website available at <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>, accessed 13/09/2018.

prostitution of women.” The CEDAW Convention can be described as *an international bill of rights for women*¹¹². It consists of a preamble and 30 articles, defining the components of discrimination against women and the creation of an agenda to cease such discrimination. These articles can be distinguished into three main categories: firstly, the nature and scope of a State’s obligations; secondly, the specific forms and the measures a State must adopt to eliminate discrimination; and lastly, the procedural and administrative issues, for example how the CEDAW reporting process works¹¹³. In its preamble, the Convention recognises that the continuing existence of discrimination against women “*violates the principles of equality of rights and respect for human dignity*”. As defined in art. 1 of the CEDAW, the gender discrimination is defined as any impediment, exclusion, or restriction of the enjoyment or exercise of human rights and participation in the political, economic, public, cultural, and other field on the basis of sex, in this particular case, at the expense of women¹¹⁴. This definition includes not only discrimination per se, but any perpetuated act that has the effect of creating and increasing gender-based violence and discrimination against women and girls. A State Party to the Convention is legally obliged to take action to eliminate such discrimination and promote gender equality. Notably, art. 2 explains that a State has the obligation to prevent and eliminate discrimination performed by organizations or individuals and not to discriminate through its own acts. It is also worth noting that CEDAW authorises ratification subject to reservations, only in the event the reservations are compatible with the purpose of the Convention. It might happen that some States enter reservations to particular articles if their national law, tradition, religion or culture are not congruent with the Convention principles¹¹⁵. However, reservations to two specific articles (art. 2 and 16 respectively) are considered impermissible as they are the core provisions of the Convention¹¹⁶. The Convention principally identifies areas where gender-based discrimination mostly prevails. For instance, art. 6 of this Convention is dedicated specifically to trafficking in women and requires member States to “*take all appropriate measures*” as well as legislative procedures, in order to prevent all forms of trafficking in women, including the exploitation of prostitution; States Parties are compelled to take appropriate measures to ensure the right of women to equally participate in the political and public life of the State¹¹⁷, equality in access to and in all

¹¹² UN Women, Convention on the Elimination of all Forms of Discrimination against Women, *Overview of the Convention*, available at <http://www.un.org/womenwatch/daw/cedaw/>, accessed 14/09/2018

¹¹³ Un Women Asia and the Pacific, website available at <http://asiapacific.unwomen.org/en/focus-areas/cedaw-human-rights/faq#optionalprotocol>, accessed 14/09/2018.

¹¹⁴ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27 (1), at art. 1

¹¹⁵ United Nation Entity for Gender Equality and the Empowerment of Women, website, *Reservations to CEDAW*, available at <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>, accessed 14/09/2018.

¹¹⁶ *Ibid.*

¹¹⁷ CEDAW, *op. cit.*, art. 7 and art. 8

other aspects of education¹¹⁸, equality in the work environment¹¹⁹, equality in access to health care services¹²⁰, equality in other areas of economic and social life¹²¹, to assist the specific needs of rural woman and eliminate discrimination against them¹²², to accord women equality before the law¹²³ and to ensure to women equal right relating to marriage and family¹²⁴. According to CEDAW discrimination is mainly rooted in domains of life such as culture, family and social relations and its missions is to address the negative impact of gender stereotyping. A significant aspect of the CEDAW is its three-dimensional view of equality based on the principle of *substantive equality* or *equality of results* between women and men. This means that instead of considering equality only in legal terms, CEDAW requires to also consider their actual and concrete impact and effect. The *substantive model of equality*, therefore, necessitates using the actual conditions of women's lives as an accurate measure to assess whether equality has been achieved or not. Altogether, the CEDAW Convention marks a new path which obliges States Parties to address not just the phenomena of trafficking and exploitation of prostitution, but also the underlying causes and effects.

a. The Committee on the Elimination of Discrimination against Women

The implementation of the CEDAW is monitored by the Committee on the Elimination of Discrimination against Women, consisting of 23 experts on women's rights from around the world working in an independent capacity and not as representatives of their countries¹²⁵. The Committee's mandate and the supervision of the treaty are defined in the art. 17 to art. 30 of the CEDAW Convention. States Parties to the Convention agree to implement a series of measures to end gender discrimination in all forms such as:

- recognise gender equality and abolish all discriminatory laws by adopting appropriate ones that do not discriminate women;
- establish tribunals and other public institutes to guarantee protection against discrimination; and
- eradicate discriminatory acts against women perpetrated by the State, individuals, or companies¹²⁶.

In addition, States Parties are requested to submit regular reports to the Committee on how the rights of the Convention are implemented within one year of ratification or accession, and later every four years. During its sessions, the Committee takes into consideration each State party report and addresses its concerns and recommendations in a sort of concluding observations (important to provide guidance on CEDAW

¹¹⁸ *ivi*, art. 10

¹¹⁹ *ivi*, art. 11

¹²⁰ *ivi*, art. 12

¹²¹ *ivi*, art. 13

¹²² *ivi*, art. 14

¹²³ *ivi*, art. 15

¹²⁴ *ivi*, art. 16

¹²⁵ United Nations Human Rights Office of the High Commissioner, *Committee on the Elimination of Discrimination against Women*, website available at <https://www.ohchr.org/en/hrbodies/cedaw/pages/introduction.aspx>, accessed 15/09/2018. See also Anne T. Gallagher *op. cit.*, p.64.

¹²⁶ United Nation Entity for Gender Equality and the Empowerment of Women, website, *CEDAW: Overview of the Convention*, available at <http://www.un.org/womenwatch/daw/cedaw/>, accessed 15/09/2018.

requirements on individual country contexts). This procedure allows a direct dialogue between the Committee and a State Party and the exchange of views and analysis of anti-discrimination policies adopted. The Committee, through the issuing of General Recommendations (GRs) and decisions under CEDAW Optional Protocol, is also responsible for developing jurisprudence, a body of legal interpretation who helps understand how the Convention applies to specific situations and issues¹²⁷. In 1992 the Committee adopted the General Recommendation No. 19 on the issue of violence against women. This document defines trafficking in women a form of violence against women caused mainly by poverty and unemployment opportunities that leads to sexual exploitation, as well as sex tourism, domestic work of servants, and bride trafficking. Moreover, the Committee includes wars, armed conflicts, and the occupation of territories as situations in which the vulnerability of women to be trafficked, sexually assaulted or forced into prostitution increases and, therefore, where specific protective and punitive procedures are absolutely needed¹²⁸. Additionally, in accordance with the Optional Protocol to the Convention (OP-CEDAW) adopted in 1999 by the GA, the Committee shall receive written and non-anonymous communications from individuals submitting allegations of violations of rights protected under the Convention and initiate on the basis of reliable information inquiries for severe violations of women's rights. These aforementioned measures are optional and are only available where the State concerned has accepted them¹²⁹. Additionally, according to art. 3, a communication is taken into consideration only if it concerns a violation committed by a State that is a party both to the CEDAW and to the Protocol. Moreover, it cannot be taken into consideration if all available domestic remedies are not first exhausted¹³⁰. The OP-CEDAW reinforces the Convention offering the first gender specific international complaints procedure and strengthens the enforcement mechanism for CEDAW, promoting the implement of the Convention. Gender equality advocates around the world have been encouraging their governments to sign on to the OP-CEDAW and at the present 109 States are party to the OP-CEDAW¹³¹.

¹²⁷ Un Women Asia and the Pacific, website available at <http://asiapacific.unwomen.org/en/focus-areas/cedaw-human-rights/faq#optionalprotocol> , accessed 15/09/2018.

¹²⁸ General Recommendation No. 19, Violence against women, IIth session, 1992, art. 6 (14 – 16), available at <https://www.refworld.org/docid/52d920c54.html> , accessed 15/09/2018.

¹²⁹ United Nations Human Rights Office of the High Commissioner, website, *Committee on the Elimination of Discrimination against Women*, available at <https://www.ohchr.org/en/hrbodies/cedaw/pages/introduction.aspx> , accessed 15/09/2018.

¹³⁰ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, art. 4.

¹³¹ United Nations Human Rights Office of the High Commissioner, website, *Status of ratification*, available at <http://indicators.ohchr.org/> , accessed 15/09/2018.

3. International law against slavery

They would not call it slavery, but some other name. Slavery has been fruitful in giving itself names [...] and it will call itself by yet another name; and you and I and all of us had better wait and see what new form this old monster will assume, in what new skin this old snake will come forth.

Frederick Douglass, 1865

3.1 Definition of slavery: The Slavery Convention of 1926

The 1815 *Declaration Relative to the Universal Abolition of the Slave Trade* (the 1815 Declaration) is the first international instrument to condemn slavery. Its prohibition became a central feature from the early nineteenth century in both multilateral and bilateral treaties prohibiting such practices in times of war and peace¹³². However, it was not until the adoption of the League of Nations Slavery Convention in 1926¹³³, that an international legal definition and abolition of slavery and the slave trade was formally articulated, resulting in what is, nowadays, a well-established principle of international law and a *jus cogens status*¹³⁴. Following art.1 of the Slavery Convention, it is stated that slavery is “*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised*”. While, art. 2 contains the definition of the term slave trade as *all the acts* involving the capture, procurement or removal of an individual with the intent to enslave, sell, or exchange her or him and, more broadly, the involvement of “*every act of trade or transport in slaves*”. In addition, the convention also affirms, in art. 5, that compelled labour “*may only be exacted for public purposes*” and requires States parties to avoid forced or compulsory labour “*from developing into conditions analogous to slavery*”. States Parties are required to prevent all vessels entering their territorial waters from embarking, disembarking and transporting slaves by adopting all necessary measures and are requested to “*give to one another every assistance with the object of securing the abolition of slavery and the slave trade*”¹³⁵. The same instrument also demands States to completely eradicate slavery in all its forms¹³⁶. By referring to *slavery in all its form and the power of ownership*, the Slavery Convention incorporates not only domestic slavery but also all the other specific forms identified in the 1924 Report of the Temporary Slavery Commission which includes slavery or serfdom; any practices impeding the enjoyment of the right to freedom; that exert control over a person such as the purchase of a bride under the guise of a dowry, the adoption of children with the intent to ultimately enslave them or “*the disposal of their persons*”; or all forms reducing a person into slave because of debt or other reasons; and any public or private

¹³² Anne T. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010, p.179.

¹³³ Convention to Suppress the Slave Trade and Slavery, 60 LNTS 253, 25th September 1926, entry into force 9th March 1927.

¹³⁴ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, Oxford University Press Inc., New York, 2008, p.45.

¹³⁵ Slavery Convention, *op. cit.*, art. 4

¹³⁶ Slavery Convention, *op. cit.*, art. 2 (a) and (b). See also Silvia Scarpa, *op. cit.*, p. 45

compulsory labour whether paid or unpaid¹³⁷. The International Court of Justice (ICJ) identifies protection from slavery as an obligation *erga omnes*¹³⁸ originating from the principles and rules of basic right of a human being or the obligation of a State toward the international community¹³⁹. The practice of slavery has, thus, been universally recognised as “*a crime against humanity*”¹⁴⁰ and the right to be free from enslavement is so central “*that all nations have standing to bring offending States before the Court of Justice*”¹⁴¹. Although the Slavery Convention constitutes an important step in outlawing the slave trade, it fails to establish clear enforcement actions for reviewing the incidence of slavery in States parties and it neglects the creation of an international monitoring body to evaluate and pursue claims of violations¹⁴². Despite these lacunae, the League of Nation achieved victory on the abolition of slavery in countries such as Afghanistan (1923), Iraq (1924), Nepal (1926), Transjordan and Persia (1929)¹⁴³. In 1931 and 1934 two Committees namely, the Committee of Experts on Slavery (CES) and the Advisory Committee of Experts on Slavery (ACES) were appointed in the framework of the League of Nations, but no remarkable new achievement was attained in the fight against slavery and the slave trade. Consequently, in order to address all the practises related to slavery and prohibit all forms of compulsory and forced labour, the UN adopted in 1956 the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*¹⁴⁴.

¹³⁷ Report of the Temporary Slavery Commission to the Council of the League of Nations. Cited United Nations, *Combating Human Trafficking in Asia: A resource Guide to International and Legal Instruments, Political Commitments and Recommended Practices*, 2003, p.83

¹³⁸ (in international law) The fulfilment of specific obligations is of legal interest to all States because their subject is of importance to the international community as a whole. The breach of such obligations is of concern not only to the victimised State but also to all the other members of the international community. Therefore, in case of a breach [...], every State must be considered justified in invoking (through judicial channels) the responsibility of the guilty State committing the internationally wrongful act. An example of an *erga omnes* obligation is people's right to self-determination (*Cit.* Oxford Reference).

¹³⁹ *Barcelona Traction, Light and Power Co, Ltd. (Belgium v. Spain)*, Judgment of 5th February 1971, I.C.J. Reports, 1970, p. 32. Cited by David Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, HR/PUB/02/4, United Nation New York and Geneva, 2002, p.3.

¹⁴⁰ The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in September 2001 acknowledged in its final declaration: “*that slavery and the slave trade are a crime against humanity and should always have been so, especially the trans-Atlantic slave trade.*”

¹⁴¹ Renee Colette Redman, *The League of Nations and the Right to be Free from Enslavement: The First Human Right to be Recognized as Customary International Law*, *Chicago-Kent Law Review*, vol. 70, 1994, pp. 759, 780. Cited by David Weissbrodt, *op. cit.*, p. 3.

¹⁴² *ivi*, p. 5.

¹⁴³ ECOSOC, Slavery Report, Benjamin Whitaker, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, updating the Report on Slavery submitted to the Sub-Commission in 1966. Cited by Silvia Scarpa, *op. cit.*, p.47.

¹⁴⁴ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956, Geneva, 7 September 1956, Entry into force 30 April 1957, in accordance with article 13.

3.2 Supplementary convention of 1956

The Supplementary Convention did not replace the Slavery Convention or its definitions, on the contrary, the aim was to strengthen the 1926 Convention. Therefore, pursuant art. 7 (b) of the Supplementary Convention, States parties are obliged to abolish the institutions and practices that includes any “*servile status*¹⁴⁵” or slavery-like practices such as:

1. debt bondage which is defined as the status of an individual who fall prey under the control of a debtor to be used for his personal services or as security for a debt;
2. serfdom is defined as the condition of any individual who is constrained to live and work on another person’s land to perform some determinate service by decree, custom or contract so with no possibility to change his own condition;
3. any cases in which a woman, without her consent, is given or inherited with the death of her husband in marriage by her parents, guardian, relatives or any other person or group of persons under the payment of money or any other method of payment;
4. the involvement and exploitation of a child or a young person under the age of 18 years with the intent to exert forced or compulsory labour.

The Supplementary Convention in art. 1 requires States Parties to eradicate and completely abolish all the institutions and practices similar to slavery, for example those existing institutions and practices where women and children are sold and transferred for forced marriage and other exploitation, and other cases, even if not covered by the definition embodied in art. 1 of the Slavery Convention. Additionally, art. 2 requires States parties, in order to end force marriage, to:

1. propose suitable minimum age for marriage and when appropriate;
2. promote the use of authorised public or religious facilities for marriage and be it in the presence of a competent civil and religious authority;
3. encourage marriage registration.

Though, the exact definition of the minimum age for marriage does not fall under the prescription of the Supplementary Convention. Whereas, in Section II art. 3 and art. 4 dedicated to slave trade, States parties are required to recognise as a criminal offence the conveyance or the attempt to transport slaves from one country to another, to prevent ships and aircraft flying their flags for the purpose to engage in the trade of human beings, and to take the necessary precautions so that ports, airfields, and coasts are not used for this inhuman trade. The next two provisions contained in Section III deals with slavery and institutions and practices similar to slavery, requiring States parties to punish anyone attempting to mutilate, brand, or mark a person to indicate her or his status or anyone committing the crime of enslavement. Although the aforesaid Convention does not provide a monitoring mechanism, art. 8 contains a general obligation for States parties

¹⁴⁵ *ivi*, art. 7 (b). It defines a person of servile status as “*a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention*”.

to cooperate among themselves and the UN to enhance the provisions and *to communicate to the Secretary-General of the United Nations* of any adopted measures, laws, and regulations in order to implement the provisions of the Convention.

3.3 Violation of Fundamental Rights associated with slavery

A common theme prevailing in all the treaties concerning slavery and slavery-like practices is the principle of *ownership*. As we have seen so far, traditionally speaking slavery was referred to as “*chattel slavery*” meaning that the owners of slaves had the right and the power to treat them as a possession and to sell or transfer them to others. However, with the establishment of the Slavery Convention the sentence, under art. 1, “*any or all of the powers attaching to the right of ownership are exercised*” is intended to cover a more expansive and comprehensive definition of slavery that incorporates not only forms of slavery of the African slave trade, but also practices with similar nature and effect. In modern society, it is essential to understand the situations of a person who has been enslaved and to associate its practices, for instance:

- the extent of constraint of the said person’s right to freedom of movement
- the extent of control of the victim’s belongings
- whether the individual has consented and is aware of its situation and the nature of the relationship between the interested parties¹⁴⁶.

Accordingly, the elements of control and ownership, often accompanied by the use of violence become the very core components in identifying the nature of slavery. Cases in which the element of choice and control of one’s own life is taken away might happen in circumstances such as having her/his passport confiscated by the employer, the case of a child sold into prostitution or the “*comfort woman*” forced into sexual slavery. In this perspective, the process of enslavement, the treatment of victims of slavery, servile status, and forced labour are followed by other human rights violation. For instance, in the case of enslavement, involving the abduction or recruitment through false promises or duplicity radically violates the ICCPR provided under art. 9 of the individual’s *right to liberty and security of person* or in the event a person is deprived of her/his liberty only in accordance to the procedures established by the law. Additionally, art. 7 of the ICCPR “*guarantees the right not to be subjected to torture or to cruel, inhuman or degrading treatment*” such as beating, cigarette burning, or starvation. Almost invariably, victims of slavery are deprived of their right to freely move and to choose their residence, as instead they should under art. 12 of the ICCPR. Unalterably, these victims are also deprived or prevented by their captors, employers, or even the authorities from exercising their right of access to the courts and to a fair trial, contrary to what it is affirmed under art. 14 and art. 16 of the ICCPR. In some instances, victims of slavery might be forced to abandon their identity and

¹⁴⁶ David Weissbrodt and Anti-Slavery International, *op. cit.*, p.7.

adopt new religion or beliefs¹⁴⁷ or obliged to speak a new language. In other extreme cases, a victim is not recognised the right to marry and to establish a family or the victim is forced into doing it without her/his consent, contrary to what it is stated in art. 10 of the ICESCR “*marriage must be entered into with the free consent of the intending Spouses*” and not subjected to the power of others. Almost invariably, victims of slavery are denied of other rights and obligations under the ICESCR such as the enjoyment of just and fair conditions of work pursuant art. 7 of the ICESCR or the right to freely choose a job and make a living by it (art.6). Women victims of slavery are prevented from exercising their right to protection during a pregnancy and afterbirth or a period of paid leave or at least with some social security benefits (art. 10 (2)). These are not but only a small portion of violations related to slavery, but we can assume that the abuses and violations of fundamental rights related to the practise of slavery are countless. To conclude, all cases generally involve violations of the victims’ freedom of expression, their right to receive information and their freedom of association.

3.4 Monitoring mechanism

The Slavery Convention requires States Parties to inform each member State and the Secretary-General any adopted procedures and laws related to “*the application of the provisions of the Convention*”¹⁴⁸. However, they are not obliged to send information on measures regarding the implementation of the slavery conventions to the Secretary-General. Hence, in order to facilitate the gathering of information on slavery and slavery-like practises in countries party to the Convention, a Working Group on Contemporary Forms of Slavery was established by the UN Commission on Human Rights at its 52nd meeting on March 1992 taking note of the Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1991/34 of 29th August 1991¹⁴⁹. In 2007, the Working Group was eventually replaced in Resolution 6/14 of the UN Human Rights Council by the mandate of *the Special Rapporteur on contemporary forms of slavery, including its causes and consequences* in order to better address the issue of contemporary forms of slavery within the UN legal system. In fulfilling the mandate, the Special Rapporteur:

- inspects and reports the contemporary forms of slavery and slavery-like practices;
- responds to alleged human rights violations with the purpose of protecting the human rights of victims and preventing violations;
- endorses actions and measures to eliminate slavery practices, including remedies to address causes and consequences of slavery;

¹⁴⁷ International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49, art. 18(2): “*No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice*”.

¹⁴⁸ Slavery Convention, *op. cit.*, art. 7

¹⁴⁹ UN Commission on Human Rights, Working Group on Contemporary Forms of Slavery, 3 March 1992, E/CN.4/RES/1992/115, available at <http://www.refworld.org/docid/3b00f0bc46.html> , accessed 21/09/2018.

- considers the gender-based discrimination and age component of contemporary forms of slavery¹⁵⁰.

The present person covering the role as Special Rapporteur on contemporary forms of slavery, including its causes and consequences is Ms. Urmila Bhoola.

3.5 Forms of modern slavery

Nowadays slavery affects millions of people around the world. The purpose of the present paragraph is to identify and to briefly summarise the most common forms of slavery and slavery-like practices such:

- Serfdom or, as defined by the Temporary Slavery Commission, *predial slavery*¹⁵¹ is a form of servile labour that binds a person *by law, custom or agreement* to work on a land on someone else property *to render some determinate service to such other person, whether for reward or not* without having the chance to change her or his own status¹⁵².
- Forced labour is the work exacted under coercion, force, threats, and the denial of freedom, however, due to its particular nature it is condemned by the international community as a practice similar to, but at the same time distinct from slavery. In spite of the fact that forced labour impose restriction on the victim's freedom, making it similar to slavery for its effect on the individual, it lacks the concept of *ownership*. An analysis of the Convention against forced labour is provided in the next paragraph.
- Debt bondage (see the definition in the Supplementary Convention of art. 1 (a)). Generally, the work of the bonded labourer is the only way of repaying the loan, but because such labourers receive little or no pay, loan repayment is extremely difficult.
- Migrant workers who enter a new country without legal authorisation are particularly vulnerable to exploitation, forced labour, debt bondage, or other slavery-like practices. The Protocol against the smuggling of migrants outlines in art. 3 (a) the smuggling of a migrant as "*the procurement, in order to obtain, directly or indirectly, a financial or other material benefit*" using the illegal entry in a State of an individual (or more) who is not national of the said State or a permanent resident.
- Sexual exploitation generally involves the recruitment of women and young girl. Recent studies have determined that 70 per cent of victims of forced sexual exploitation were detected in the Asia and the Pacific region, followed, then, by Europe and Central Asia, Africa, the Americas, and the Arab States¹⁵³.

¹⁵⁰ United Nations Human Rights Office of the High Commissioner, *Overview of the Mandate*, website available at <https://www.ohchr.org/en/issues/slavery/srslavery/pages/overviewmandate.aspx>, accessed 21/09/2018.

¹⁵¹ Temporary Slavery Commission Report to the Council, League of Nation document A.19.1925.VI (1925), para. 97. Cited by David Weissbrodt and Anti-Slavery International, *op. cit.*, p.11

¹⁵² Supplementary Convention, *op. cit.*, art. 1 (b).

¹⁵³ ILO and Walk Free Foundation in Partnership with International Organization for Migration (IOM), *Global Estimates of Modern Slavery Forced Labour and Forced Marriage*, ILO Publications, Geneva, 2017, p.39.

- Children and prostitution. In accordance with the ILO's Worst Forms of Child Labour Convention¹⁵⁴, children found in any sort of commercial sexual activity exploitation are automatically victims of sexual exploitation. Current estimates are not close enough to the real data, although efforts is drawn by law enforcement and child protection agents.
- Forced marriage and the sale of wives occurs when not free or valid consent is given and on payment of money. Cases of forced marriage might be affected by brokers through advertisement on billboards or the internet, through organized tours for bride-seeking men to the source countries, or even through exhibition of women as *show trade*¹⁵⁵. Notably, women and girls represent eighty-four per cent of victims of forced marriage with more than a third of victims under 18¹⁵⁶. For example, women from Cambodia, Mongolia, Thailand, and Vietnam are marketed to be sold as brides to more developed countries as Japan, Malaysia, and Taiwan, and more recently to China and South Korea.
- Child labour and child servitude often apply two predominant forms. It can result in children working with their guardians, whether a parent or a relative or children exploited because of trafficking, deceptive recruitment, or coercive means. It might also happen that state authorities use children abusively by making them participate in minor communal services or civic obligations and economic purposes. For instance, North Korean children are compelled as part of their schooling to engage in work that far surpassed the goals of vocational education and also extremely demanding in terms of physical capabilities¹⁵⁷.

4. The International Labour Organization (ILO)

The ILO, based on Geneva, was founded in 1919 as part of the Treaty of Versailles in response to WWI, to pursue a vision that universal and lasting peace could be accomplished through social justice. During the International Labour Conference held in June of each year in Geneva, Switzerland, tripartite negotiations are conducted on these aforementioned standards. The scope of ILO is to ensure equal opportunities to obtain productive work in conditions of freedom, equity, security and human dignity. Its main scope is to promote rights at work, encourage fair employment opportunities, enhance social protection and strengthen tripartism¹⁵⁸ and social dialogue¹⁵⁹. In order to deal with specific issues such as forced labour, child labour or

¹⁵⁴ The International Labour Conference in 1999 adopted Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

¹⁵⁵ Kathryn Cullen-DuPont, Foreword authors, Jessica Neuwirth and Taina Bien-Aimé, *Global Issues: Human Trafficking*, Infobase Publishing, New York, 2009, p.16.

¹⁵⁶ ILO and Walk Free Foundation, *op. cit.*, p.10.

¹⁵⁷ *ivi*, p.41

¹⁵⁸ The International Labour Organization (ILO) is the only tripartite UN agency with government, employer, and worker representatives. The tripartite structure makes the ILO a unique forum in which the governments and the social partners of the economy of its Member States can freely and openly debate and elaborate labour standards and policies.

¹⁵⁹ Global Health Workforce Alliance, website, *International Labour Organization*, 2018, available at http://www.who.int/workforcealliance/members_partners/member_list/ilo/en/, accessed 27/09/2018.

the employment of migrant workers, every ratification of the ILO Conventions create a binding force on member nations and recommendations serve as guide for action for the formulation of social policies, in particular the aspect related to labour. Currently, the ILO has adopted 189 Conventions, 205 Recommendations and 6 Protocols, some dating back as far as 1919. To better address modern day's need, the ILO has adopted over the years revising Conventions to replace older ones, or Protocols to add new provisions to older Conventions¹⁶⁰. The ILO's Governing Body has identified eight fundamental conventions, addressing subjects considered as fundamental principles and rights at work, consisting in:

1. *Forced Labour Convention, 1930 (No. 29)*
2. *Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)*
3. *Right to Organize and Collective Bargaining Convention, 1949 (No. 98)*
4. *Equal Remuneration Convention, 1951 (No. 100)*
5. *Abolition of Forced Labour Convention, 1957 (No. 105)*
6. *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*
7. *Minimum Age Convention, 1973 (No. 138)*
8. *Worst Forms of Child Labour Convention, 1999 (No. 182)*

Men, women, and children alike are forced to work in different environment around the globe with their freedom and right to work restricted. Just to name some, labourers are forced to work in garment making in South Asian factories, as domestic workers in East Asian homes, dig for minerals in African mines, harvest tomatoes in North America or Latin America, beg in European cities, and construct high buildings in the Gulf States. According to the ILO and WFF in 2016 an estimated 16 million people were victims of forced labour exploitation imposed by private actors: data shows that females depicted as a larger share of total victims (57 per cent) than males (43 per cent), while nearly 20 per cent of the victims of forced labour exploitation were children either working alone or with their parents¹⁶¹. In 2017, the ILO report showed that almost 73 million children – almost half of the 152 million in child labour – were engaged in hazardous work¹⁶². The ILO's Governing Body has also recognised four other *priority* instruments and has encouraged member states to ratify them because of their importance for the regular functioning of the international labour standards system¹⁶³, these include the Labour Inspection Convention, 1947 (No. 81), the Employment Policy Convention,

¹⁶⁰ International Labour Organization (ILO), website available at <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm> , accessed 27/09/2018

¹⁶¹ ILO and Walk Free Foundation in Partnership with International Organization for Migration (IOM), *Global Estimates of Modern Slavery Forced Labour and Forced Marriage*, ILO Publications, Geneva, 2017, p.32.

¹⁶² ILO and Fundamental Principles and Rights at Work Branch (FUNDAMENTALS), *Towards the Urgent Elimination of Hazardous Child Labour*, ILO Publications, Switzerland, 2018, Executive Summary.

¹⁶³ ILO, *Conventions and Recommendations*, website available at <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> , accessed 03/10/2018.

1964 (no. 122), the Labour Inspection (Agriculture) Convention, 1969 (no. 129), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (no. 144).

4.1 Forced Labour Convention

The ILO Forced Labour Convention no. 29, adopted in 1930, defines, under art. 2 (1), forced or compulsory labour any work or service which is exacted under menace and it is not consented by the interested party. The ILO Convention obliges State parties, under art. 1 (1) “*to suppress the use of forced or compulsory labour in all its forms within the shortest possible period*”. However, it should also be taken into account that ILO conventions or other international instruments do not prohibit all forms of forced labour. In fact, the Slavery Convention of 1926 allows forced labour specifically and only exacted for public purposes, regulated by a competent central authority of the territory. The specific exceptions which are not part of the definition of forced or compulsory labour are contained in art. 2 (2) of the ILO Convention, some of which are, for instance:

- compulsory military service;
- public obligations to fulfil self-governing country;
- community service as a consequence of a conviction (she or he must be under the supervision of a public authority and not hired by private individuals, companies or associations);
- state of emergency including natural disasters and other calamities (flood, earthquake, famine, diseases, and any event that could endanger the well-being of a community) or in the event of war;
- minor communal services as long as the community has been consulted in regard to the need for such services

In addition, violation of articles 2, 9, 10, 11 and 19 of the UDHR arise in case force labour is used as means of political coercion. The subsequent ILO Convention (No. 105) concerning the Abolition of Forced Labour, adopted in 1957 aiming to complement the 1930 Convention, specifies that forced labour can never be used for the purpose of economic development, as a mean of political education, discrimination, labour discipline or punishment for having participated in strikes, and provides for the immediate eradication of forced labour in specific circumstances. Practises of forced labour for such purposes, generally lead people to migrate in order to escape exploitation, without knowing that it might only result in an increase of their vulnerability to trafficking. The ILO forced labour conventions are the only available international measures to provide a definition of forced labour, but its prohibition is recognised in various international and regional treaties¹⁶⁴.

4.2 Child Labour and the role of ILO

The most relevant treaties adopted by the ILO in the field of child labour are the Conventions concerning minimum age for admission to work (no. 138) and concerning the elimination of the worst forms of child labour (no. 182). The ILO Minimum Age Convention, 1973 (no. 138) and its accompanying Recommendation

¹⁶⁴ David Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, HR/PUB/02/4, United Nation New York and Geneva, 2002, p.12.

No. 146¹⁶⁵, are the principal international instruments referring to the abolition of child labour. The Convention applies to all sectors of economic activity and whether or not they are employed for wages. The Minimum Age Convention is the only instrument to provide guidelines on the appropriate age young children can enter the work force. Subsequently, in order to prevent the exploitation of child labour the minimum age for work was set at not less than the age of compulsory schooling and not less than 15 years, and 14 years for countries in which the “*economy and educational facilities are insufficiently developed*” (art. 2 (3) (4)). However, as provided in art. 7, national laws and regulation can effectively allow the employment of young persons from 13 to 15 years old to do light work as long as it is not harmful to their health and does not restrict their attendance at school and other programmes related to education. While, art. 3 (1) declares that for any employment and work which is by nature or circumstances enough dangerous “*to jeopardise the health, safety or morals of young persons*” cannot be less than 18 years old. In view to the increasing numbers of children employed in contravention to the Convention no. 138, the Convention no. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (also known as Worst Forms of Child Labour Convention) was adopted by the International Labour Conference in 1999 together with Recommendation no. 190 on the same subject. The Convention deems necessary the immediate and comprehensive action to prohibit and eliminate the worst forms of child exploitation at national and international level, including the need for international cooperation and assistance¹⁶⁶. “*The worst forms of child labour*” are defined in art. 3 and includes

- all of the forms of slavery and similar practices such as serfdom, recruitment of children in armed conflict, and debt bondage;
- child prostitution, pornography, and any pornographic acts and videos;
- the use of a child for illegal activities especially for the production and trafficking of drugs;
- any activities and practices that tend to harm the health, safety, and morals of such child.

Children in hazardous work are in many equations the silent majority within child labour. Although the ILO child labour Conventions and the Convention on the Rights of the Child do not use the term “hazardous”, ILO Recommendation no. 190 includes an entire section determining all the Hazardous work¹⁶⁷ such as any work:

- a) endangering children on a physical, psychological level and exposes them to sexual abuse;
- b) requiring children to go underground, water, at heights or confined places;

¹⁶⁵ Minimum Age Recommendation, no. 146, Recommendation concerning Minimum Age for Admission to Employment Adoption Geneva, 58th ILC session, 26th June 1973, website available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R146, accessed 03/10/2018

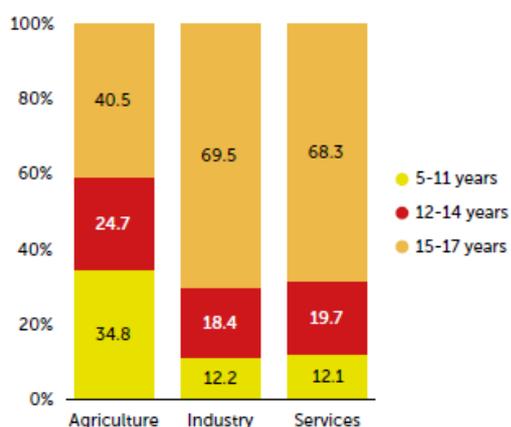
¹⁶⁶ Worst Forms of Child Labour Convention (No. 182) Adoption Geneva, 87th International Labour Conference session, 17 June 1999, Entry into force 19th November 2000.

¹⁶⁷ Recommendation Concerning the Prohibition and Immediate Action for The Elimination of The Worst Forms of Child Labour Adopted by the Conference at its Eighty-Seventh Session, Geneva, 17th June 1999. <https://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chir.htm>

- c) involving the use of dangerous machinery and the transportation or handling of heavy weights;
- d) in any environment that exposes children to unhealthy and hazardous substances or to noise levels, vibrations, and temperatures highly dangerous for their health.;
- e) exacting difficult circumstances including long working hours or working during the night as well as being confined in one place.

According to ILO, multiple studies show a clear correlation between economic sector and the age of children doing hazardous work. For instance, agriculture is the sector with the highest accountability of younger children in child labour worldwide (5-11 years). On the other hand, older children are more likely to do hazardous work in industry and services. Of all children in hazardous work in industry, 69.5 per cent are 15-17 years old and only 12.2 per cent are 5-11 years old¹⁶⁸ (see table 2).

Table 2 Percentage of hazardous work by branch of activity and age group, 5-17 years (Source ILO, 2017)



As regards of the obligations, art. 1 of ILO Convention no. 182 requires States to “*take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency*”. Notably, art. 5 of the same Convention calls on States Parties to establish a mechanism to monitor the implementation of the relevant national provisions giving effect to the Convention, including the application of penal sanctions. Furthermore, under art. 6 States Parties are obliged to implement programmes of action to eliminate and prevent child engagement in the worst forms of child labour. Art. 7 requires States to “*to ensure the effective implementation and enforcement of the provisions giving effect to the Convention*”, taking into consideration the role of education, assistance, rehabilitation and social integration. Pursuant art. 8 States shall cooperate to guarantee the respect of the provisions of the Convention through support “*for social and economic development, poverty eradication programmes and universal education*”¹⁶⁹.

¹⁶⁸ ILO and Fundamental Principles and Rights at Work Branch (FUNDAMENTALS), *Towards the Urgent Elimination of Hazardous Child Labour*, ILO Publications, Switzerland, 2018, p. 13.

¹⁶⁹ United Nations (UN), *Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices*, Sales No. E.03.II.F.5, United Nations Publication, New

5. United Nations Palermo Protocol

In response to the global quandary of human trafficking and the need for an international law, the UNGA established an intergovernmental, ad hoc committee in December 1998, to develop a new international regime to fight transnational organized crime¹⁷⁰. For this matter, the most recent instrument of international law was established and a definition to define, prevent, and prosecute human trafficking was provided worldwide, known as the UN Convention against Transnational Organized Crime¹⁷¹ and its two related protocols: The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, and the United Nations Protocol against the Smuggling of Migrants by Land, Sea, and Air¹⁷³. The essence of the UNODC was to create conventions to support and facilitate international law's ability to combat human trafficking around the world. The hope was to enhance international cooperation in addressing trafficking in a manner that would support the end goal of the protocol: to end human trafficking as it exists today.

5.1 Protocol to prevent, suppress and punish trafficking in persons, especially women and children

In order to enable cooperation amongst States on this thematic, there was a need to agree on a definition of human trafficking, so that all states could operate on the same basis. According to the *travaux préparatoires*, almost every participating country expressed a preference for the Trafficking Protocol to address all persons rather than only women and children, although it was agreed that emphasis ought to be given to the protection of women and children¹⁷⁴.

I. General provisions The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and children, supplementing the UNCTOC came to the conclusion of the term human trafficking as:

(a) 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

York, 2003, p. 266. See also Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, Oxford University Press Inc., New York, 2008, p. 129.

¹⁷⁰ May Ikeora, *Bilateral Cooperation and Human Trafficking Eradicating Modern Slavery between the United Kingdom and Nigeria*, Springer Nature, Bristol, 2018, p. 3.

¹⁷¹ UN General Assembly, United Nations Convention against Transnational Organized Crime, adopted by the General Assembly, 8th January 2001, A/RES/55/25, available at <https://www.refworld.org/docid/3b00f55b0.html>

¹⁷² UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15th November 2000, available at <https://www.refworld.org/docid/4720706c0.html>

¹⁷³ UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15th November 2000, available at <https://www.refworld.org/docid/479dee062.html>

¹⁷⁴ United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, 2006 (Travaux Préparatoires for the Organized Crime Convention and Protocols)*, at p. 322.

*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*¹⁷⁵.

This definition, whose title places emphasis on the trafficking of women and children, clearly indicates a recurrent concern for sexual exploitation, however, the UN Protocol does not describe trafficking exclusively by forced participation in the sex trade, but rather it provides an open definition that includes *at a minimum*¹⁷⁶. The *travaux préparatoires* includes an explanatory note to the concept “abuse of a position of vulnerability”, meaning that it is represented “to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved¹⁷⁷”. Furthermore, the *travaux préparatoires* explains that “exploitation of the prostitution of others” and “other forms of exploitation”, are intentionally left undefined, in order for States parties to address prostitution in their domestic laws *without prejudice*¹⁷⁸. As emphasised 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*¹⁷⁹”.

Under the definition of the Trafficking Protocol, human trafficking comprises three separate elements¹⁸⁰:

- The action element is the first part (but in the case of trafficking involving children it represents the only part) of the *actus reus* of trafficking. This element is performed by different actions consisting, but not limited to, practices of *recruitment, transportation, transfer, harbouring, or receipt of persons*;
- The means element is the second part of the *actus reus* requiring “*threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, or abuse of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person*¹⁸¹”; in the case of child victims the illegal means is not relevant;
- The purpose element, in this case the phrase “*for the purpose of*” sets forth a *mens rea* requirement into the definition. Therefore, trafficking occurs if the implicated individual or entity *intended* that the specific action lead to one of the said end results. The UNODC refers to this element in identifying

¹⁷⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000, art. 3 (a).

¹⁷⁶ The *travaux préparatoires* indicate that the words “at a minimum” were included to ensure that unnamed or new forms of exploitation would not be excluded by implication. *Travaux Préparatoires for the Organized Crime Convention and Protocols*, at 343, note 22 “*The words “at a minimum” will allow States parties to go beyond the offences listed in this definition in criminalizing. It was also intended to make it possible for the protocol to cover future forms of exploitation (i.e. forms of exploitation that were not yet known)*”; and at 344, note 30.

¹⁷⁷ United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, 2006, p. 347.

¹⁷⁸ *Ibid.*

¹⁷⁹ UN Trafficking Protocol, *op. cit.*, at Preamble

¹⁸⁰ Anne T. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010, p.29.

¹⁸¹ UN Trafficking Protocol, *op. cit.*, art. 3 para. (a).

trafficking as a crime of specific or special intent, also defined as *dolus specialis*¹⁸², meaning *the purpose aimed at by the perpetrator when committing the material acts of the offence*.

The Trafficking in Persons Protocol has three basic purposes based on art. 2 of the Protocol:

- (a) The prevention and suppression of trafficking in human beings;
- (b) The protection and assistance of victims of trafficking;
- (c) The promotion of cooperation among States parties to meet the aforementioned aims.

Art. 5 of the UN Trafficking Protocol obliges States parties to criminalise trafficking in persons when committed intentionally and such criminalisation also applies in case of attempt to commit the crime of trafficking¹⁸³, participation as an accomplice¹⁸⁴, organizing or supervising others to commit trafficking¹⁸⁵.

II. Protection of victims of trafficking in persons Considering that the Protocol is a criminal law instrument primarily intended to intercept and punish traffickers, the provisions reserved to victims' identification and protection are ambiguous and do not create strong obligations on States Parties¹⁸⁶. Protective provisions to assist victims of trafficking are suggested in part II of the Protocol, they include, for instance, *protect the privacy and identity of trafficking victims in appropriate cases and to the extent possible under domestic law*¹⁸⁷ as well as *consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking, including, in appropriate cases, in cooperation with non-governmental organizations, [...] and other elements of civil society*¹⁸⁸. Notably, the use of words applied in which States Parties are required to "consider" certain measures or to "endeavour" to take action "in appropriate cases", "to the extent possible", establishes the vagueness of these provisions turning victim protection, in the human rights paradigm, too "soft"¹⁸⁹. Such vagueness is also applied to the repatriation of victims in art. 8 of the Protocol.

III. Prevention, cooperation, and other measures Art. 9 contains a set of prevention and cooperation measures for States parties, such as the establishment of policies, programmes, and other measures aimed at preventing trafficking and protecting trafficked persons from re-victimization¹⁹⁰ and to endeavour to undertake research, information and mass media campaigns, as well as social and economic initiatives¹⁹¹.

¹⁸² UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners 2009: Definition of Trafficking in Persons and Smuggling of Migrants*, module 1, p. 4. UNODC notes that "It is the purpose that matters, not the practical result attained by the perpetrator. Thus, the fulfilment of the *dolus specialis* element does not require that the aim be actually achieved. In other words, the "acts" and "means" of the perpetrator must aim to exploit the victim. It is not therefore necessary that the perpetrator actually exploits the victim".

¹⁸³ UN Trafficking Protocol, *op.cit.*, art. 5 (2) (a)

¹⁸⁴ *ivi*, art. 5 (2) (b)

¹⁸⁵ *ivi*, art. 5 (2) (c)

¹⁸⁶ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, Oxford University Press Inc., New York, 2008, p. 63.

¹⁸⁷ UN Trafficking Protocol, *op. cit.*, art. 6 (1)

¹⁸⁸ *ivi*, art. 6 (3)

¹⁸⁹ Anne T. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010, p. 75 and p. 139. See also May Ikeora, *Bilateral Cooperation and Human Trafficking Eradicating Modern Slavery between the United Kingdom and Nigeria*, Springer Nature, Bristol, 2018, p. 75.

¹⁹⁰ UN Trafficking Protocol, *op. cit.*, art. 9 (1)

¹⁹¹ *ivi*, art. 9 (2)

These measures should include cooperation with NGOs, relevant associations, and other components of civil society¹⁹². Bilateral and multilateral cooperation between States Parties is envisaged as a way to address the root causes of trafficking in persons, namely poverty and lack of equal opportunities¹⁹³. States Parties are also required to adopt legislative or other measures “to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking¹⁹⁴”. Under art. 10, States Parties are expected to cooperate and share information, aimed at identifying methods and means employed by traffickers¹⁹⁵ and shall also strengthen training for law enforcement, immigration, and other authorities aimed at preventing trafficking, prosecuting traffickers, and protecting the rights of victims and their safety from trafficking. This training should also take into account “the need to consider human rights, child, and gender-sensitive issues¹⁹⁶”. The final text requires States Parties to strengthen border controls to detect and prevent trafficking¹⁹⁷, to take legislative or other appropriate measures to prevent commercial transport being used in the trafficking process; and to punish such involvement¹⁹⁸. Pursuant art. 12 States parties shall act to ensure the integrity of travel and identity documents, and to prevent the creation and use of falsified or altered documents.

IV. Final provisions The first paragraph of the final provisions explains that the UN Trafficking Protocol does not affect existing rights and obligations under international law, particularly, those provided by international humanitarian law and international human rights law. Specific mention is made of the 1951 Convention relating to the Status of Refugees, of its 1967 Protocol and of the principle of *non-refoulement*. The second paragraph contains a non-discrimination clause, ensuring that trafficking victims are not discriminated against and that the UN Trafficking Protocol is interpreted with the international principles of non-discrimination¹⁹⁹.

5.2 Soft Law instruments against trafficking

Not all international instruments against trafficking are legally enforceable treaties. Declarations, guidelines, memoranda of understanding, agreements, UN resolutions, interpretive texts, declarations of human rights treaty bodies, and reports of special procedures of the UNHRC are all sources of guidance in detecting the nature of rights and obligations²⁰⁰. In the case of trafficking, there are also *soft law* instruments. The term “soft law” is used to refer to non-treaty instruments that do not bind States,

¹⁹² *ivi*, art. 9 (3)

¹⁹³ *ivi*, art. 9 (4)

¹⁹⁴ *ivi*, art. 9 (5)

¹⁹⁵ *ivi*, art. 10 (1)

¹⁹⁶ *ivi*, art. 10 (2)

¹⁹⁷ *ivi*, art. 11 (1)

¹⁹⁸ *ivi*, art. 11 (2) (4)

¹⁹⁹ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, Oxford University Press Inc., New York, 2008, p. 67.

²⁰⁰ United Nations Human Rights Office of the High Commissioner, *Recommended Principles and Guidelines on Human Rights and Human Trafficking Commentary*, UNITED NATIONS Publication Sales No. E.10.XIV.1, New York, 2010, p. 24.

even if employing the “hard” language of binding treaties. Vice-versa, there are also provisions contained in binding instruments that do not create obligations for member States, often recognizable by the language used in the text²⁰¹. This can be true for optional provisions of the Trafficking Protocol, cited above, about the protection and assistance of victims. Moreover, it should be kept in mind that if broadly implemented, soft law principles may even become an international customary norm in the future. An international customary norm requires two elements for its creation: an objective element, a consistent and widespread practice by the majority of States of the international community (*diuturnitas*); and a subjective element, the acceptance of the custom as law in which prevails the belief that that behaviour is required of them by a binding law or a social norm (*opinio iuris sive necessitatis*)²⁰². In the specific area of trafficking, the most important non-legal international instrument is the 2002 Trafficking Principles and Guidelines, an international instrument that provides for a practical and rights-based policy guidance for States, international organizations and NGOs. Recently, the United Nations Children’s Fund (UNICEF) released a set of Guidelines on the Protection of the Rights of Child Victims of Trafficking, which provides additional guidance on the specific issue of child victims. The UN High Commissioner for Refugees has also issued a set of guidelines that focus on the relationship between trafficking and asylum. In summary, soft law instruments can become customary law or inspire new treaties and norms, can clarify present norms, and they can be taken as guidelines by States.

5.3 Monitoring mechanism

a. Conference of Parties

The Trafficking Protocol does not establish a specific monitoring mechanism to oversee its implementation. However, the UNCTOC establishes (art. 32) a Conference of the Parties to the Convention as body responsible for periodic examination in order to advocate and monitor the ability of States Parties to combat transnational organized crime and to implement the requirements of the Convention²⁰³. The COP has been empowered to request and receive information on State parties’ implementation of the Protocol and their relative responses; facilitate training, technical assistance, and related activities; and cooperate with relevant intergovernmental and non-governmental organizations²⁰⁴. The first COP was held in 2004 followed by other eight sessions including the last one in October 2018. At these sessions, the COP discusses various issues including the basic adoption of national legislation in accordance with the Trafficking Protocol; the

²⁰¹ Anne T. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010, p. 139.

²⁰² Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, Oxford University Press Inc., New York, 2008, p. 73.

²⁰³ U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex I, art. 32, U.N. Doc. A/RES/55/25, 15th November 2000.

²⁰⁴ Anne T. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010, p. 466. See also United Nations Human Rights Office of the High Commissioner, *Human Right and Human Trafficking Fact Sheet no. 36*, United Nations Publications, New York and Geneva, 2014, p. 53.

examination of criminal legislation and difficulties encountered in its implementation. For instance, the second Conference in 2005 included issues of assistance and prevention²⁰⁵ and the third in 2006 focused on states' compliance with other provisions of the Protocol including assistance and protection of victims²⁰⁶. In addition, in 2008 the COP established the Working Group on Trafficking to identify weaknesses, gaps, and challenges in implementation of the Protocol. The Working Group is mandated to facilitate implementation and provide recommendations to States parties through the exchange of experience and practices between experts and practitioners and assist the COP in guiding the UNODC secretariat on its activities related to the implementation of the Protocol and cooperation with other bodies²⁰⁷.

b. The Special Rapporteur for Trafficking in Persons, Especially Women and Children

In 2004 the UN Commission on Human Rights, adopted at its sixtieth session, decided to appoint, for a three-year period, a Special Rapporteur to focus on the human rights aspects of victims of trafficking, especially women and children²⁰⁸. In July 2017, the Human Rights Council further extended for three years the mandate of the Special Rapporteur through resolution 35/5. The present Special Rapporteur is an Italian judge, Ms. Maria Grazia Giammarinaro, appointed in 2014. The rapporteur is required to submit an annual report together with recommendations “*on measures required to uphold and protect the human rights of the victims*”. The UN Special Rapporteur on TIP generally submits annual reports to the UNHRC and the GA. These reports focus on specific issues, including trafficking for the purpose of forced marriage, integration of the human rights of women, and the gender perspective in cases of trafficking in women. The Special Rapporteur relies on country visits, participation in meetings, conferences and training courses, questionnaires, communications to governments and other actors, press statements and publications. The Special Rapporteur may also receive information regarding violations of human rights in the context of trafficking as well as individual complaints²⁰⁹. However, she or he cannot issue decisions on individual

²⁰⁵ Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, 10-21 October 2005, Report on the Conference of the Parties to the United Nations Convention Against Transnational and Organized Crime on its Second Session, U.N. Doc. CTOC/COP/2005/8.

²⁰⁶ Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, 8-17 October 2008, Report of the Secretariat on the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Consolidated Information Received from States for the Second Reporting Cycle, U.N. Doc. CTOC/COP/2006/Rev.1.

²⁰⁷ Conference of Parties to the United Nations Convention on Transnational Organized Crime, Decision 4/4, Trafficking in Human Beings, “Report of the Conference of Parties to the United Nations Convention on Transnational Organized Crime on its fourth session, held in Vienna from 8 to 17 October 2008,” UN Doc. CTOC/COP/2008/19, 1st December 2008. See also Anne T. Gallagher, *op. cit.*, p. 469.

²⁰⁸ United Nations Office of the High Commissioner for Human Rights, Decision 2004/110, Special Rapporteur on trafficking in persons, especially women and children, 55th meeting, 19th April 2004.

²⁰⁹ Mohamed Y. Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, Vanderbilt Journal of Transnational Law, 2008, p. 1402. Available at <https://wp0.vanderbilt.edu/wp-content/uploads/sites/78/mattar.pdf>, accessed 03/10/2018.

complaints and cannot require the State to resolve the alleged violation but can raise the matter of concern to the State of interest²¹⁰.

c. International Framework for Action

In 2009, several UN agencies, including UNODC, UN High Commissioner for Refugees, UN Children’s Fund, UN Development Fund for Women, and UN Interregional Crime and Justice Research Institute, published the International Framework for Action to Implement the UN Trafficking Protocol. The Framework for Action is a technical assistance instrument to assist and propose measures to the UN Member States in the effective implementation of the Protocol in conformity with international standards. It follows the “3P’s” framework outlining knowledge and research, capacity-building, monitoring and as key challenges in implementing the Protocol. The framework for action has five key pillars: prosecution, protection, prevention, national coordination and cooperation, and international coordination and cooperation²¹¹.

d. Trafficking in Persons Report

A further international mechanism that has wielded considerable influence in counter-trafficking efforts internationally is the U.S. TIP report, established by the United States and introduced in 2001. Unlike UN mechanisms for reviewing counter trafficking efforts the *modus operandi* supporting the TIP Report is diplomatic pressure and the threat of coercion in the form of economic sanctions for nations who do not comply with U.S. standards. Essentially, the TIP report assesses in two ways. The first is to determine which nations fall under its attention, based on data that examines which countries are “of interest” as countries of origin, transit, destination, or a combination. The major assessment regards the analysis of counter-trafficking policies in relation to U.S. standards regarding the “3P’s” and “3R’s” (rescue, rehabilitation, and reintegration). In the TIP Report, the role of the Department of State is to place each country onto one of three tiers according to the extent of their governments’ efforts to achieve the “*minimum standards for the elimination of trafficking*” of Section 108 of the TVPA²¹². If a country is ranked in Tier 1, it does not mean that it has no human trafficking problem. Instead, it indicates that a government recognises the presence of human trafficking in its own territory and it is addressing the problem with solutions, complying with the

²¹⁰ International Justice Resource Center, website <https://ijrcenter.org/un-special-procedures/special-rapporteur-in-trafficking-in-persons-especially-women-and-children/>, accessed 03/10/2018.

²¹¹ John Winterdyk, Benjamin Perrin, Philip Reichel, *Human Trafficking Exploring the International Nature, Concerns, and Complexities*, CRC Press Taylor & Francis Group, 2012, p. 238.

²¹² The Trafficking Victims Protection Act (TVPA) of 2000 is the cornerstone of Federal human trafficking legislation, and established several methods of prosecuting traffickers, preventing human trafficking, and protecting victims and survivors of trafficking. The act establishes human trafficking and related offenses as federal crimes and attaches severe penalties to them. It also mandates restitution be paid to victims of human trafficking. It further works to prevent trafficking by establishing the Office to Monitor and Combat Trafficking in Persons, which is required to publish a Trafficking in Persons (TIP) report each year. Available at <https://polarisproject.org/current-federal-laws>, accessed 03/10/2018.

TVPA's minimum standards. Every year, governments shall prove their progress in combating trafficking, so they can maintain a Tier 1 ranking or improving they actual rank if they are place in Tier 2 or 3²¹³.

²¹³ U.S Department of State Diplomacy in Action, official website available at <https://www.state.gov/j/tip/rls/tiprpt/> , accessed 03/10/2018.

CHAPTER 2: REGIONAL LEGAL INSTRUMENT AGAINST TRAFFICKING IN PERSONS IN EUROPE AND ASEAN

1. Council of Europe

The Council of Europe (CoE) is an international organization founded on 5th May 1949 in St. James's Palace, London, by ten countries (Belgium, France, Luxembourg, the Netherlands and the United Kingdom, accompanied by Ireland, Italy, Denmark, Norway and Sweden²¹⁴), whose founding principles are *human rights, democracy, and the rule of law*²¹⁵. These values are indispensable to obtain a stable, tolerant and functional Europe aimed at increasing economic growth and social cohesion. The proposal for its creation was first made by Winston Churchill, who in his speech of 19 September 1946 in Zurich, stated that what the Old Continent needed was *"a remedy which [...] as if by miracle transform the whole scene and would in a few years make all Europe as free and happy as Switzerland is today. [...] We must build a kind of United States of Europe"*²¹⁶. It was finally in The Hague, held in May 1948 by the International Committee of the Movements for European Unity, that the idea of convening a European assembly first arose at the Congress of Europe²¹⁷, also remembered as *"The Congress of Europe"*²¹⁸. Today the CoE is the continent's leading human rights organisation and it includes 47 member States, 28 of which are members of the EU. Through dialogue and co-operation, the CoE is determined to maintain citizens' faith in the rule of law by concluding new treaties in areas such as international terrorism, trafficking in persons, violence against women, sexual abuse of children, cybercrime, data protection, and so on. It is also urging member states' governments to implement its recommendations and for non-member states to ratify its conventions. Current priorities are²¹⁹:

1. Fighting corruption;
2. Assisting governments in implementing judicial reforms;
3. Protecting freedom of expression and the media;
4. Combat intolerance and hate speech;
5. Defending cultural diversity and fighting against racism;
6. Promoting gender equality and ensuring protection on children's rights;

²¹⁴ Centri Studi sul Federalismo: International Democracy Watch, *Council of Europe*, official website available at <http://www.internationaldemocracywatch.org/index.php/council-of-europe->, accessed 03/10/2018

²¹⁵ Council of Europe, official website available at <https://www.coe.int/en/web/sarajevo/history>, accessed 03/10/2018.

²¹⁶ Winston Churchill, speech delivered at the University of Zurich, 19 September 1946, available at <https://rm.coe.int/16806981f3>, accessed 03/10/2018

²¹⁷ Cvce.eu, *The origins of the Council of Europe*, available at <https://www.cvce.eu/en/education/unit-content/-/unit/026961fe-0d57-4314-a40a-a4ac066a1801/13839cdf-3e7e-4985-995f-2b6d9b534633>, accessed 03/10/2018

²¹⁸ More information about The Hague available at <https://www.cvce.eu/en/education/unit-content/-/unit/7b137b71-6010-4621-83b4-b0ca06a6b2cb/4b311dc0-cbe6-421d-9f9a-3bc8b1b155f6>, accessed 03/10/2018

²¹⁹ Sophie Lobey, *The Council of Europe*, Global Law and Justice, 2016. More information available at http://www.nyulawglobal.org/globalex/Council_of_Europe1.html, accessed 03/10/2018

7. Protecting minorities.

An important remark for the CoE is the promotion human rights through international conventions, such as the *Convention on Action against Trafficking in Human Beings* (discussed in the following paragraph) or the *Convention on Preventing and Combating Violence against Women and Domestic Violence*²²⁰ (Istanbul Convention). It oversees member States' advance in the areas abovementioned and formulates recommendations through independent expert monitoring bodies²²¹.

1.1 CoE Convention on Action against Trafficking in Human Beings

A proposal for a legally binding instrument in Europe to combat trafficking first emerged in 2002 through a recommendation of the Parliamentary Assembly. Later, in 2003 through Recommendation 1610, the Parliamentary Assembly declared that the drafting of the CoE Convention on trafficking in human beings would “bring added value to other international instruments with its clear human rights and victim protection focus and the inclusion of a gender perspective²²²”. It was in April 2003 that the Committee of Ministers established an Ad Hoc Committee on Action against Trafficking in Human Beings with the purpose of preparing a European convention on trafficking. Finally, the Convention²²³ formally opened for signature in Warsaw on 16th May 2005, at the Third Summit of Heads of State and Government of the CoE and, eventually, came into force on 1st February 2008. It is open for signature to member states as well as non-member states of the CoE, namely, those who participated in the drafting process such as Canada, the Holy See, Japan, Mexico, and the United States of America. The Convention is the first European treaty in this field and, compared to the UN Trafficking Protocol, it is a comprehensive document focusing mainly on victim protection and the safeguarding of their rights irrespective of their nationalities²²⁴, but also aimed at preventing and prosecuting traffickers²²⁵. Furthermore, contrary to the Trafficking Protocol, the CoE Convention obliges States to guarantee a period of determined mandatory recovery and reflection for victims of trafficking. According to Gallagher, the Coe Convention *embodies a revolutionary way of thinking about trafficking and victims of trafficking*²²⁶. The text of the CoE Convention is composed of a preamble and ten

²²⁰ Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No.210, opening of the treaty Istanbul, 11/05/2011, entry into force 01/08/2014. Available at <https://rm.coe.int/168008482e>. Since this study is not focused on violence against women (VAW) more information about the Istanbul Convention is also available on Sara De Vido, *Women's Rights and Gender Equality in Europe and Asia*, in Yumiko Nakanishi, *Contemporary Issues in Human Rights Law Europe and Asia*, SpringerOpen, 2017, p. 154

²²¹ Council of Europe, *Values Human rights, Democracy, Rule of Law*, available at <https://www.coe.int/en/web/about-us/values>, accessed 03/10/2018

²²² Council of Europe, Parliamentary Assembly, Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution, adopted June 25, 2003.

²²³ Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197, available at: <https://www.refworld.org/docid/43fded544.html>, accessed 03/10/2018

²²⁴ Anne T. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010, p. 114.

²²⁵ United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons Global Programme against Trafficking in Human Beings*, United Nations publication, Sales No. E.08.V.14, New York, 2008, p. 23.

²²⁶ Anne T. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010, p. 127

chapters and it provides for measures and actions to raise awareness against trafficking, identification, protection, and assistance to victims of trafficking with a prospective of reintegration into society, granting renewable residence permits if the victim cooperates with law enforcement authorities and also according of a victim's personal situations; criminalisation of traffickers and third parties involved; protection of the victim's privacy and safety throughout judicial proceedings²²⁷. The Preamble defines trafficking in persons as a violation of human rights and an offence to the dignity and integrity of the human being and further affirms the need to improve victims' protection taking into account non-discriminatory actions and gender equality as well as the rights of a child in the case of child victims.

Chapter I: The first chapter of the Convention deals with the purpose, the scope, the non-discrimination principle, and its definition. By virtue of art. 1, the purpose of the Convention is aimed at preventing human trafficking, protecting victims through a comprehensive framework on the protection and assistance of victims and witnesses, prosecuting traffickers and promoting international cooperation. Additional reference to the article enshrines the importance of guaranteeing gender equality in relation to both prevention and protection. The Explanatory Report also explains that its title includes the word *action* to outline that a set of different measures is contained, including legislative and other programmes needed to achieve its purposes²²⁸. The Convention applies to all forms of trafficking, whether committed within or outside national borders and irrespective to its relation to organized crime²²⁹. This definition represents one of the most significant achievements of the CoE Convention, compared to the UN Trafficking Protocol. Contained in art. 3 of the Convention there is the non-discrimination clause which specifies: *sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status* (the Trafficking Protocol includes a general non-discrimination clause with no reference to any sort of discrimination). It is worth noting that this non-discrimination clause, except from the reference to the association with a national minority, is identical to the clauses embodied in art. 2 of the UDHR, art. 2 (1) of the CCPR, and art. 2 (2) of the CESC²³⁰. The definition of trafficking in human being set out in art. 4 of the CoE Convention correspond to the one contained in art. 3 of the UN Trafficking Protocol²³¹. The only difference in the two provisions is that art. 4 (e) of the CoE Convention also provides the definition of trafficking victim as being "*any natural person who is subject to trafficking [...] as defined in this article*". In

²²⁷ UNODC, *Toolkit to Combat Trafficking in Persons Global Programme Against Trafficking in Human Beings*, United Nations Publication, New York, 2008, p. 23.

²²⁸ CoE Committee of Ministers, *Explanatory report to the Council of Europe Convention on Action against trafficking in human beings*, CETS No. 197, COE Doc CM, 3 May 2005, Addendum II Commentary on the provisions of the Convention para. 39, p. 7. Available at <https://rm.coe.int/16800d3812>, accessed 04/10/2017.

²²⁹ CoE Convention, *op. cit.*, art. 2 "*This Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organized crime*".

²³⁰ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*, Oxford University Press Inc., New York, 2008, p. 147.

²³¹ Anne T. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010, p. 115.

addition, the Explanatory Report of the Convention provides specific analysis on several aspects of the article such as:

- Trafficking occurs even when a border is legally crossed and presence on national territory is lawful²³².
- The abuse of a position of vulnerability that is to include *any situation in which the person involved has no real and acceptable alternative to submitting to the abuse* meaning that it can be any situation of hardship that induces someone *to accept being exploited*²³³.
- No need for exploitation to occur to be defined trafficking, meaning that it is enough to be subjected to one of the actions defined by the Convention and *for the purpose of exploitation*²³⁴.
- The issue of consent is not simple to establish because we don't know when the free will ends and when constraint starts. However, when addressing trafficking the definition applies whether or not the victim has consented to be exploited²³⁵.

Chapter II: This chapter contains five provisions dedicated specifically to the prevention of human trafficking and measures to create the basis for operative cooperation among member States. Pursuant art. 5 (1) States parties are required to establish and strengthen measures and programmes to tackle human trafficking through research, information, awareness raising and education campaigns, social and economic plans and training programmes. Furthermore, art. 5 (3) obliges for the promotion of a human rights-based approach, gender mainstreaming²³⁶, and child-sensitive approach in the development and implementation of policies and agendas. When dealing with specific measures in relation to children, States are ought to provide a *protective environment* and, as emphasised by the Explanatory Report, such concept has been fully promoted by UNICEF²³⁷. An important recognition in combating trafficking has been proved by the role of NGOs and other relevant organizations. For this purpose, parties to the Convention are required to involve NGOs where and when possible. When addressing human trafficking, it is necessary to intervene at the root of the demand causes of the activity. Therefore, unlike the UN Trafficking protocol that deals with the issue of demand in only one paragraph of art. 9, the CAHTEH decided to include a whole provision of the CoE Convention to

²³² Council of Europe (Committee of Ministers), *Explanatory report to the Council of Europe Convention on Action against trafficking in human beings*, CETS No. 197, COE Doc CM, 3 May 2005, para 80.

²³³ *ivi*, para 83

²³⁴ *ivi*, para 87

²³⁵ *ivi*, para 97

²³⁶ *ivi*, para 104. *Gender mainstreaming* is a concept often raised in international documents, especially those of the UN World Conferences on Women, and in European documents since its 1996 adoption by the European Commission, Commission Communication, 21st February 1996, *Incorporating equal opportunities for women and men into all Community policies and activities*, COM 96, 67 final. The concept was further consolidated in the Community Framework Strategy on Gender Equality, 2001-2005. The CoE group of specialists on the subject described the approach as “*the re-organization, improvement, development and evaluation of policy processes*”, to allow gender equality to be incorporated in all policies and strategies.

²³⁷ *ivi*, para 106. The concept of a protective environment, as promoted by UNICEF, is related to the protection of children's rights from hostile attitudes, customs, behaviour, and so on; reinforcement of children's rights; open discussion of child protection issues as well as reporting abuse cases; adoption of programmes and services to enable child victims of trafficking to recover and reintegrate.

effectively discourage the demand and prevent human trafficking. For this specific purpose, pursuant art. 6 States Parties are required to adopt through all necessary measures including research, awareness raising on the role of the media and civil society in this area, information campaigns and preventive measures, such as educational programmes to be conducted in public structures. Finally, following articles 7, 8 and 9, identical mirror of art. 11, 12 and 13 of the UN Trafficking Protocol, establish preventive measures aimed at detecting trafficking in human beings, such as strengthening border controls, introducing minimum standards for the integrity of travel and identity documents, in order to avoid falsification, alteration, reproduction, issuance, or illegal use, and cooperating with other States Parties to verify the validity of travel or identity documents.

Chapter III: A remarkable improvement has been realised from the protection and promotion of victims' rights, providing minimum standards for the assistance of physical, psychological, and social recovery²³⁸. The provisions for the protection of trafficking victims are contained from art. 10 to art. 17. They neatly encapsulate the two main aspects of anti-trafficking policies, that of seeking to protect the victim and prosecute the traffickers. Perhaps, the most significant section of the provision related to victim's protection concerns the issue of identification set out at art. 10. The Convention acknowledges the essentiality of identifying victims of trafficking, so they can be granted protection and assistance as intended in the provision, and a failure to accurately identify the victim will likely lead to a denial of that person's rights as well as problems to prosecute and convict the perpetrator²³⁹. State parties are required to cooperate with each other and also with local NGOs. Additionally, under the same article if there are any *reasonable grounds* to believe that someone is a victim that is sufficient reason for governments not to *remove* that person from *its territory*²⁴⁰. Art. 12 of the CoE Convention contains the minimum standards of assistance and protection to all victims of trafficking, for instance, adequate standards of living that includes a suitable and sheltered accommodation, psychological and material assistance; access to emergency medical treatment; translated and interpretative materials; counselling and information services legal rights in a language the victim can understand; and assistance in defending their rights and interests. We can understand that the protection of victims from further harm has become the core of the Convention and States parties are obliged to *take due account of the victim's safety and protection needs*²⁴¹. While, for all victims who are lawfully resident in the territory of a State Party²⁴² there are also additional provisions that States are required to make available

²³⁸ Kristina Touzenis, *Trafficking in human beings: human rights and transnational criminal law, developments in law and practices*, UNESCO Migration Studies 3, France, 2010, p. 89

²³⁹ *ivi*, para 127

²⁴⁰ *ivi*, para 132 – 133. According to the Explanatory Report "*removed from its territory*" refer both to removal to the country of origin and removal to a third country.

²⁴¹ CoE Convention, *op. cit.*, art. 12 (2).

²⁴² CoE Explanatory Report, *op. cit.*, para 165 – 166. According to the Explanatory Report "*lawfully resident victims are, in particular, nationals and persons with the residence permit referred to in Article 14*"

such as medical and other assistance, access to the labour market, professional training, and education²⁴³. The next provision states that a recovery and reflection period of at least 30 days has to be granted to the presumed victims, so that they can recover and escape from the influence of their traffickers and decide if they wish to cooperate with the authorities. It is worth noting that the recovery and reflection period is granted to all the victims, independently of their willingness to cooperate or not. During this period victims cannot be repatriated against their will²⁴⁴. However, at the expiration of the recovery and reflection period, States Parties shall consider issuing a renewable residence permit to victims after the competent authority has claimed it to be necessary due to the victim's personal condition or when the victim decide to cooperate in a criminal investigation²⁴⁵. Under art. 15, victims are also granted the following rights:

- the access to informative materials on relevant judicial or administrative proceedings;
- legal assistance under the conditions provided by each State Party;
- compensation from the traffickers;
- the adoption of measures, such as the establishment of a fund for victims' compensation or for the adoption of programmes for social assistance or social reintegration of victims, aimed at guaranteeing the compensation of the victims.

Finally, for the identified victims who wish to return to their country, the CoE Convention provides in its art. 16, the right of the victim to be repatriated and States are obliged to conduct return "*with due regard for his or her rights, safety and dignity*" as well as facilitate and consent such return without unjustified or unreasonable obstruction and delay. The Convention adds that the repatriation "*shall preferably be voluntary*"; consequently, States parties are obliged to establish repatriation programmes with the aim of avoiding re-victimisation and are required to make their best effort to reintegrate the victims into the society. The last provision of the chapter promotes *gender equality and use gender mainstreaming in the development, implementation and assessment of the measures*²⁴⁶.

Chapter IV: This chapter comprises nine articles comprehensive of the criminal law measures necessary to combat the phenomenon. The criminalisation provisions of the Convention are almost identical to those contained in the Trafficking Protocol, with, however, some relevant annexes. States Parties are required to criminalise trafficking when committed intentionally²⁴⁷ as well as certain acts committed for the purpose of enabling trafficking such as document fraud or retainment of document²⁴⁸. The innovation of such provisions

²⁴³ Venla Roth, *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European, and Finnish Responses to Prostitution-Related Trafficking in Human Beings*, Martinus Nijhoff Publishers, Leiden, 2012, p. 120

²⁴⁴ CoE Convention, *op. cit.*, art. 13

²⁴⁵ *ivi*, art. 14 (1)

²⁴⁶ *ivi*, art. 17

²⁴⁷ As contained in the Explanatory Report *the interpretation of the word "intentionally" is left to domestic law.*

²⁴⁸ CoE Convention, *op. cit.*, art. 18 - 20

is that States Parties shall consider the possibility of criminalising the use of services²⁴⁹ when there is full knowledge of the status of a victim, meaning that those employing and exploiting trafficked domestic servants, clients of trafficked prostitutes, owners of plantations, and the recipients of human organs and tissues *donated* by a trafficked person, should be punished²⁵⁰. While this provision is not binding on States Parties, they are encouraged to take into consideration the adoption of this criminal offence in order to discourage the demand for the services provided by trafficked victims. Adopting this measure in the domestic law system would mean to deter those who demand the exploitation knowing that they can be prosecuted at the same level as traffickers. States parties shall adopt measures related to any attempt, aiding, or assisting of criminal offences in accordance with art. 18 and 20 of the Convention. Pursuant art. 23, the offenses established under the Convention *are punishable by effective, proportionate and dissuasive sanctions*, to include deprivation of liberty which give rise to extradition. Also included are aggravating circumstances, while determining penalties, such as deliberate or negligent endangering the life of the victim, the commission of the offence in regard to a child or by a public official in the performance of her or his duties or in the framework of a criminal organization. Art. 25 adds a new principle to the criminal law chapter of the Convention that is *previous convictions* or as explained by the Explanatory Report the *principle of international recidivism*²⁵¹, in which national courts may provide for a stricter penalty when the offender was previously convicted for the same crime in another State based on the principle of recidivism. Finally, pursuant art. 26 of non-punishment provision requires States Parties, following the principle of its legal system, to not criminalise a victim who has been involved in illegal acts if they were forced to do so²⁵².

Chapter V: When addressing trafficking, victims who manage to escape are rarely willing to initiate complaints against their perpetrator because of fear and intimidation. For this reason, one of the articles of this chapter focuses on ensuring that investigations or prosecutions can be *ex officio*, intended that authorities shall investigate and initiate prosecution for offences when committed in its territory in whole or in part, irrespective of the victims' complaints. If victims make complaints outside the country where the offence was committed, in this case, her or his State residence shall forward the complaint to the State party in which the offence has taken place. Pursuant art. 28 the CoE Convention recognises the needs to ensure *effective and appropriate protection* to victims and others (for instance families, witnesses, and victim support agencies) *from potential retaliation and intimidation, specifically during and after the investigation and prosecution process*. In conjunction to this provision, there is art. 30 which provides for specific measures aimed at protecting victims' private lives and, where necessary, identities and at guaranteeing their safety and protection from intimidation during the course of judicial proceedings. The final article of this chapter

²⁴⁹ *ivi*, art. 19

²⁵⁰ CoE Explanatory Report, *op. cit.*, para 230 – 236. See also Anne T. Gallagher, *op. cit.*, p. 123.

²⁵¹ *ivi*, para 265 - 267

²⁵² CoE Convention, *op. cit.*, art. 26. See also the CoE Explanatory Report, *op. cit.*, paras. 272–274

provides the establishment of a State party's jurisdiction over an offence when committed in its territory (principle of territoriality), by one of its nationals²⁵³ (nationality principle), or against one of its nationals (passive personality principle). In these cases, States are obliged to apply the principle of *aut dedere aut judicare* (prosecute or extradite)²⁵⁴.

Chapter VI: This section of the Convention mainly deals with cooperation measures among States parties by providing information and the creation of partnerships with NGO. In addition, States parties are encouraged to reinforce the search for missing people, in particular of missing children, through bilateral and multilateral agreements²⁵⁵.

Chapter VII: Another important added value to the CoE Convention is the monitoring mechanism created to monitor the implementation of the obligations: The Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties which we are going to discuss in the following paragraph. The remaining chapters, notably chapter VIII, IX, and X contain provisions related to the rules governing the relationship with the UN Trafficking Protocol and with other international instruments, the establishment of the basic rule for amending the Convention²⁵⁶, and finally the signature and entry into force of the Convention²⁵⁷.

1.2 Monitoring mechanism of the CoE Convention

In order to control the implementation of the obligations contained in the CoE Convention, it is important to provide for the creation of an operative and independent monitoring mechanism. The Explanatory Report considers the monitoring mechanism as “*undoubtedly one of its main strengths*”. This monitoring mechanism is consistent of:

1. the Group of Experts on Action against Trafficking in Human Beings (GRETA), a technical body composed of highly qualified experts; and
2. the Committee of the Parties, a political body composed of representatives of all the States Parties to the Convention.

²⁵³ CoE Convention, *op. cit.*, art 31. Jurisdiction under the territoriality principle also applies when the offense is committed on board a ship flying a State Party's flag or on aircraft registered under its laws. States are also entitled to enter reservations to the jurisdiction grounds only when relating to the nationality of the victim and of the perpetrator.

²⁵⁴ CoE Explanatory Report, *op. cit.*, para 332. No reservation can be made against the aspect of the jurisdictional requirement on the principle of territoriality.

²⁵⁵ CoE Convention, *op. cit.*, art. 33(2).

²⁵⁶ *ivi*, art. 41. Any proposal for an amendment shall be communicated to the Secretary General of the CoE, who will forward it to all member States, all the signatories of the Convention, all the Parties, and all the States invited to sign or accede to the Convention. The amendment shall also be communicated to GRETA who will submit an opinion to the Committee of Ministers. The latter may adopt the amendment after having considered the proposal, the opinion of GRETA, and obtained the unanimous consent of all the Parties. The amendment will, however, enter into force only after the acceptance by all States Parties. See also CoE Explanatory Report, *op. cit.*, paras 378 – 379.

²⁵⁷ *ivi*, art. 42.

a. GRETA: On the basis of art. 36, GRETA is composed of a minimum of ten and a maximum of 15 members and it is elected by the Committee of the Parties, keeping in mind a gender and geographical balance and a multidisciplinary expertise. Furthermore, according to the provision the members of GRETA:

1. are elected for a term of office of 4 years, renewable only once;
2. are selected based on their competence in the areas covered by the Convention and be nationals of the States parties to the Convention;
3. shall operate in their individual capacity, be independent and impartial in exercising their functions and represent the legal status;
4. cannot be two of the same nationality.

Besides the monitoring procedure set out by the Convention, there is also a further supplemented Rules of Procedure adopted by GRETA in June 2009²⁵⁸. The evaluation procedure is divided into four-year rounds²⁵⁹, with GRETA selecting the provisions of the Convention to be discussed on that particular round²⁶⁰. A questionnaire aimed at ascertaining compliance with relevant provisions is developed and distributed to all States Parties, no one excluded²⁶¹. In case the replies of the questionnaire are not exhaustive or complete, GRETA is allowed to request additional information from the States parties, which are confidential unless otherwise stipulated²⁶². GRETA has also the possibility of requesting information from civil society²⁶³ and if considered necessary conduct an on-site visit to complement the received information of States or to assess the measures adopted²⁶⁴. On this basis, GRETA shall provide drafting reports containing its description, analysis, suggestions and proposals related to the implementation of the provisions. The report and conclusions are then sent to the party concerned and to the Committee of the Parties.

b. Committee of Parties: The Committee of Parties is composed of the representatives on one Committee of Ministers of the CoE of the member States and representatives of the Parties to the Convention, which are not members of the CoE. The Rules of Procedure allow for non-voting “participants” and “observers”²⁶⁵. In addition, as stated in its Rules of Procedure²⁶⁶ the Committee functions as an “*Official Observatory*” on the prevention and suppression of trafficking and the protection of the human rights of trafficked victims;

²⁵⁸ Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), *Rules of Procedure for Evaluating Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties* (GRETA, Evaluation Rules of Procedure), THB-GRETA (2014)52, 17th June 2009, amended on 17th November 2014, entry into force 1st January 2015.

²⁵⁹ *ivi*, rule no. 2

²⁶⁰ *ivi*, rule no. 4

²⁶¹ *ivi*, rule no. 3

²⁶² *ivi*, rule no. 6

²⁶³ *ivi*, rule no. 8. See also CoE Convention, *op. cit.*, art. 38 (3).

²⁶⁴ *ivi*, rule no. 9, available at <https://rm.coe.int/native/16805a983c>. See also CoE Convention, *op. cit.*, art 38 (4).

²⁶⁵ Anne T. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2010, p. 475.

²⁶⁶ Committee of the Parties, CoE Convention on Action against Trafficking in Human Beings, Rules of Procedure of the Committee of the Parties (European Trafficking Convention Committee of the Parties, Rules of Procedure), THB-CP (2008)2, 5th December 2008.

consequently, it may “*hold debates on different aspects of trafficking in human beings*”. The Committee’s mission is essentially focused on adding political weight to the work of GRETA. However, it cannot modify or change the reports produced by the latter²⁶⁷. The role of the Committee is to monitor the implementation of the conclusions provided by GRETA to States parties and to supervise cooperation for the proper implementation of the Convention. As explained in the Explanatory Report, the intention behind the inclusion of this additional step was to allow the independence of GRETA “*in its monitoring function*” and at the same time present “*a ‘political’ dimension into the dialogue between the parties*”²⁶⁸.

2. Association of Southeast Asian Nations (ASEAN)

The Association of Southeast Asian Nations (hereinafter ASEAN²⁶⁹) was established on 8th August 1967 in Bangkok with the adoption of the ASEAN Declaration (known also as Bangkok Declaration) by the founding members of ASEAN: Indonesia, Malaysia, Philippines, Singapore and Thailand. The ASEAN Declaration is a very simple document containing only five articles. It basically affirmed the creation of an Association for Regional Cooperation among the Countries of Southeast Asia by establishing aims and purposes and involving mutual cooperation in different sectors such as in economic, social, cultural, and educational areas. The main idea of the Association was to consent all States in the Southeast Asian region to participate and for them to subscribe to its aims, principles, and purposes²⁷⁰ such:

1. The promotion of national peace and stability by respecting justice and the rule of law among countries of the region and to abide to the UN Charter principles;
2. Mutual aid and legal assistance on common interests such in economic, social, cultural, scientific fields, and so on;
3. Support among States to develop educational, professional, and technical training and research skills;
4. Collaboration in agriculture and industry areas, expansion of their trade, improvement of transportation and communications facilities, and enhance the living standards of their peoples;
5. Keep positive relations with present international and regional syndicates who share the same aims and purposes and improve cooperation among themselves²⁷¹.

²⁶⁷ CoE Explanatory Report, *op. cit.*, para 368.

²⁶⁸ *ivi*, para 369.

²⁶⁹ ASEAN’s ten member States are: Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, and the Socialist Republic of Vietnam. For more information on ASEAN as a regional organization

²⁷⁰ ASEAN, *History: The Founding of ASEAN*, official website <https://asean.org/asean/about-asean/history/> , accessed 07/10/2018

²⁷¹ ASEAN University Network, website, *History of ASEAN*, available at <http://www.aunsec.org/historyofasean.php> , accessed 07/10/2018.

In addition, the main idea of ASEAN is to allow Southeast Asian nations to bind themselves in cooperation, friendship, and securing their people, while claiming peace, freedom and prosperity²⁷². What is interesting about this organization is that it is trying to build more binding and institutionalised legislation by adopting voluntary and informal agreements. Since the adoption of the Bangkok Declaration, ASEAN has adopted more formal and legally-binding treaties, like the 1976 Treaty of Amity and Cooperation in Southeast Asia and the 1995 Treaty on the Southeast Asia Nuclear Weapon-Free Zone²⁷³. However, it was not until the late 1990s that ASEAN finally started to cooperate also on a human rights level, including the trafficking in human beings by adopting the ASEAN Vision 2020, the first policy document to address the issue. In 1997, in order to promulgate the former ASEAN Vision 2020, ten ASEAN countries elaborated and signed the ASEAN Declaration on Transnational Crime at the ASEAN Conference on Transnational Crime, Manila. In other words, the declaration principally aimed at eight transnational crimes, one of which is trafficking in women and children²⁷⁴. While, the 2004 Declaration was the first to specifically combat human trafficking in the region, ASEAN published three reports to monitor its implementation progress and these are:

- ASEAN Responses to Trafficking in Persons: Ending Impunity for Traffickers and Securing Justice for Victims published in 2006;
- Update and Supplement to the 2006 Study: ASEAN Responses to Trafficking in Persons: Ending Impunity for Traffickers and Securing Justice for Victims published in 2007;
- Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region published in 2011

2.1 ASEAN Declaration on Trafficking in Persons, Particularly Women and Children

Before adopting the ASEAN Trafficking Convention in 2015, there were efforts to tackle human trafficking through non-binding measures directed against transnational crime and at protecting women and children. However, due to the preference of ASEAN Member States to adopt soft-law instead of hard-law instruments, these efforts were quite futile. ASEAN countries, then, adopted the ASEAN Declaration against Trafficking in Persons, Particularly Women and Children at the ASEAN Ministers Meeting calling for a “*victim-centred criminal justice response*”²⁷⁵. The commitments of ASEAN members in the Declaration involved:

1. A regional network to combat human trafficking, with a focus on women and children;

²⁷² The Asean Declaration (Bangkok Declaration) Bangkok, 8 August 1967. Available at <https://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/> , accessed 07/10/2018

²⁷³ ASEAN, *History: The Founding of ASEAN*, official website <https://asean.org/asean/about-asean/history/> , accessed 07/10/2018

²⁷⁴ 1997 ASEAN Declaration on Transnational Crime, Manila, 20 December 1997, website available at http://www.asean.org/?static_post=asean-declaration-on-transnational-crime-manila-20-december-1997 , accessed 07/10/2018.

²⁷⁵ ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, Vientiane, 29 November 2004, available at <https://asean.org/asean-declaration-against-trafficking-in-persons-particularly-women-and-children-4/> , accessed 07/10/2018.

2. The exchange of information on related migratory flows, trends and patterns;
3. Strengthen border controls and implement monitor mechanisms;
4. Enhance applicable and necessary legislation, law enforcement, and judicial responses against alleged offenders or syndicates²⁷⁶.

Despite the 2004 Declaration recognition of trafficking, the criminal justice approach had been strongly criticised by many scholars. One of them, Rizal Sukma argued that because ASEAN countries treated the issue as an ordinary crime problem instead of “*a security problem that requires stronger measure*”²⁷⁷, it only led to a lack of actual policy response. Other intellectuals also claimed that the 2004 Declaration could not guarantee enactment due to its not legally-binding principle. In particular, Hao Duy Phan specifically criticised that the declaration is only like “*general political commitment by nature rather than plans to take concrete steps*”, without a “*strong monitoring and reporting procedure*”²⁷⁸. However, it is also worth emphasising that after the 2004 Declaration, SOMTC established an Ad-hoc Working Group on trafficking in persons in 2006 to oversee the execution of the agenda. To monitor the implementation of the 2004 ASEAN Declaration, member States adopted the 2007-2009 Work Plan, similar to the 2002 Work Program for the 1997 Declaration²⁷⁹. The legal text consists of detailed action programmes, financial requirements for the implementation of the Declaration, and the period of time required to complement the declaration²⁸⁰. The 2004 Declaration clearly shows a stronger cooperation among Asian countries in criminalising trafficking, compared to the 1997 Declaration. The main achievement reached by ASEAN countries is the adoption of the ASEAN Convention against Trafficking in Persons signed on 21th November 2015.

2.2 ASEAN Convention Against Trafficking in Persons, Especially Women and Children ACTIP

In the Southeast Asian region, we find that most of the measures against the exploitation of human beings occur within ASEAN members and through bilateral or multilateral agreements²⁸¹. The adoption of the ACTIP at the 27th ASEAN Summit in November 2015, complemented by the ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children (APA), establishes a legal binding framework for the region to combat human trafficking. This concurred with the founding of the ASEAN Community that is committed to

²⁷⁶ *Ibid.*

²⁷⁷ Rizal Sukma, *The Securitization of Human Trafficking in Indonesia*, working paper, no. 162, S. Rajaratnam School of International Studies, Singapore, 2008.

²⁷⁸ Hao Duy Phan, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights*, Martinus Nijhoff Publishers, Leiden, 2012, p. 89.

²⁷⁹ 2007-2009 Work Plan to Implement the ASEAN Declaration against Trafficking in Persons, Particularly Women and Children, Vientiane, 25 June 2007, in update and supplement to the *2006 Study: ASEAN Responses to Trafficking in Persons: Ending Impunity for Traffickers and Security Justice for Victims*, ASEAN Secretariat, Jakarta, 2007, Appendix 5, p. 40-49

²⁸⁰ Jadice Lau, *Voluntarism and Regional Integration: ASEAN's 20 Years of Cooperation on Human Trafficking*, Department of Government and Public Administration, The Chinese University of Hong Kong, p. 12.

²⁸¹ Anne Gallagher and Klara Skrivanekova, *Human Rights and Trafficking in Persons 15th Informal ASEM Seminar on Human Rights*, Asia-Europe Meeting, Montreux, November 2015, p. 19

collaborate among themselves in an effort to protect human rights devoted to building “a truly rules-based, people-oriented, people-centred ASEAN²⁸²”. The ASEAN Secretary General, thus, emphasised the “need to [...] address the issue of trafficking in persons in the region²⁸³”. Through the ratification of the ACTIP by the Philippines as the sixth ASEAN member, the ACTIP finally came into force on March 2017 in the ASEAN member States who ratified the Convention at that time²⁸⁴. To date, it has been ratified by eight out of 10 ASEAN Member States²⁸⁵ (Indonesia and Brunei Darussalam have not yet ratified the ASEAN Convention). The ACTIP has been developed in accordance of the growing issue of human trafficking within ASEAN, especially in the wake of the grave humanitarian crisis surrounding migratory flows in Southeast Asia. International complaints started in 2014 after witnessing the vulnerability of thousands of Burmese Rohingya refugees and Bangladeshi migrants crossing the Andaman Sea and Straits of Malacca²⁸⁶, resulting to trafficking on a massive scale²⁸⁷ and also the case of mass graves of Rohingya along the Thai-Malaysia border in 2015²⁸⁸. It is only understandable that due to the international nature of trafficking, countries were unable to address these cases on an individual or internal level. And even despite the adoption of the 2004 ASEAN Declaration, being it non-binding and unenforceable, only left countries with no operative mechanisms to collaborate on anti-trafficking efforts²⁸⁹. Thus, the aim of the ACTIP is to “prevent, suppress and punish all forms of trafficking” while protecting and assisting victims of trafficking by working in a “comprehensive and coordinated regional approach²⁹⁰”. The ACTIP maintains the structure of the UN Trafficking Protocol and it accepts the Protocol’s definition on trafficking and its obligations. ASEAN also adopts the international framework based on the “3Ps” notion, which highlights prosecution, protection and prevention of trafficking²⁹¹. Its main goals are to strengthen the rule of law, prosecute traffickers, strengthen border controls and regional cooperation, so to effectively provide assistance to trafficking victims²⁹².

²⁸² ASEAN, *ASEAN 2025: Forging Ahead Together*, Jakarta, ASEAN Secretariat, November 2015, p. 9

²⁸³ ASEAN, *Regional Review on Laws, Policies and Practices within ASEAN relating to the Identification, Management and Treatment of Victims of Trafficking, especially Women and Children*, Jakarta, 2016, p. VII H.E. LE LUONG MINH Secretary-General of ASEAN

²⁸⁴ ASEAN, *ASEAN Welcomes Entry into Force of ACTIP*, article available at <https://asean.org/asean-welcomes-entry-into-force-of-actip/>, accessed 07/10/2018

²⁸⁵ Cambodia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

²⁸⁶ Amnesty International, website, *Southeast Asia: Persecuted Rohingya refugees from Myanmar suffer horrific abuses at sea*, 21 October 2015, article available at <https://www.amnesty.org/en/press-releases/2015/10/southeast-asia-persecuted-rohingya-refugees-from-myanmar-suffer-horrific-abuses-at-sea/>, accessed 10/10/2018

²⁸⁷ AsiaSentinel, website, *ASEAN’s Disgraceful Inaction on Rohingya Refugees*, 18 May 2015, article available at <https://www.asiasentinel.com/society/asean-inaction-rohingya-refugees/>, accessed 10/10/2018

²⁸⁸ The Guardian, website, *Malaysia mass graves: villagers tell of migrants emerging from secret jungle camps*, 26 May 2015, article available at <https://www.theguardian.com/world/2015/may/26/malaysia-mass-graves-villagers-tell-of-desperate-migrants-emerging-from-jungle-camps>, accessed 10/10/2018

²⁸⁹ HTC Blog, website, *One Year Later: ASEAN Anti-Trafficking Action Plan Still Dormant*, 28 September 2016, article available at <http://humantraffickingcenter.org/one-year-later-asean-anti-trafficking-action-plan-still-dormant/>, accessed 10/10/2018

²⁹⁰ ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children 2015 (APA), section III

²⁹¹ HTC Blog, *op. cit.*

²⁹² ASEAN Trafficking Convention Plan of Action, *op. cit.*, section IV, part D, para j.

2.3 Comprehensive analysis of the ACTIP

The ACTIP consists of a Preamble and seven chapters:

- Chapter I covers general provisions and includes the aims, use of terms, the applicability and the importance of the sovereignty principle;
- Chapter II provides for the criminalisation of alleged traffickers;
- Chapter III is finalised to address prevention, cooperation, and other measures;
- Chapter IV is committed to victim protection, repatriation and return;
- Chapter V regards law enforcement, including confiscation and seizure of revenues of trafficking;
- Chapter VI compels member states to cooperate internationally, to provide mutual legal assistance against criminal activities, and extradition;
- Chapter VII contains the final provisions to establish coordinating structures, monitor, review, and report mechanism²⁹³.

The ASEAN Trafficking Convention affirms in its preamble the commitment to protect victim “*with full respect for their human rights*”²⁹⁴, while effectively prevent and combat trafficking in persons, ensure just and effective punishment of traffickers, and promote cooperation among countries and other organizations in a non-discriminatory principle²⁹⁵ to meet the mentioned objectives. However, the provisions on victim protection and assistance of the ACTIP are not as strong as the standards provided by the CoE Convention. Furthermore, the ACTIP makes no reference to gender equality unlike the CoE Trafficking Convention. Nevertheless, the APA does recognise “*the need to respect human rights, child and gender-sensitive issues*”, while building measures related to law enforcement, immigration, education, labour, social welfare, and other relevant actions²⁹⁶. Though, a reference to gender and age context is given when protecting the victim, requiring State Parties to “*take into account [...] age, gender, and special needs of victims, in particular the special needs of children*”²⁹⁷. The scope of the ASEAN Convention is also different from the CoE instrument, this means that if latter applies to all human trafficking situations, the ACTIP only limits its scope to border crossing or transnational trafficking²⁹⁸, hence, it leaves domestic trafficking to the sole jurisdiction of the country’s national legislation²⁹⁹. Though, the ASEAN Convention does recognise the need for more relevant measures and cooperation among parties to improve prevention and protection³⁰⁰. It is also worth mentioning that in some respects the ACTIP provides provisions that cover the criminal law aspects in ways

²⁹³ Marija Jovanovic, *Comparison of Anti-Trafficking Legal Regimes and Actions in the Council of Europe and ASEAN: Realities, Frameworks and Possibilities for Collaboration*, CoE, Strasbourg, 2018, p. 28

²⁹⁴ ASEAN Trafficking Convention, *op. cit.*, Chapter I, art. 1 (b)

²⁹⁵ *Ivi*, art. 2

²⁹⁶ ASEAN Trafficking Convention Plan of Action, *op. cit.*, section IV (A), p. 4

²⁹⁷ ASEAN Trafficking Convention, *op. cit.*, Chapter IV, art. 14 (12)

²⁹⁸ ASEAN Trafficking Convention, *op. cit.*, art. 3

²⁹⁹ Marija Jovanovic, *op. cit.*, p. 29

³⁰⁰ ASEAN Trafficking Convention, *op. cit.*, art. 1

that surpass the requirements of the CoE Trafficking Convention. For instance, the ACTIP pursuant art. 5 requires higher penalties for more aggravating circumstances. It also covers other provisions such as that of compelling governments to criminalise any involvement in organized criminal syndicates (art. 6), money laundering (art. 7), corruption (art. 8) and obstruction to justice (art. 9). In the whole, we can say that the ACTIP has stronger governing standards than the ASEAN Declaration and provides a concrete structure for comprehensive collaborative efforts between member State³⁰¹. To better comprehend the ACTIP we will analyse it following the 4Ps, namely Protection, Prosecution, Prevention, and Partnership.

Victim Protection The victim protection measures are provided in two provisions. Effectively, only art. 14 deals with victim protection and assistance, whereas art. 15 is related to the repatriation and return of trafficking victims. Art. 15 (1), on the other hand, issues victim identification and requires governments to create national procedures to facilitate victims' identification. By virtue of art. 14 (2), governments are obliged to acknowledge the identification of victims presented by the authorities of the *receiving Party*, however, their identification does not mean it will provide the same rights in destination states, which may actually affect the rights of the persons, specifically when it concerns the legal redress. Furthermore, only victims who are successfully identified can access measures of care and support, though, identification process may require some time, mandatory reflection and recovery period are not granted at all. Accordingly, unlike the CoE Trafficking Convention which makes reference in art. 40 (4) to the principle of non-refoulement as binding the member States, the ACTIP demands parties to *consider adopting* measures for victims to remain in their territories temporarily or permanently and if possible, when making such decisions, to consider the humanitarian and compassionate factors³⁰². This is probably because only Cambodia and the Philippines have signed the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, ensuring the principle of non-refoulement³⁰³. Pursuant art. 14 (9) and (10) the identified and legal resident victims, may access care and support such as housing, information of their legal rights, medical and psychological care, employment, education and training facilities. Government are requested to establish funds and *where applicable, national trust funds*, so to provide decent care and support³⁰⁴. Compared to the CoE Trafficking Convention (art. 12 (2)), the article states that States shall *endeavour to provide* for the physical safety of victims while within their borders³⁰⁵. In addition, privacy and identity protection of victims during legal process cannot be granted if not in *appropriate cases and to the extent possible*³⁰⁶. Protection of

³⁰¹ *Ibid.*

³⁰² ASEAN Trafficking Convention, Chapter IV, art 14 (4)

³⁰³ UNHCR The United Nations Refugee Agency, Chapter V, Refugees And Stateless Persons, Protocol relating to the Status of Refugees New York, 31 January 1967, website available at https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=V-5&chapter=5&lang=en#Participants , accessed 13/10/2018.

³⁰⁴ ASEAN Trafficking Convention, *op. cit.*, art. 14 (14)

³⁰⁵ *Ivi*, art. 14 (5)

³⁰⁶ *Ivi*, art. 14 (6)

victims and witnesses from intimidation and harassment is also cited in Chapter V³⁰⁷, but only because the Convention needs to preserve the integrity of the criminal process. As for the non-punishment provision we can find it, in a similar form to the CoE Convention, in the section of substantive criminal law (Chapter IV) art. 15 of the ACTIP. Also, victims of trafficking cannot be held criminally or administratively responsible for illicit performances, if such are consequences of them being trafficked³⁰⁸ or to even *unreasonably* hold identified victims in detention or in prison³⁰⁹. Despite the fact that the provisions in the two regional treaties are very similar in this respect, if we read carefully there are few differences such as the return of victims to the country of their nationality or residence should be processed, as we have seen in the CoE paragraph in art. 16, *with due regard for his or her rights, safety and dignity*. Conversely, art. 15 of the ACTIP only refers to safety, completely excluding from its vision the victims' rights and dignity in the return operation. Also, the requirement that such a return should *preferably be voluntary* is completely missing from the ACTIP.

Prosecution The ACTIP provisions on criminalisation and law enforcement are embedded in Chapters II and V. Certain provisions are similar to the ones in the CoE Trafficking Convention. For example, art. 5 (1) and (2) of the ASEAN Convention we find criminalisation of trafficking, including any attempt or assistance in pursuing the offence, however, it does not mention criminalisation of acts on identity or travel documents, the use of services of a victim, or corporate liability³¹⁰. Though, the APA does require members to *ensure liability* to all alleged offenders *including liability of legal persons and entities*³¹¹. In our analysis we already mentioned the additional provisions contained in the ACTIP of articles 6, 7, 8, and 9. These provisions are important because such criminal activities tend to jeopardise legislative efforts within the region and, thus, States are obliged to take all appropriate measures to strengthen law enforcement and prosecute corruption, obstruction to justice, money laundering, and involvement in any organized criminal syndicate³¹². What else the ACTIP does not provide is the *ex parte* and *ex officio* applications, leaving criminal investigation, prosecution, and procedural law in the hands of the competent authority who shall be competently prepared and well-informed against trafficking and victims protection. For this purpose, they are trained through coordinated policies and actions of the government and other public agencies³¹³. However, following art. 16 (7) victims protection is only ensured to respect the integrity of the criminal justice process, as aforementioned. In addition, pursuant art. 10 (3) a State party shall establish jurisdiction where the alleged

³⁰⁷ Marija Jovanovic, *op. cit.*, p. 32. ASEAN Trafficking Convention, *op. cit.*, art. 16 (7).

³⁰⁸ ASEAN Trafficking Convention, *op. cit.*, art. 14 (7).

³⁰⁹ *Ivi*, art. 14 (8)

³¹⁰ Marija Jovanovic, *Comparison of Anti-Trafficking Legal Regimes and Actions in the Council of Europe and ASEAN: Realities, Frameworks and Possibilities for Collaboration*, CoE, Strasbourg, 2018, p. 35

³¹¹ ASEAN Trafficking Convention Plan of Action, *op. cit.* Section IV C (i), p. 8

³¹² *Ivi*, art. 16 (2)

³¹³ Marija Jovanovic, *op. cit.*, p. 35. This is equivalent to the provisions provided in the CoE Trafficking Convention (art. 16 (1), (4) and (6)).

offender is present within the borders and it cannot extradite her/him on the basis of her/his nationality³¹⁴. As Dr. Jovanovic has stated the ACTIP does not contain an explicit provision on penalties or the need for Parties to ensure effective, proportionate and dissuasive sanctions for trafficking offences, unlike art. 23 of the CoE Trafficking Convention³¹⁵. Still, art. 1 does mention the need to ensure “*just and effective punishment of traffickers*” as one of its main goals as well as make certain “*penalties are proportionate to the gravity of the committed offence*”³¹⁶. When it comes to aggravating circumstances, the ACTIP highlights the involvement of serious injury to the victim or another person, especially vulnerable individuals including those with physical or mental disability³¹⁷, when victims are endangered with life-threatening diseases such as HIV/AIDS or in case the offender had been previously convicted for the same or similar offence, and when it affects more than one victim³¹⁸. Another added value in the ACTIP is identification, traceability, and freezing of assets followed by confiscation³¹⁹. Money laundering is also addressed, when there is a situation where the assessed value of the criminal activity has been *intermingled* with property acquired lawfully³²⁰, being as well accountable to confiscation. It is evident that all income or other benefits derived from trafficking offences, as well as properties obtained unlawfully, are also subject to seizure and confiscation³²¹. Notably, bank secrecy rules are not excluded from disclosure or seizure of bank, financial or commercial records if it is requested by courts³²².

Prevention Chapter III of the ACTIP contains preventive measures against trafficking in three articles, i.e., to adopt comprehensive strategies, programmes and other relevant procedures and to protect trafficking victims from being re-victimised³²³. The phrase “*to endeavour to undertake*” is reinforced with the use of “*shall*” to define the obligation for members to face factors such as poverty, underdevelopment, and lack of equal opportunities causing persons, especially women and children to be *vulnerable to trafficking*³²⁴; also, with similar language we can find the obligation to discourage the demand side³²⁵. Similar to the CoE Trafficking Convention, the ACTIP recommends State parties to cooperate with NGOs when *appropriate*³²⁶ and also, chapter III of the ACTIP, includes an extensive provision in the areas of cooperation and prevention³²⁷, like for example, the need to discourage demand, reduce factors that make victims vulnerable

³¹⁴ *Ibid.*

³¹⁵ *Ibid.* See also CoE Trafficking Convention, *op. cit.*, art. 23 (1)

³¹⁶ ASEAN Trafficking Convention Plan of Action, *op. cit.* Section C (c).

³¹⁷ The CoE Trafficking Convention, instead, only defines children in art. 24

³¹⁸ ASEAN Trafficking convention, *op. cit.*, art. 5 (3)

³¹⁹ *Ivi*, art. 17 (2)

³²⁰ *Ivi*, art. 17 (4)

³²¹ *Ivi*, art. 17 (5)

³²² *Ivi*, art. 17 (6)

³²³ *Ivi*, art. 11

³²⁴ *Ivi*, art. 11 (4)

³²⁵ *Ivi*, art. 11(5)

³²⁶ *Ivi*, art. 11 (3)

³²⁷ *Ivi*, art. 12

to trafficking, offer research and information sharing, mass media campaigns or social activities, raise awareness, finance education and training agendas, enable legal migration, and promote trainings and technical cooperation³²⁸. To conclude with the prevention section, art. 13 contains provisions related to cross-border cooperation, control and validity of documents. In contrast to the strong language used to describe the obligation to conduct effective border control and controls on the issuance of identity and travel documents, when it comes to cross-border cooperation through direct communication and exchange of intelligence and information sharing, the text uses the phrase “*shall endeavour to*” as a form of suggestion³²⁹.

Partnerships Contained in Chapter VI of the ACTIP are international cooperation in criminal issues as well as mutual legal assistance³³⁰, extradition³³¹, law enforcement cooperation³³² and cooperation for procedures of confiscation and disposal of confiscated proceeds of crime and property³³³. To do so, each member State is allowed inclusive actions for “*mutual legal assistance in criminal investigations and prosecutions*³³⁴”. The comprehensive measures for the execution of art. 18 are delivered in a distinct document, the Treaty on Mutual Legal Assistance in Criminal Matters³³⁵. Besides, offences of the criminal action are extraditable in any extradition agreement between States parties. Whereas, in case there is no extradition treaty between two Parties to the ACTIP, the Convention may be considered the *legal basis for extradition*³³⁶. In addition, in absence of bilateral or multilateral agreements on cooperation between countries’ law enforcement agencies, the ACTIP may assist as a substitute legal basis for a joint law enforcement cooperation³³⁷. To further complement the ACTIP, the ASEAN Practitioner Guidelines was published in 2007, to provide information on cross-border cooperation between domestic law enforcement agencies through cooperation on inquiries, joint investigations, and information sharing. Even though the APA recognises the important role of NGOs in assisting victims of trafficking, cooperation with NGOs is not compulsory, on the contrary, parties can determine when such situation is “*appropriate*³³⁸” to their case.

³²⁸ Marija Jovanovic, *op. cit.*, p. 37

³²⁹ *Ibid.*

³³⁰ ASEAN Trafficking convention, *op. cit.*, art. 18

³³¹ *Ivi*, art. 19

³³² *Ivi*, art. 20

³³³ *Ivi*, art. 21 and art. 22. See also Marija Jovanovic, *op. cit.*, p. 38

³³⁴ *Ivi*, art. 18 (1)

³³⁵ Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries, Nov. 29, 2004, held in Kuala Lumpur, Malaysia. For a detailed analysis of this instrument, see ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases, 2010.

³³⁶ ASEAN Trafficking convention, *op. cit.*, art. 19 (2). ASEAN has yet to adopt a regional instrument on extradition, despite several deliberations.

³³⁷ *Ivi*, art. 20 (2)

³³⁸ *Ivi*, articles 11 (3), 14 (1) and (10)

2.4 Monitoring mechanism

The ACTIP does not have particular monitoring mechanism to oversee its implementation. However, ASEAN does have several sectoral bodies to undertake work relevant to anti-trafficking action such as the Senior Officials Meeting on Transnational Crime (SOMTC) Working Group on Trafficking in Persons who is the main body officially charged with supervising the implementation of the Convention and the APA who is in charge for the promotion, monitoring, and reporting to the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) regarding the current implementation of the ACTIP³³⁹. To support and assist the SOMTC with its mandate, the ASEAN Secretariat plays a fundamental role, however, there are no details of the method and procedures in performing such monitoring mechanism. Following art. 23 each Party is invited to “consider” establishing coordinated and operative structures that includes increasing cooperation for the investigation, prosecution, and conviction of traffickers and protection of victims. The fact that the Convention use the word “consider” limits the applicability and functionality of authorities and agencies involved in the combat against trafficking in persons, as noted by Piotrowicz³⁴⁰. The CoE Trafficking Convention, on the other hand, compels parties to adopt such measures as deemed essential to ensure effective coordination³⁴¹. Unfortunately, the weakness of the ACTIP monitoring mechanism directly reflects the ASEAN’s weak system of ensuring compliance and effective implementation of its decisions and agreements on a domestic level³⁴².

3. Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT)

In this section we are briefly going to introduce the role of COMMIT in addressing human trafficking in the Greater Mekong Sub-region. As in other regions of the globe, attention to trafficking issues in the Greater Mekong Subregion (GMS) started at the end of the 1990s, principally with a gender-based focus on women and children and their exploitation in the sex market. Through the establishment of COMMIT, as a sophisticated policy dialogue, States realised they could not tackle trafficking on their own. COMMIT is the structure for a cohesive and comprehensive anti-trafficking response to prosecute criminals responsible of the crime, to protect victims and provide repatriation and reintegration,³⁴³. The GMS includes six countries: Cambodia, China, the Lao PDR, Myanmar, Thailand and Vietnam. One of the major initiatives taken within the framework of COMMIT Process is the adoption of the *Memorandum of Understanding on cooperation against trafficking in persons in the Greater Mekong Subregion* (MoU) in Myanmar in October 2004. The MoU

³³⁹ *Ivi*, art. 24.

³⁴⁰ Such as the police, labour inspectorates, social workers, shelters for victims and prosecutors’ offices. Ryszard Piotrowicz, *ASEAN Takes on Trafficking in Human Beings*, Australian Law Journal 2017, vol. 91, no. 4, pp. 288.

³⁴¹ CoE Trafficking Convention, *op. cit.*, art. 29 (2)

³⁴² Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran, *Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in Asean Instruments*, Cambridge University Press, 2016. See also Marija Jovanovic, *Comparison of Anti-Trafficking Legal Regimes and Actions in the Council of Europe and ASEAN: Realities, Frameworks and Possibilities for Collaboration*, CoE, Strasbourg, 2018, p. 39

³⁴³ Susan Kneebon and Julie Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Subregion*, Routledge Taylor and Francis Group, New York, 2012, p.207

is the governments' recognition of trafficking caused by the deficiency of human security at national, regional, and international level. The MoU has 34 articles focused on the need for governments to collaborate with international organizations and NGOs in order to eradicate the exploitation of individuals. The COMMIT process is not a legal convention but more a series of multilateral agreements that bind signatory countries to multilateral action. In order for the MoU to work, the six governments developed a Sub-Regional Plan of Action (COMMIT SPA), intended to complement, develop, and support national responses as well as to coordinate government and NGOs anti-trafficking efforts and victim protection operations. Furthermore, the COMMIT process:

1. Recognises the vulnerability of marginalised populations;
2. Highlights the importance to strengthen mechanisms and law enforcement to better identify and assist victims of trafficking;
3. Stresses the important role of migration policy, including as well bilateral migration agreements;
4. Recognises the need to strengthen labour laws and monitor labour recruitment corporations;
5. The MoU is nationally and regionally-owned, it means that GMS countries are taking the lead in identifying the problem of trafficking in human beings by agreeing on strategies and activities;
6. It is portrayed by inclusion and participation³⁴⁴.

In summary, COMMIT is the first regional instrument trying to institutionalise a multisectoral approach to ensure that obligations and commitments, made in the MoU and the subsequent COMMIT SPA, are delivered into appropriate actions and in accordance with international norms and standards. The COMMIT MoU explicitly bases its definition on the UN Trafficking Protocol. Furthermore, COMMIT is compelled by the principles enshrined in the UDHR and in other human rights archives like the UN Convention on the Rights of the Child, the CEDAW, and the fundamental ILO Conventions³⁴⁵. The COMMIT process is supported and coordinated with the assistance of the UN Action for Cooperation against Trafficking in Persons (UN-ACT)³⁴⁶, a regional project managed by the UN Development Programme (UNDP), while, the UN Inter-Agency Project on Human Trafficking (UNIAP) serves as Secretariat³⁴⁷.

³⁴⁴ Susu Thatun, website, *Mekong sub-region committed to ending trafficking*, Forced Migration Review 25, available at <https://www.fmreview.org/peopletrafficking/thatun>, accessed 18/10/2018.

³⁴⁵ Marion Couldrey and Tim Morris, *Forced Migration Review People trafficking: upholding rights and understanding vulnerabilities*, Refugee Studies Centre in association with the Norwegian Refugee Council, 2006, p. 20

³⁴⁶ More information is provided on the official website at <http://un-act.org/>

³⁴⁷ Naparat Kranrattanasuit, *ASEAN and Human Trafficking Case Studies of Cambodia, Thailand and Vietnam*, Brill Nijhoff, Global Oriental, and Hoter Publishing, Leiden, 2014, p. 4

CHAPTER 3: A CLOSER PERSPECTIVE ON EAST-ASIAN COUNTRIES

Abstract: In this chapter we are going to analyse only some of the East-Asian countries: The People's Republic of China, Japan, the Republic of Korea, and the Democratic People's Republic of Korea. Indeed, these countries are different in many aspects both at political, economic, and social level, but all sharing one common feature, the trafficking on women and young girls. I have decided to consider these specific nations because trafficking in persons has been rampant in the East-Asian region, exposing tens of thousands of women to abuse and violence, however, if compared to other regions, trafficking in persons in East Asia does not present enough research-based surveys or has not been sufficiently investigated. Consequently, this resulted in quite limited available literatures and researched papers on the topic, in contrast to the number of publications on trafficking in South-East and South Asia, let alone Africa or Europe. In fact, only media reports newspapers, and the UN and other agencies' publications directly refer to East-Asian trafficking issue. This is relatively peculiar because, just to name a few examples, China has a massive issue related to bride trafficking or sexual exploitation; and even Japan has a large sex industry employing a significant number of Japanese and non-Japanese women, through the use of fraud, coercion, or deception. Therefore, this chapter is going to examine the general trends in human trafficking reported in East Asia from somehow disparate sources. It will attempt to investigate the prevailing forms of trafficking in each state and their government's legal response to combat human trafficking.

1. People's Republic of China

The People's Republic of China is a perfect case study because it has one of the highest volumes of human trafficking in the world, especially in the sex and brides' market, and also shows many of the causal roots and social deprivation that drive and sustain trafficking worldwide. According to the U.S Department of States China is a country of origin, transit, and destination for the trafficking of women, men, and children³⁴⁸ and in realising its annual TIP Report, has placed the PRC as one of the worst offenders of human trafficking³⁴⁹. Chinese women, men, and children are trafficked within China's borders mainly for sexual exploitation, forced marriage, forced begging, and forced labour in coal mines, factories, and brick kilns³⁵⁰. Other causes that led China in the lowest tier is the use of forced labour among drug addicts, ethnic minorities, and the imposed repatriation of North Koreans victims knowing that such returnees would face prison, forced labour, or even execution³⁵¹. As reported by the Global Slavery Index, by 2016 China has seen more than 3.8 million people living in situations of modern slavery within its own borders³⁵². The rapid economic rise over the past

³⁴⁸ U.S Department of State, *Trafficking in Persons Report June 2018*, p. 138

³⁴⁹ *Ibid.*

³⁵⁰ *ivi*, p. 141

³⁵¹ Gardiner Harris, *China Is Among Worst Human Trafficking Offenders, State Dept. Says*, The New York Times, 27 June 2017 <https://www.nytimes.com/2017/06/27/world/asia/china-human-trafficking.html> , accessed 21/10/2018

³⁵² Website, information available at <https://www.globallslaveryindex.org/2018/findings/country-studies/china/> , accessed 21/10/2018.

half century has led China to be the second largest economy³⁵³ as well as the second largest importer³⁵⁴ in the world, creating a continuing demand for cheap labourers. During 2016, cases of forced child labour were found in a garment factory in Changshu (Jiangsu Province), where minors were forced to work overtime and subjected to beating if they refused, also their passports and mobile phones were confiscated to prevent them from escaping³⁵⁵. The exploitation of forced labourers also occurred in several electronics facilities supplying major company such as Acer, Apple, HP, Sony, and many other brands³⁵⁶. Another exemplary case arose in May 2017 with the discovery of seven exploited Filipino women deceived by Chinese brokers and forced to work on farms, while instead they were promised marriages to local Chinese individuals and better lives³⁵⁷. The complexity of China's trafficking dynamics is connected to its labour migration from rural to urban areas, which can camouflage forced migratory flows into trafficking under the "supposed consent" on the part of the migrant or the irregular migration movement from inland provinces to neighbouring countries in the Asia-Pacific region for sexual exploitation under the guise of legitimate employment opportunities³⁵⁸. As reported in the U.S State Department, China has also drawn international attention for its State-imposed forced labour methods, known as *Láodòng Gǎizào* 劳动改造 (re-education or reform through labour RTL), a punitive system where individuals are subjected to extra-judicial detention involving forced labour, from which the State reportedly profited. Finally, in 2013 the National People's Congress ratified a decision to abolish RTL and by 2015 the government closed most RTL facilities; however, a 2017 report by the US-China Economic and Security Review Commission alleged that facilities are still operative and that the government only converted RTL facilities into state-sponsored drug rehabilitation centres or so called *Shōuróng Jiàoyù* 收容教育 "custody and education centres", where deprived of any charge or trial, people are sent to and alleged forced labour continues³⁵⁹. Due to the hidden nature and challenges of trafficking in persons in the PRC, the present study will not cover all the forms of trafficking, on the contrary, the aim of this section is to

³⁵³ Website, available at <https://www.focus-economics.com/blog/the-largest-economies-in-the-world> , accessed 21/10/2018.

³⁵⁴ Website, available at <http://www.visualcapitalist.com/visualizing-the-worlds-largest-importers-in-2017/> , accessed 21/10/2018

³⁵⁵ Chen Xiaoli, website, *Undercover Video Reveals Child Labor in Changshu*, ShanghaiDaily.com, 2016, available at <https://www.shine.cn/archive/viral/omg/Undercover-Video-Reveals-Child-Labor-in-Changshu/shdaily.shtml> , accessed 21/10/2018

³⁵⁶ Kate Hodal and Peter Bengtsen, website, *Chinese factory supplying major laptop brands accused of student labour abuses*, The Guardian, 2017, available at <https://www.theguardian.com/global-development/2017/oct/06/laptop-firms-accused-of-labour-abuses-against-chinese-students-sony-hp-acer> , accessed 21/10/2018.

³⁵⁷ ABS-CBN, website, *6 Chinese arrested for human trafficking*, 23 May 2017, available at: <http://news.abs-cbn.com/news/05/23/17/6-chinese-arrested-for-human-trafficking> , accessed 21/10/2018

³⁵⁸ United States Department of States' Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2010*, p. 112

³⁵⁹ Amnesty International, website, *China's 'Re-education Through Labour' camps: Replacing one system of repression with another?*, December 2013, available at <https://www.amnesty.org/en/latest/news/2013/12/china-s-re-education-through-labour-camps-replacing-one-system-repression-another/> , accessed 21/10/2018. See also Caijing Magazine Global Times, website, *Education without trial*, June 2014, available at <http://www.globaltimes.cn/content/863879.shtml> , accessed 21/10/2018

analyse and problematise women and young girls' situation and highlights the inequalities in the Chinese context that makes women and infant girls vulnerable to trafficking, centred on the gravity of the present-day situation starting with a brief history of human trafficking in the territory.

1.1 History of Human Trafficking Evolution in China

Prior to the establishment in 1949 of the PRC, according to Watson, China had “one of the largest and most comprehensive markets for the exchange of human beings in the world³⁶⁰”. Starting from the Qing Dynasty to the early twentieth century, the sale of people was a tolerated system to help families to dispose of unwanted children, borrow the reproductive or child-rearing services, or buy sons into their households³⁶¹. During that time, there were no organized traffickers, but the trade of persons was perpetuated by household heads who were the patriarchal decision markers in buying and selling their children, concubines, servants, wives and slaves³⁶². Infanticide and abandonment of females was morally accepted because girls were considered outsiders of the family, and this resulted in a skewed gender ratio that triggered the sale of women as concubines, slave or servants, infant daughters-in-law, wives, or prostitutes to meet the increased demand of single men (we will further develop the argument in the following section). Women could be procured from markets, whereas others were transferred from one family to another through an exchange of marriage price³⁶³. Even the sale of a child was legalised by the Qing Code through the sign of a “white contract” (drafted privately) or “red contract” (registered and stamped with the local magistrate’s red seal) to document the sale that specified the rights of both buyer and seller³⁶⁴. The statute of the Qing Code (大清律例, *Dà Qīng Lǜ Lì* 1644-1912) during the Qing Empire, forbade many forms of the sale of persons, but it also included provisions that allowed the practice to continue. To justify the selling of children, families and traffickers often used the excuse of starvation and that their motives were only benevolent towards that child, in which cases, they were acquitted by magistrates³⁶⁵. Following the research of Ransmejer, the Qing Code contained numerous laws to limit these practices:

- Statute 79 proscribed any person from selling stray children of unidentified origin into slavery³⁶⁶

³⁶⁰ James L. Watson, *Asian and African System of Slavery, “Transactions in People: The Chinese Market in Slaves, Servants, and Heirs”*, University of California Press, Berkeley and Los Angeles, 1980, p. 223.

³⁶¹ Johanna S. Ransmeier, *Sold People: Traffickers and Family Life in North China*, Harvard Press University, Cambridge Massachusetts, 2017, p. 2

³⁶² Rubie S. Watson, *Wives, Concubines and Maids: Servitude and Kinship in the Hong Kong Region, 1900-1940*. In Watson, Patricia E, editors. *Marriage and Inequality in Chinese Society*, Berkeley and Los Angeles, University of California Press, 1991. p. 231–255.

³⁶³ Johanna S. Ransmeier, *op. cit.*, p. 24

³⁶⁴ *ivi*, p. 57. See also James L. Watson, *op. cit.*, p. 234.

³⁶⁵ Johanna S. Ransmeier, *op. cit.*, p. 5

³⁶⁶ William C. Jones, Tianquan Cheng, and Yongling Jiang, English version, *The Great Qing Code*, Clarendon Press, Oxford, 1994, art. 79

- Statute 367 forbade any person from selling a wife by criminalising the sale of marriage through a dowry (*maixiu maixiu*) as well as the sale of prostitution (*maichang*)³⁶⁷
- Statute 275 prohibited abduction *lüe* and abduction for the purpose of selling (*lüemài*). Illegal also was selling commoners (*liáng rén* 良人) or wives to be forced into slavery or prostitutes and even the act of deceiving for the purpose of sale was outlawed (*lüè rén lüemài*)³⁶⁸

In addition:

- Statute 115 imposed the strokes of the heavy bamboo as form of punishment for a head of household if he arranged the marriage between a slave and a daughter of honourable birth³⁶⁹.

Before the transition from imperial to Republican the issue of “buying and selling human beings” (*mǎimài rén kǒu* 买卖人口) was first submitted as a memorial to the Throne in 1906 from Viceroy Zhou Fu³⁷⁰ asking the court to join the modern world by prohibiting human trafficking and adding that “*foreign nations look upon those that tolerated slavery as barbarous peoples*³⁷¹”. Three years later, another official delivered the same cause and requested the Throne to prohibit slavery on the basis that it was fundamentally incompatible with the government’s reform agenda. Censor Wu Wei Ping wrote:

*We are about to establish a constitutional regime throughout the Empire [...] It is inconsistent with good government that the poor and unfortunate, [...] should be bought and sold and allowed to sink into the degradation of slavery, to be oppressed and cruelly ill-treated and denied all human rights*³⁷².

Because both memorials dealt with the same issue, the Constitutional Commission worked on them jointly and agreed that slavery would only weaken and endanger the legitimacy of the government in the eyes of other countries if such practices were not prohibited³⁷³. The Constitutional Commission proposed ten regulations for the abolition of slavery and after the approval of the Emperor, the imperial edict of 1910 was promulgated to abolish slavery and realise the legal equality of persons in the territory. The edict criminalised the sale and purchase of human being including the sale of one’s self or children on account of poverty and nullified all legal contracts³⁷⁴. The shift to the Republican era from 1912 to 1949 was accompanied by the government willingness to cooperate with international community on a broad spectrum of transnational

³⁶⁷ *Ivi*, art. 367

³⁶⁸ *Ivi*, art. 275

³⁶⁹ *Ivi*, art. 115

³⁷⁰ Zhou Fu is a high-ranking official in the Qing bureaucracy who governed the three Provinces along the Yangtze River.

³⁷¹ E. T. Williams, *The Abolition of Slavery in the Chinese Empire*, 1910, p. 794 - 795

³⁷² The American Journal of International Law, *Report to the Throne of the Imperial Chinese Commission on Constitutional Government Recommending the Abolition of Slavery, together with the Imperial Rescript Approving the Report and Ten Regulations for its Enforcement*, Vol. 4, No. 4, Supplement: Official Documents, Cambridge University Press, 1910, p. 360-361. Also available at https://www.jstor.org/stable/2212089?seq=3#metadata_info_tab_contents, accessed 25/10/2018.

³⁷³ *Ivi*, p. 361-362

³⁷⁴ *M. J. Meijer, The Introduction of Modern Criminal Law in China*, ABC-CLIO, LLC, 1976

issues³⁷⁵. Although it was unable to ensure legislative implementation and enforcement, it did mark a starting point on the adoption of national legal reforms. For instance, during the early Republic, a revised version of the Qing Code was actually used as the provisional criminal code of China. Subsequently, legislative reforms took place after 1928, following the Nationalist Party's consolidation of control over most of China and establishment of a central government in Nanjing. Under the leadership of Chiang Kai-shek, the post-1928 Republican government realised how law could be a powerful tool for the creation of a strong and centralised state³⁷⁶. Between 1928 and 1935, Republican lawmakers issued, amended, and promulgated numerous laws amongst which can be found the basic codes establishing a new legal order in China, including the Civil Code of 1929 and 1930³⁷⁷; the Code of Civil Procedures of 1930 and the revised code of 1935³⁷⁸; the Criminal Code of 1928 and its revision in 1935³⁷⁹; the Code of Criminal Procedures of 1928 and the revised code of 1935³⁸⁰. The most fundamental legal reform was the full legal equality of all persons, particularly those pertained to gender relations, subsequently, an ideological departure from the Confucian view of social hierarchy based on positions, roles and gender³⁸¹. Finally, the Criminal Code of the Republican government criminalised, in art. 298, the trafficking of women by abduction for various purposes, such as forced marriage with another person or for lucrative gain and if carried "*with the intent that an indecent act may be committed against her or that carnal knowledge may be had of her*"³⁸². Although there were improved efforts to curtail the sale of human beings, brokers and local intermediaries were able to find new solutions to bypass the restrictive controls and perpetuate the supply of domestic, reproductive and sexual activities, while local courts

³⁷⁵ William C. Kirby, *The Internationalization of China: Foreign Relations at Home and Abroad in the Republican Era*, in Frederic Wakeman, Jr. & Richard Louis Edmonds, *Reappraising Republican China*, Oxford University Press, 2000, p. 179

³⁷⁶ Klaus Mühlhahn, *Criminal Justice in China: A History*, Harvard University Press, 2009, p. 62

³⁷⁷ State Council of the National Government of the Republic of China, *The Civil Code of the Republic of China: Book I on General Principles*, adopted on 10 May 1929, promulgated on 23 May 1929, entry into force on 10 October 1929. Other books of the civil law: *Book II on Obligations*; *Book III on Law of Things*; *Book IV on Family Law*; and *Book V on Succession* were promulgated separately between 1929 and 1930.

³⁷⁸ State Council of the National Government of the Republic of China, *The Code of Civil Procedure of the Republic of China*, promulgated on 26 December 1930, entry into force on 13 February 1931; revised code promulgated on 1 February 1935, entry into force on 1 July 1935.

³⁷⁹ State Council of the National Government of the Republic of China, *The Criminal Code of the Republic of China*, promulgated on 10 March 1928, entry into force on 1 September 1928; revised code promulgated on 1 January 1935, entry into force on 1 July 1935.

³⁸⁰ State Council of the National Government of the Republic of China, *The Code of Criminal Procedure of the Republic of China*, promulgated on 28 July 1928, entry into force on 1 September 1928; revised code promulgated on 1 January 1935, entry into force on 1 July 1935.

³⁸¹ The principle of full legal equality was affirmed in the following versions of the constitution of the Republican period. However, gender discrimination was not explicitly referenced until 1946, when art. 7 of the Constitution of the Republic of China, adopted on 25 December 1946, specifically prohibited distinction on the basis of sex, religion, race, class or party affiliation.

³⁸² Criminal code of the Republic of China, 1935, art. 298 (1) (2). While women obtained greater autonomy through these laws, there were also unintended legal lacunae, for instance, art. 298 of the Criminal Code of 1935 did not recognise any kind of selling of adult women that did not involve the use of force.

advocated leniency in the prosecution process³⁸³. The establishment of the Maoist era, from 1949 to 1977, saw a drastic decrease in the practice of trafficking thanks to the enforcement of the household registration system, the 1950 Marriage Law³⁸⁴ (*xīn hūnyīnfǎ* 新婚姻法), the closure of brothels, and the eradication of prostitution exponentially reduced women's vulnerability to brokers and significantly mitigated the trafficking practice. However, the post-Mao era from 1978 to the present day, saw a rise on trafficking due to the high demand for domestic, reproductive and sexual services; also, the introduction of the One-Child policy (OCP) resulted in a skewed sex ratio and a shortage of women reigniting incentives for trafficker. Families who had unregistered babies (black children *hēi háizi* 黑孩子) born outside of the OCP often sold them to traffickers for profit. The fuelling of trafficked victims' vulnerability is also embedded within the country's internal migration, which is strictly regulated by the *hùkǒu registration system* 户口 limiting migrants' access to governmental benefits, employment opportunities, and social or other services in the cities. Even if women successfully migrate from rural areas without the intervention of traffickers, they might face a second moment of vulnerability as they enter a market economy still attached to the traditional views of women and their role in society, limiting their access to labour markets. As we further proceed with the study, we are going to provide an analysis of the most recent domestic legal reforms adopted to combat trafficking in persons, namely 1979 Criminal Law and the 1997 Criminal Law.

1.2 Trafficking in women: a question of gender inequality and its effects

Human trafficking of women in China has become a lucrative business that is expanding due to several factors: the aggressive implementation of the OCP, a defective legal system, and the continuous persistence of cultural traditions devaluing women. This shows that the government are only enhancing the aspect of gender as a vulnerability factor for women through its policies and culture. Studies have shown also that both trafficking and prostitution are "*gendered systems*" as a consequence "*from structural inequality between women and men*", continuing by noting how "*men create the demand and women are the supply*"³⁸⁵. Even though the Chinese government is making efforts to comply with the minimum standards in the elimination of trafficking, it fails to adequately protect Chinese and foreign victims of trafficking. Even with its growing global awareness, the level of knowledge remains very low and increases the vulnerability of potential victims, particularly of female victims. The discussion of women and gender vulnerability in sex and bride trafficking

³⁸³ Johanna S. Ransmeier, *Sold People: Traffickers and Family Life in North China*, Harvard Press University, Cambridge Massachusetts, 2017, p. 173

³⁸⁴ 全国人民代表大会, Marriage Law of People's Republic of China 中华人民共和国婚姻法, art. 1 abolished "*the feudal marriage system based on the arbitrary and compulsory arrangements and supreme act of man over woman, and in the disregard of the interests of children*", while art. 2 specified prohibited practices under its reach. These included "*bigamy, concubinage, child betrothal, interference with the re-marriage of widows and the exaction of money or gifts in connection with marriage*". Through the adoption of the Marriage Law, women obtained the right to divorce. Available at http://www.npc.gov.cn/npc/lfzt/rlys/2014-10/24/content_1882723.htm, accessed 29/10/2018

³⁸⁵ Ramona Vijayarasa, *Sex, Slavery and the Trafficked Woman: Myths and Misconceptions about Trafficking and its Victims*, Ashgate Publishing Limited, 2015, p. 133

is, therefore, highly important. This is not only in terms of discussing how the gender relation structures in society is fuelling trafficking of women, but more importantly if gender inequality is causing increasing trafficking of women in China and transnationally. Thus, the effort of this section is to provide a broad knowledge of how gender inequality has affected the nature of trafficking in the Chinese context. Up until the twentieth century, it was assumed that women had to be subject to the authority of the males. Their inferiority is not only deeply embedded in the Chinese culture, but also it is reflected in the Five Classics of a moral acceptance in objectifying women³⁸⁶. The Confucian view of a woman was:

*inferior by nature, she was dark as the moon and changeable as water, jealous, narrow-minded and insinuating. She was indiscreet, unintelligent, and dominated by emotion.
Her beauty was a snare for the unwary male, the ruin of states*³⁸⁷.

Furthermore, Chinese culture, especially in rural areas, strongly prefer male children instead of daughters because of the belief that girls marry into the husband's family and take care of their husband's parents. China's feudal patriarchal and patrilineal system, constantly exposed women to subordination by their family's male-dominant figure³⁸⁸. The role of women during the Qing was especially marked by a rigid set of legal rules and social values, more so, if considering Confucian virtues such as filial piety, righteousness, and female chastity. Watson also argued that during the Qing and Republican period, Chinese women "*belonged to*" rather than "*belonged in*" the family because women were considered as property of the male-dominated household³⁸⁹. As mentioned before, women and young girls were sold into concubinage or prostitution, exchanged for money as domestic servants or promised brides-to-be for men. Only during the Republican period, gender equality became a central projection of a changing and progressive China that was no longer bound by its imperial past. One of the most prominent examples to affirm the principle of gender equality was the right to divorce; under the new civil law the Republican government both husband and wife has an equal right to initiate divorce proceedings³⁹⁰, this gave women greater legal status than they had been previously allowed, although it also created legal lacuna because did not recognise any kind of selling of adult women that did not involve the use of force, as in cases of abductions³⁹¹. Therefore, excluded from the scope of criminalisation of trafficking in women, during Republican China, the initial act of recruitment such as use of threats, coercion, fraud, deception, or even the abuse of power or of a position of vulnerability. Under

³⁸⁶ Canonical literary text ascribed to Confucius. Susan Tiefenbrun and Christie J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, Fordham International Law Journal, The Berkeley Electronic Press, Volume 32, Issue 3, art. 1, 2008, p. 734

³⁸⁷ Richard W. Guisso, *Thunder Over the Lake: The Five Classics and the Perception of Women in Early China*, in Richard W. Guisso & Stanley Johannesen, *Women in China: Current Directions in Historical Scholarship*, 1981, p. 59.

³⁸⁸ Susan Tiefenbrun and Christie J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, 32 Fordham Int'l L.J. 731, 2008, p. 5

³⁸⁹ James L. Watson, *Asian and African System of Slavery, "Transactions in People: The Chinese Market in Slaves, Servants, and Heirs"*, University of California Press, Berkeley and Los Angeles, 1980, p. 227

³⁹⁰ The Civil Code of the Republic of China, Book IV on Family Law, art. 1052.

³⁹¹ Criminal Code 1935, *op. cit.*, art. 298

Mao Zedong ruling (1949-1978) to alleviate women from the male-dominant power, they were granted the legal right to vote, employment, marriage, education, and inheritance rights. Even the problem of prostitution under the Communism notably decreased³⁹². Nevertheless, with the transition from a planned economy under Communism to a free market economy in 1979 under Deng Xiaoping regrettably brought a setback to women's equality, the re-emergence of prostitution and the abduction of women for sexual exploitation and forced marriages³⁹³. It was also through the introduction of the OCP that China further experienced an increase of demographic crises that arguably rose to the level of *gendercide* (a systematic killing of a group, in this case of women, based on their gender), decimation of the female population in China, and abandonment of infant girls to comply with a governmental policy. Even after the institutionalisation of the Two-Child Policy in 1 January 2016, the sex-selective abortion of baby girls, especially second daughters, did not come to an end. For example, it was reported a case in 2017 in which a Chinese woman from Anhui Province died after her husband pressured her into aborting four pregnancies in a year, because of his desire for a male child³⁹⁴. We can clearly witness how the role of the restrictive birth planning regulations, under the Chinese government, violate Chinese women's reproductive rights under art. 16 of CEDAW which calls for States parties to the Convention to take all necessary actions to guarantee, following the principle of gender equality between women and men, “*same rights to decide freely and responsibly on the number and spacing of their children*”³⁹⁵. At the present, according to a report by World Economic Forum, China ranked 100th out of 144 countries for gender parity in 2017³⁹⁶.

1.3 Forced marriage and bride trafficking

Generally speaking, bride trafficking appears when social practices or political policies generates a scarcity in women, insufficient to the number of men and so, bride trafficking fills that void. In this particular circumstance, the gender imbalance in China has generated a high demand in brides for Chinese men. In 1979, the Chinese government implemented the OCP (*dúshēng zǐnǚ zhèngcè* 独生子女政策) to keep under control its population expansion. Couples who fail to comply with the policy regularly face demotion or loss of jobs, extreme fines, loss of benefits, or access to social services. At times, even homes and personal property might be demolished or confiscated for unpaid fines. So, to meet the standards of the OCP and to ensure the desired baby boy, countless of Chinese families have committed sex-selective abortions,

³⁹² Hong Ju et al., *Female Criminal Victimization and Criminal Justice Response in China*, British Justice Criminology, 2006, p. 859

³⁹³ *Ibid.*

³⁹⁴ Reggie Littlejohn, website, *China's One (Now Two) Child Policy Turns 37; Chinese Woman Dies After Husband Pressures Her to Abort Four Girls in One Year*, Women's Rights without Frontier, September 2017, available at <http://www.womensrightswithoutfrontiers.org/blog/chinas-one-now-two-child-policy-turns-37-chinese-woman-dies-after-husband-pressures-her-to-abort-four-girls-in-one-year/>, accessed 01/11/2018

³⁹⁵ Convention on the Elimination of All Forms of Discrimination against Women, 18th December 1979, G.A. Res. 34/180, 34 UN GAOR, Supplement no. 46, U.N. Doc A/34/46, 1979, art. 16

³⁹⁶ Human Rights Watch, *World Report 2018*, p. 146

infanticide of their baby girls, non-registration of the child, and their abandonment or sale, generating a scarcity of females³⁹⁷. It was reported cases in which in the rural Yunnan province, rather than just abandon their babies, many women drown or even murder their girl child or sell them on the black market to smugglers. Babies are, then, sold to wealthier or childless parents in eastern China who don't want to wait for the adoption system or rural farmers to help with the farm and the housework. The traditional male-child preference and the birth limitation policy skewed a sex ratio of 117 boys to 100 girls in China fuelling the prostitution demand and the demand for foreign women as brides for Chinese single men, especially of those living in rural areas³⁹⁸. Due to the increased migration of women from villages to more developed coastal areas of eastern China, rural men had no other choice but to resort in purchasing a trafficked bride, and some girls are even raised in remote villages to be child brides for farmers³⁹⁹. Research showed that most of the trafficked victims are from Henan, Anhui, Hunan, Sichuan, Guizhou, and Yunnan provinces⁴⁰⁰ and they are sold into forced marriages in Zhejiang, Shandong, Jiangsu, and Inner Mongolia. According to the 2017 Report of the Congressional-Executive Commission on China⁴⁰¹ at risk of being sold into forced marriages and sexual exploitation in China are also the women from other countries such as Cambodia, Myanmar, Nepal, Vietnam, Laos, Mongolia, Russia, North Korea as well as countries in Africa and the Americas⁴⁰². For example, in 2015, the Cambodian government rescued 85 trafficked brides return to their country and they are just few of the thousands still imprisoned in this illegal market. As stated by Phil Robertson, deputy director of Human Rights Watch's Asia division, "for every woman who escapes her captivity in China and returns to Cambodia, there are dozens more that never make it out"⁴⁰³. Another case occurred in 2016 when authorities in eastern China confirmed that a pregnant 12-year-old girl had been abducted from Vietnam and sold as a bride-to-be to an

³⁹⁷ Susan Tiefenbrun and Christie J. Edwards, *Gendecide and the Cultural Context of Sex Trafficking in China*, Fordham International Law Journal, The Berkeley Electronic Press, Volume 32, Issue 3, art. 1, 2008, p. 732

³⁹⁸ Reggie Littlejohn, website, *World Day Against Trafficking in Persons: Gendecide and Sexual Slavery in China*, Women's rights without Frontiers 女权无疆界, July 2018, available at <https://www.womensrightswithoutfrontiers.org/blog/world-day-against-trafficking-in-persons-gendecide-and-sexual-slavery-in-china/>, accessed 01/11/2018. See also U.S TIP Report 2018, *op. cit.*, p. 142

³⁹⁹ Elisabeth Rosenthal, website, *Bias for Boys Leads to Sale of Baby Girls in China*, The New York Times, July 2003, available at <https://www.nytimes.com/2003/07/20/world/bias-for-boys-leads-to-sale-of-baby-girls-in-china.html>, accessed 01/11/2018

⁴⁰⁰ U.S Department of State, Trafficking Report 2008

⁴⁰¹ Congressional-Executive Commission on China 2017 Annual Report, One Hundred Fifteenth Congress First Session, U.S. Government Publishing Office Washington, October 2017. Available at <https://www.cecc.gov/publications/annual-reports/2017-annual-report>, accessed 01/11/2018

⁴⁰² Madeline Fetterly, website, *Sex Trafficking and China's One Child Policy Among the consequences of China's one child policy: a growing market for trafficked women*, The Diplomat, November 2014, available at <https://thediplomat.com/2014/11/sex-trafficking-and-chinas-one-child-policy/>, accessed 01/11/2018. See also Congressional-Executive Commission on China, *Annual Report 2018*, One Hundred Fifteenth Congress Second Session, October 2018, U.S. Government Publishing Office, p. 178

⁴⁰³ Sen David, website, *Maids, bride return after abuse abroad*, The Phnom Pehn Post, November 2015, available at <https://www.phnompenhpost.com/national/maids-bride-return-after-abuse-abroad>, accessed 01/11/2018

older man by a woman⁴⁰⁴. While in 2017, it was reported that the 17-year-old May Khine Oo after being drugged on a train by a couple was sold twice to forced marriage in China during the next 13 years. She managed to escape after contacting a student group via the Chinese app messaging service, leaving her two children behind⁴⁰⁵. According to the Women's Rights without Frontier⁴⁰⁶ China approximately estimates a number of 30 to 40 million "bare branches⁴⁰⁷" and the pressure and expectation of the community for men to get a wife has not helped combating bride trafficking. In order to marry a woman, the matter of costs has become an obstacle, in fact, Chinese men usually pay an expensive traditional bride price for local women, similar to a dowry. However, when men cannot afford it, they turn to traffickers to purchase kidnapped brides from other areas because is a cheaper solution in the "marriage squeeze⁴⁰⁸". What is interesting and contradicting at the same time, is that in spite of the high demand for women in rural areas, there is a common practice of rural families to give away their baby girls, creating a vicious circle of gender imbalance in many parts of China. The situation of bride trafficking demonstrates that the patriarchal Confucian structures are prevalent and still a strong influence on Chinese society behaviour that exacerbate gender imbalance and increase trafficking in women and young girls.

1.4 Forced sexual exploitation and the sex industry

The trafficking in women for sexual exploitation (*guǎimài fùnǚ* 拐卖妇女) and in the sex industry emerged in the wake of economic reforms. During the Mao era, prostitutes were sent to labour camps for education. In 1958, the Chinese Communist Party (CCP) proudly declared to the world that prostitution had been eradicated, and this success was a symbol of China's transformation into a modern nation⁴⁰⁹. However, after

⁴⁰⁴ Jane Li, website, *Pregnant 12-year-old confirmed by Chinese authorities to have been abducted from Vietnam*, Sotuh China Morning Post, October 2016, article available at <https://www.scmp.com/news/china/society/article/2027054/pregnant-12-year-old-confirmed-chinese-authorities-have-been>, accessed 01/11/2018

⁴⁰⁵ South China Morning Post, website, *This Myanmar woman escaped a life of forced marriages in China and left two children behind Trafficked to China to marry, a Myanmar woman hopes to save others from same fate*, August 2017, article available at <https://www.scmp.com/news/asia/southeast-asia/article/2108092/myanmar-woman-escaped-life-forced-marriages-china-and-left>, accessed 01/11/2018.

⁴⁰⁶ Women's Rights Without Frontiers is an international coalition of individuals and organizations standing together to progressively and completely eradicate forced abortion and sexual slavery in China. Their mission consists of raising public awareness regarding the coercive enforcement of China's OCP and its connection with trafficking in the Asian region, and of other human rights. Their goal is to achieve freedom, justice and women's rights by exposing violations of women's rights to the media and the public, both nationally and internationally, and give assistance to victims of trafficking. More information available at <https://www.womensrightswithoutfrontiers.org/index.php>, accessed 01/11/2018

⁴⁰⁷ Bare branches *guāng gun-er* 光棍儿 refer to young adult males who will never marry because they cannot find spouses and, therefore, being unable to reproduce and carry on the family line. Bare branches tend to share similar characteristics such as belonging to the lowest socioeconomic class, being underemployed or unemployed, and they live with other bare branches, creating a distinctive bachelor subculture.

⁴⁰⁸ IOM, June JH Lee, *Human Trafficking in East Asia: Current Trends, Data Collection, and Knowledge Gaps*, Data and research on human trafficking: A global survey, Offprint of the Special Issue of International Migration Vol. 43 (1/2) 2005, IOM, Geneva, p. 177

⁴⁰⁹ Tiantian Zheng, *Sex Trafficking, Human Rights and Social Justice*, Routledge Taylor & Francis Group, New York, 2010, p. 85

1978, the intensification of internal migration precipitated the rise in prostitution and the sex market. Not surprisingly, most of the victims come from disillusioned and vulnerable circumstances. Once their targets from neighbouring countries reach the destination country, the traffickers take away their passport or any other identity document to impede victims from running away. Fear through the use of threats and violence, rape, and threats against family members are other coercive methods to make victims submissive and fearful. These tactics consent traffickers to deploy these victims to meet the sexual demand and the outcome is them engaging in underground work such street prostitution, brothels, or being sold as involuntary brides. Since the economic reform of 1978, brothels have been operating in massage parlours, hair or beauty salons, and nightclub/KTV lounges. Visitors to these places are mainly middle-aged businessmen, male government officials, entrepreneurs, policemen, and foreign investors. Street prostitution and brothels only differ in location and in the process used to attract customers. With street prostitution, women “work” on the streets until a customer approach them. By contrast, brothels are easier access for customers as women are restricted in one area. It is confirmed that every year numerous cases of North Korean women rely on brokers to facilitate their travel in the territory, only to end up sold into a Chinese household or forced into the sex work⁴¹⁰. The UN Commission of Inquiry Report examined cases of North Korean women trafficked into forced marriages or sexually exploitation by their presumably husbands or other associates⁴¹¹. Moreover, studies also found Chinese children, including the “*left-behind children*” (those in care of family relatives in rural villages), and girls from Russia, Mongolia, and Vietnam trafficked into exploitative conditions and forced marriage⁴¹². China has adopted an abolitionist policy stance that deems prostitution a form of violence against women, in fact over the past decades, China has published several laws to ban prostitution and prosecute the third party involved. These legislative policies rely on the belief that no women would choose prostitution voluntarily because it strips of their “natural” and legal rights. Therefore, the extant trafficking literature and Chinese anti-trafficking law classify all women forced in prostitution as trafficked victims. These series of laws include⁴¹³:

1. The first Criminal Law adopted in 1979⁴¹⁴

⁴¹⁰ Human Rights Council, *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, Twenty-fifth session, A/HRC/25/CRP.1, February 2014, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/108/71/PDF/G1410871.pdf?OpenElement> accessed 03/11/2018

⁴¹¹ Tiantian Zheng, *op. cit.*, p. 138

⁴¹² ECPAT, *Global Study on Sexual Exploitation of Children in Travel and Tourism Country-Specific Report China 2015*, executive summary. Available at <http://www.ecpat.org/wp-content/uploads/2016/10/3.-SECTT-CHINA.pdf> , accessed 03/11/2018

⁴¹³ Susan Dewey, Tiantian Zheng, Treena Orchard, *Sex Workers and Criminalization in North America and China: Ethical and Legal Issues in Exclusionary Regimes*, Springer, New York, 2016, p. 9

⁴¹⁴ Fifth National People's Congress (Second Session), Criminal Law of the People's Republic of China 中华人民共和国刑法 1979 年 (the “1979 Criminal Law”), adopted on 1 July 1979 and came into effect on 1 January 1980.

2. the 1983 Decision of the Standing Committee of the National People's Congress on Severely Punishing Criminals Who Gravely Endanger Public Security (the 1983 Decision)⁴¹⁵
3. the 1991 Decision on Strictly Forbidding the Selling and Buying of Sex⁴¹⁶
4. the 1991 Decision on the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women and Children⁴¹⁷
5. the 1992 Law on Protecting the Rights and Interests of Women (Women's Law)⁴¹⁸
6. the Revised Criminal Law of 1997
7. the 1999 Entertainment Regulations⁴¹⁹.

These provisions aim to forbid syndicates or third parties from providing prostitution in women, or any attempt to coordinate and partake in felonious behaviours with prostitutes⁴²⁰. Unfortunately, even if we assume these are comprehensive legal strategies, there are several challenges weakening the effectiveness of these legal obligations. By far, the most prevalent quandary in China, that increases trafficking in women both at transnational and national level, is corruption (*tānwū fǔbài* 贪污腐败). Like in other countries, corruption and complicity among states' officials have eased trafficking operations inside the nation. For example, Chinese media reported in July 2012 the involvement of local government officials and businessmen in the kidnapping and commercial sexual exploitation of eight girls under the age of 14⁴²¹.

1.5 Response to trafficking in persons and Domestic Law enforcement

In the last decade, the government has taken measures and responsibility to strengthen women's rights such as the implementation of the *China National Plan of Action on Combating Human Trafficking in Women and*

⁴¹⁵ Standing Committee of the Sixth National People's Congress, Decision of the Standing Committee of the National People's Congress on Severely Punishing Criminals Who Gravely Endanger Public Security 人民代表大会常务委 员会关于严惩严重危害社会治安的犯罪分子的决定 (the 1983 Decision), promulgated and entered into force on 2nd September 1983. It has since been annulled by the passage of China's revised Criminal Law in 1997.

⁴¹⁶ Min Liu, *Migration, Prostitution and Human Trafficking: The Voice of Chinese Women*, Transaction Publishers, New Jersey, 2011, p. 177

⁴¹⁷ Congressional Executive Commission on China, 全国人民代表大会常务委 员会关于严惩拐卖、绑架妇女、儿童 的犯罪分子的决定, 1991. Available at <https://www.cecc.gov/resources/legal-provisions/decision-regarding-the-severe-punishment-of-criminals-who-abduct-and>

⁴¹⁸ Fifth Session of the Seventh National People's Congress, 1992, art. 2 states "The state shall protect the special rights and interests enjoyed by women according to law, and gradually perfect its social security system with respect to women. Discrimination against, maltreatment of, or cruel treatment in any manner causing injury even death of women shall be prohibited". While art. 8 of this document also has the state guaranteeing that women enjoy equal political rights with men. Available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383859.htm

⁴¹⁹ Elaine Jeffreys, *Prostitution Scandals in China: Policing, Media and Society*, Routledge Taylor & Francis Group, New York, 2012, p. 26

⁴²⁰ ⁴²⁰ Tiantian Zheng, *Sex Trafficking, Human Rights and Social Justice*, Routledge Taylor & Francis Group, New York, 2010, p. 89

⁴²¹ U.S Department of State, *Trafficking in Persons Report 2013*, available at <https://www.state.gov/j/tip/rls/tiprpt/countries/2013/215439.htm> , accessed 04/11/2018

*Children 2008-2012*⁴²² (中国反对拐卖妇女儿童行动计划 2008-2012年). However, due to lack of concrete evidence, we cannot estimate whether it was implemented or not and if it had any effect at all. In order for the State Council to take additional steps to bring government efforts into compliance with international standards, in January 2013 it issued a revised version of its predecessor, the *China Action Plan to Combat Trafficking in Persons 2013-2020*⁴²³ (中国反对拐卖人口行动计划 2013-2020年). The Action Plan basically calls the government to strengthen international cooperation⁴²⁴; improve anti-trafficking laws, regulations, and policy systems⁴²⁵; raise anti-trafficking funds through multiple channels⁴²⁶; and increased efforts in prevention⁴²⁷ and protection⁴²⁸. To date, the Ministry of Public Security (MPS) maintains directives on anti-trafficking interagency process and guides the implementation of the National Action Plan on Combatting Human Trafficking. Although, it did not report the amount of anti-trafficking funding activities in maintenance of the action plan, an approximate assessment was reported in 2016 to be more than 55 million RMB (\$8.5 million)⁴²⁹. As previously anticipated, the only available legislative measures provided by the Chinese government are the 1979 Criminal Law and the 1997 Criminal Law, a revised version of the former.

a. Criminal law of 1979

In July 1979, the National People's Congress, China's highest legislative body, adopted the Criminal Law of the PRC⁴³⁰ (the "1979 Criminal Law"). Finally, after a thirty-years absence of a statutory mechanism to specify criminal conducts and equivalent punishments by the state, the offense of trafficking in persons first appeared in art. 141 of the 1979 Criminal Law, which sentenced, whoever engaged in abduction for the purposes of trafficking, for a fixed-term imprisonment of 5 years, while for *serious case*, the offender could be sentenced for more than 5 years⁴³¹ (拐卖人口的, 处五年以下有期徒刑; 情节严重的, 处五年以上

⁴²² The Central People's Government of the People's Republic of China 中华人民共和国中央人民政府, China National Plan of Action on Combating Human Trafficking in Women and Children 2008-2012 中国反对拐卖妇女儿童行动计划 2008-2012 年, 2007, available at http://www.gov.cn/zwggk/2007-12/20/content_839479.htm, accessed 05/11/2018. The English version is available on the UN-ACT website at <http://un-act.org/publication/china-national-plan-of-action-on-combating-trafficking-in-women-and-children-2008-2012/>, accessed 05/11/2018

⁴²³ The Central People's Government of the People's Republic of China 中华人民共和国中央人民政府, China Action Plan to Combat Trafficking in Persons 2013-2020 中国反对拐卖人口行动计划 2013-2020 年, 2013, available at http://www.gov.cn/zwggk/2013-03/08/content_2349019.htm, accessed 05/11/2018

⁴²⁴ *ivi*, para 2 (6.2)

⁴²⁵ *ivi*, para 2 (4)

⁴²⁶ *ivi*, para 3 (2)

⁴²⁷ *ivi*, para 2 (5)

⁴²⁸ *ivi*, para 2 (2)

⁴²⁹ U.S Trafficking Report 2018, *op. cit.*

⁴³⁰ Fifth National People's Congress (Second Session), Criminal Law of the People's Republic of China 中华人民共和国刑法 1979 年 (the "1979 Criminal Law"), adopted on 1 July 1979 and came into effect on 1 January 1980.

⁴³¹ 全国人民代表大会, 中华人民共和国刑法, 1979 年 7 月 1 日第五届全国人民代表大会第二次会议通过 1979 年 7 月 6 日全国人民代表大会常务委员会委员长令第五号公布 自 1980 年 1 月 1 日起施行. Available at http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4379.htm. The English translation is available at http://www.opbw.org/nat_imp/leg_reg/China/CRIMINAL_LAW.pdf, accessed 07/11/2018

有期徒刑)。However, as we can see, the article fails to provide a definition of the offense of trafficking in human beings and the criteria used to determine serious circumstances. Besides, the 1979 Criminal Law did not include forced prostitution as competence of art. 141 since it was not gender specific and also because art. 140 already targeted the perpetrators who forced women into prostitution. On the same subject, art. 169 criminalised the offenses of luring or sheltering women in prostitution for the purpose of profit, but it is unclear whether it applied to all cases of prostitution or only in cases of forced prostitution. In addition, unlike art. 140 and art. 141 categorised under Chapter 4 “*on offenses of infringing on the personal or democratic rights of the citizens*”, art. 169 approaches prostitution more as a problem of obstructing the administration of public order rather than the deprivation of personal liberties as in cases of forced prostitution. Translation further generated confusion on the interpretation of art. 140 and art. 141 on the traffic in human beings. Whereas, the official English translation of the 1979 Criminal Law enacted the offense of “*abduction for purposes of trafficking in human beings*”, the original Chinese text *guǎimài rénkǒu* 拐卖人口 represented a much more restricted scope of criminal activity limited to the act of abduction, sale of individuals and to the specific exploitation of women for forced prostitution⁴³². On the basis of the two provisions, the concept of criminal responsibility focused on the offenses committed: the abduction and sale of trafficked victims in art. 141 during the earlier stages of trafficking would be considered separately from the subsequent role played by other individuals in the exploitation of victims of art. 140. Therefore, under art. 140, the criminal activity by pimps or brothel-owners in forcing women into prostitution would be considered distinctly and sanctioned differently from those who initiated abduction or sale of the victim. Whereas, art. 141 prescribed the penalty of imprisonment of five years or less for perpetrators of human trafficking, with the exception of serious cases, those who forced women to engage in prostitution could be imprisoned from three to ten years. This provision created ambiguity because a trafficker who abducts and sells a woman could be treated more leniently by the law by claiming to have no responsibility in her resultant situation, even if it was reasonable to believe that forced prostitution was the final result of her sale and transfer.

b. Criminal law of 1997

In 1997, China’s criminal law was significantly revised to provide wider coverage of crimes through the expansion from 192 to 452 articles in the criminal law. The 1997 revised Criminal Law sought to improve many of the limited definition of trafficking and criminalise more associated offenses, such as obstructing the rescue of victims⁴³³. The revisions also sanctioned more stringent punishments and specified what situations constituted serious crimes enough to increase penalties. The most significant article dealing with human

⁴³² *Guǎimài rénkǒu* [拐卖人口] only recognises the abduction, kidnapping and sale of the victims as actions of trafficking, whereas as we know, the international standard is actually much more expansive by including other actions such as transporting, transferring, harbouring and receipt of persons in the definition for trafficking

⁴³³ Criminal Law of the People's Republic of China, adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on 14th March 1997, art. 242. Available at <https://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm> , accessed 09/11/2018

trafficking can be found in art. 240 which states “*by abducting and trafficking in a woman or child is meant any of the following acts: abducting, kidnapping, buying, trafficking in, fetching, sending, or transferring a woman or child, for the purpose of selling the victim*”. In contrast to the gender-neutral scope of art. 141 of the 1979 Criminal Law, the present definition excludes adult male victims from its scope. Additionally, compared to the 1979 Criminal Law, the statutory penalties are more stringent and may also include life imprisonment and the death penalty for serious crimes identifiable according to the status of the defendant in a criminal trafficking gang; the number of victims trafficked; the means used in the kidnapping; the manner in which a trafficked baby or infant was acquired; and extent of the injury caused⁴³⁴. Other factors also involve whether sexual assault was committed; if the victim was sold abroad; or if the trafficked woman was forced or enticed into prostitution, either directly or indirectly, by the offender⁴³⁵. On the other hand, although the PRC Criminal Law prohibits human trafficking its provisions do not prohibit fraudulent or coerced commercial sexual exploitation, nor do they prohibit all forms of trafficking, such as debt bondage⁴³⁶. In this respect, the PRC Criminal Law has a broader definition, for example, unlike the UN Trafficking Protocol, the purchase or abduction of children and its subsequent sale, the end purpose of these actions are not indicated⁴³⁷. Moreover, China has yet to meet the obligations to criminalise, *at the minimum*, the full range of demeanour of trafficking covered by the international definition. The revised 1997 Criminal Law distinguishes criminal liability for the acts of selling and buying a trafficked victim, where each carries a different punitive sanction. Art. 240 condemns the act of selling a trafficked woman or child calling for a minimum sentence of five to ten years of imprisonment. In contrast, art. 241 on the purchase of an abducted woman or child only prescribes a sentence of “*fixed-term imprisonment of not more than three years, criminal detention or public surveillance*”. It is quite vague what legal base supports the reduced sentence for a buyer vs. a seller of a trafficked woman or child, especially since both actions are required for the transaction and the exchange of person to take place. In other words, if the buyer of a trafficked woman or child under art. 241 resells the victim after purchase, then, the defendant can be prosecuted on the basis of art. 240 for abduction and trafficking *for the purpose of selling* the victim. Per contra, such interpretation is quite challenging, not only because the action of buying a trafficked victim permits lighter sanctions than the act of selling, but also because it creates possible openings for the prosecution of offenders “*to take advantage of the vagaries*” of

⁴³⁴ *ivi*, arts. 240 (1), 240 (2), 240 (5), 240 (6,) and 240 (7).

⁴³⁵ *ivi*, arts. 240 (3), 240 (8) and 240 (4)

⁴³⁶ PRC Criminal Law [中华人民共和国刑法 1997 年 *Zhōnghuá rénmín gònghéguó xíngfǎ*], passed 1 July 79, amended 14 March 97, effective 1 October 97, amended 25 December 99, 31 August 01, 29 December 01, 28 December 02, 28 February 05, 29 June 06, 28 February 09, 25 February 11, arts. 240(4), 244, 358(3).

⁴³⁷ PRC Criminal Law [*Zhōnghuá rénmín gònghéguó xíngfǎ* 中华人民共和国刑法], passed 1 July 79, amended 14 March 97, effective 1 October 97, amended 25 December 99, 31 August 01, 29 December 01, 28 December 02, 28 February 05, 29 June 06, 28 February 09, 25 February 11, art. 240. The PRC Criminal Law defines trafficking as “*abducting, kidnapping, buying, trafficking in, fetching, sending, or transferring a woman or child, for the purpose of selling the victim.*”

the law by claiming to have had no prior awareness of the status of the trafficked victim⁴³⁸. Other law enforcements are art. 358 that criminalises forced prostitution with penalties from five to ten years imprisonment; art. 359 punishes whoever harbour, seduce, or introduce others into prostitution by imposing a maximum of five years imprisonment and a fine; while a stringent penalty is described to the alleged offender if he seduces girls younger than 14 years of age into prostitution; and art. 244 convicts with penalties from three to ten years detention, whoever forces a person “to work by violence, threat or restriction of personal freedom” and any action involving the recruitment, conveyance, and assistance⁴³⁹. The precise number of investigations, prosecutions, and convictions cases are still undefined, even with the statistics of the State legislative enforcement data⁴⁴⁰. However, studies showed that prosecution did not occur under section 240 of the criminal code, but, instead, were applied criteria of art. 358, in particular cases involving sexual exploitation⁴⁴¹. The State adopted law enforcement cooperation with foreign governments to investigate cases of trafficking in Chinese citizens in the USA, Africa, and Europe⁴⁴²; however, in some instances, Chinese authorities tried to extradite the victims of trafficking as criminals, viz. in Europe⁴⁴³. The Chinese law enforcement authority also expanded its consultative partnerships with Laos and to address forced and fraudulent marriage of their citizens to Chinese individuals. To maintain its efforts to prevent trafficking, the Chinese government donated funds to television shows, social media, and distributed posters and other materials to public and community centres to raise awareness of the risks of trafficking, especially among vulnerable rural communities⁴⁴⁴.

2. Japan

Japan is another valuable example of human trafficking as it involves men, women, and children from Northeast Asia, Southeast Asia, South Asia, South America, and Africa in the form of forced labour, exploitation, and sex trafficking. Japan is also known to be a destination, source, and transit country⁴⁴⁵. The tolerance of organized crime in Japan, *yakuza* or *bōryokudan*, leads to opportunities for vulnerable people to be targeted and exploited in its lucrative and rich sex industry. As in the case of trafficking of women and girls in China, both foreign and Japanese women have been subjected to objectification since ancient times. However, it was not until the late 1980s and early 1990s, when the media started to raise the issue of criminal

⁴³⁸ Gracie Ming Zhao, Challenging Traditions: Human Rights and Trafficking of Women in China, 6 J. L. & Soc. Challenges 167, 182 (2004).

⁴³⁹ U.S Trafficking Report 2018, *op. cit.*, p. 139

⁴⁴⁰ U.S Trafficking Report 2017, *op. cit.*, p. 126

⁴⁴¹ U.S Trafficking Report 2018, *op. cit.*, p. 139

⁴⁴² *Ivi*, p. 140

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Ivi*, p. 247

cases involving women, that the phenomenon of human trafficking in Japan became visible⁴⁴⁶. Incidents of human rights being violated were frequent with foreign women, such as Filipinos and Thais being forced into prostitution and serving customers against their will. The Japanese government classified human trafficking under the *transnational threat* at least until 2004 as a parallel to illegal immigration (so a problem originating outside of Japan and in less developed countries), not even connected to *transnational organized crime*. It was only in response to the growing concerns and criticisms from international and local communities that the Japanese government took serious measures in order to prevent and eliminate trafficking. In 2017, a World Economic Forum survey placed Japan as the 114th worst-performing country out of 144 countries when it comes to gender equality. On this respect, there are still few women in leadership positions across the government, the public and private sectors. Japanese women and girls regularly suffer sexual violence and discrimination in every aspect of life, especially in the working environment, leading them to the vulnerability of traffickers, and this is rarely brought to light despite the current global movement for empowerment⁴⁴⁷. To date, Japan has finally acceded the UN Convention against Transnational Organized Crime and the UN Trafficking Protocol.

2.1 Japanese history of human trafficking

First of all, it would be fair to mention that due to my limited knowledge of the Japanese language, every reference and notion related to this particular issue is solely based on the reading of English textbooks and articles. The purpose of this passage is to provide a clearer understanding of the situation of trafficking of women in Japan and its policy efforts. To understand the prevalence of human trafficking in Japan in modern society, let us briefly explore the history of human trafficking issue within Japan and its most prevalent form at that time, prostitution. Unsurprisingly, although the practice of abducting and selling a person for sexual or slavery purposes was severely punished by the Japanese law⁴⁴⁸, it was not until the Maria Luz incident⁴⁴⁹ that trafficking in women started to become one of the government's concern. To this end, in 1879 the Meiji government proclaimed the Emancipation Decree for Prostitutes (*Shôgi-Kaihô-Rei*), which prohibited the sale of human beings⁴⁵⁰, even if the selling of children during a famine was still quite common. The legalisation of

⁴⁴⁶ Yuriko Saito, *The trafficking of Thai women to Japan and countermeasures of the Thai government*, in Shiro Obuko and Louise Shelley, *Human Security, Transnational Crime, and Human Trafficking Asian and Western Perspectives*, Routledge Transnational Crime and Corruption Series, New York, 2011, p. 233

⁴⁴⁷ Hiroka Shoji, website, *Why the 'Comfort Women' Issue Still Matters, 70 Years Later*, The Diplomat, June 2018, article available at <https://thediplomat.com/2018/06/why-the-comfort-women-issue-still-matters-70-years-later/>, accessed 12/11/2018

⁴⁴⁸ Atsushi Kondo, *Japanese experience and response in combating trafficking*, in Louise Shelley, *op. cit.*, p. 216

⁴⁴⁹ When the Peruvian ship *Maria Luz* called at the port of Yokohama, the Japanese government emancipated Chinese coolie labourers who were treated like slaves on the ship while being trafficked from China to Peru. The Peruvian party asserted that the sale of slaves was not prohibited under Japanese law because trafficking of prostitutes was a long-standing Japanese custom.

⁴⁵⁰ Kumiko Fujimura-Fanselow, *Transforming Japan: How Feminism and Diversity Are Making a Difference*, The Feminist Press, 2011

the prostitution system was completely abolished in 1958 when the government enacted the Law on the Prevention of Prostitution⁴⁵¹ to comply with the UN Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitutions of Others or, in Japanese, the Anti-Sale of Human Beings Convention (*Jinshin Baibai Kinshi Jōyaku*⁴⁵²). Since the late nineteenth and the early twentieth centuries, Japan was one of the nations to have Japanese women and young girls trafficked overseas for the main purpose of prostitution, these women were known as *karayuki-san*⁴⁵³, literally meaning “Ms. Gone Abroad”. Later, on the mid-twentieth century, however, Japan changed from a prostitute sending country to a receiving country and Asian women destined to Japan were known as *Japayuki-san*⁴⁵⁴, “Ms. Gone to Japan”, known to be sex workers, either entertainers or prostitutes. The number of foreign workers in Japan increased rapidly due to the country’s economic growth from the time of the Plaza Agreement in mid-1980⁴⁵⁵. At that time, mass media often reported foreign women working in the Japanese sex industry because indebted of airplane ticket and other expenses and confiscation of their passports by managers. Not unexpectedly, *Japayuki-san* and human rights violations of victims of trafficking became social problems. In the mid-1980’s to the 1990s, trafficked women come mainly from the Philippines, followed by Thailand⁴⁵⁶. It was not until 2005, with the amendment of its criminal laws (the revised Penal Code for the purpose of punishing those involved in human trafficking and the Immigration Act for granting victims special residency status to protect them, even in extended period), that the government started to crack down traffickers. The enactment of anti-trafficking policy steadily decreased the number of identified victims, from 117 in 2005 to 46 in 2018, providing also appropriate protective services to victims among vulnerable groups.

2.2 The Trade in Women’s Bodies, Then: the case of Comfort Women

Prostitution and other forms of sexual exploitation and violence during war time have always been a widespread occurrence, but on such a large scale as the ‘comfort women’ system is an unprecedented phenomenon⁴⁵⁷. During WWII, the Japanese military force abducted, kidnapped and coaxed, with job

⁴⁵¹ Shiga Fujime Yuki and Beverly L. Findlay Kaneko, *The Prostitutes' Union and the Impact of the 1956 Anti-Prostitution Law in Japan*, U.S.-Japan Women's Journal, English Supplement No. 5, 1993, p. 3

⁴⁵² After the UN Trafficking Protocol, the Japanese government examined the translation of the term trafficking in persons and chose the present legal term *jinshin-torihiki* because it provides a broader concept that includes even cases where no payments or benefits (such as money) are involved, instead of the term *jinshin-baibai* which provides a narrower concept that excludes such cases.

⁴⁵³ Bill Mihalopoulos, *The Making of Prostitutes in Japan: The Karayuki-san*, Social Justice Vol. 21, No. 2 (56), in *Japan Enters the 21st Century*, 1994, p. 161

⁴⁵⁴ The word *Japayuki-san* was coined in 1980 and is a pun on the name of the *Karayuki-san*. The former refers to immigrants who come to Japan, connoted for their sexual and entertainment industry *Mizushōbai*. See also Yoko Sellek, *Migrant Labour in Japan*, Palgrave Macmillan, New, York, 2001, p. 158

⁴⁵⁵ Atsushi Kondo, *Development of Immigration Policy in Japan*, 2002, p. 2. Available at <https://www.kyusan-u.ac.jp/keizai-kiyo/dp12.pdf>, accessed 12/11/2018.

⁴⁵⁶ Martha Mensendiek, website, *Human Trafficking and the Sex Trade in Japan*, Global Ministries, May 2014. Article available at <https://www.globalministries.org/human-trafficking-and-the-sex-trade>, accessed 12/11/2018

⁴⁵⁷ Maki Kimura, *Unfolding the ‘Comfort Women’ Debates Modernity, Violence, Women’s Voices*, Palgrave Macmillan, 2016, p. 71

promises, from 50.000 up to 200.000 women, mostly Korean and Chinese young women but also from Indonesia, Malaysia, and the Philippines, to work as sex slaves or “comfort women” *jūgun ianfu*⁴⁵⁸ for the Japanese army in “comfort stations” or *ianjo*⁴⁵⁹. The comfort women system, authorised by the Empire of Japan, was established and regulated for three main reasons: first, the desire to “restore the image” of the Imperial Army⁴⁶⁰. By confining rape and sexual abuse to military-controlled facilities and by coping “with widespread military disciplinary problems⁴⁶¹”, the Japanese government hoped to prevent atrocities like the Nanjing massacre⁴⁶² or, if such atrocities did occur, to conceal them from the international attention; secondly, was to control and prevent the spread of venereal disease; and thirdly, was to provide access to sexual pleasure. It is estimated that no more than thirty per cent of comfort women survived the atrocities after the war ended. Those who survived suffered from physical and psychological trauma and instead of receiving sympathy and support, Asian patriarchal view of chastity and morality further oppressed the survivors of comfort stations. Many of them felt forced to remain silent about their experiences, believing they would be banished or beaten to death by their own family members, if the truth was revealed⁴⁶³. Only in the late 1980s, South Korean women's groups began to take action on the comfort women issue. However, without the instigation of legal action by comfort victims or the disclosure of documents and records related to the government involvement in the comfort stations, the activists had not much success. It was, finally, on December 1991 the first comfort women's case was brought before Japanese courts⁴⁶⁴. Survivors started to share their experiences publicly in a way that preserved their dignity and those testimonies also brought to light the cruel sexual slave-like working conditions they were forced into⁴⁶⁵. Each comfort woman was made to service an average of ten soldiers per day or even thirty or forty soldiers per day in the wake of a fight⁴⁶⁶.

⁴⁵⁸ Originally such women were called *teishintai* “voluntary labour corps”.

⁴⁵⁹ The Week, website, ‘Comfort women’: the dark history of Japan’s WWII sex slaves, August 2018, article available at <https://www.theweek.co.uk/95831/the-dark-history-of-japan-s-comfort-women-during-wwii>, accessed 12/11/2018

⁴⁶⁰ Carmen M. Argibay, *Sexual Slavery and the “Comfort Women” of World War II*, Vol. 21:375, Berkeley Journal of International Law, Berkeley Law Scholarship Repository, 2003, p. 376.

⁴⁶¹ Sara De Vido, *Women’s Tribunals to Counter Impunity and Forgetfulness: Why are They Relevant for International Law?*, DEP Deportate, Esuli, Profughe no. 33, 2017, p. 154

⁴⁶² Also known as Rape of Nanjing of 1937, the Imperial Japanese Army brutally murdered hundreds of thousands of people including both soldiers and civilians for an estimate of 200.000 to 300.000 deaths in the Chinese city of Nanjing. Estimates also show a number from 20.000 to 80.000 of women sexually assaulted, some of whom raped repeatedly or even by groups of militaries. *Whereas the rape of Nanking was prosecuted before Tokyo tribunal, the crimes against “comfort women” [...] went unpunished* (De Vido, *op. cit.*, p. 154).

⁴⁶³ Sue R. Lee, *Comforting the Comfort Women: Who Can Make Japan Pay*, Penn Law: Legal Scholarship Repository, 2014, p. 517-518

⁴⁶⁴ Formally known as the *Asia-Pacific War Korean Victims Compensation Claim Case*. See George Hicks, *The Comfort Women: Japan’s Brutal Regime of Enforced Prostitution in the Second World War*, Norton & Company, New York, 1994, p. 199

⁴⁶⁵ Kim Haku Soon was the first to come forward as a former comfort woman. Using her testimony, she shared her experience with the world. With her historic confession, survivors from North Korea, Taiwan, China, the Philippines, Indonesia, and Burma come forward and made confessions of their own.

⁴⁶⁶ Rosa Caroli, *Comfort women: una lettura di genere*, DEP Deportate, Esuli, Profughe Rivista Telematica di studi sulla memoria femminile, DEP no. 10, 2009, p. 133

The comfort women of the Imperial Japanese Army in WWII are an extreme condition of an institutionalised sexual violence against women⁴⁶⁷. Ultimately, in 1993 in response to the accumulated evidence of the military's role in the recruitment and transportation of comfort women, Japan had no other choice but to revise its position by admitting a “moral responsibility” that the military had been officially involved in the comfort station system and that the women had, indeed, been coerced through deception and intimidation into forced sexual labour, however it continued to deny any “legal responsibility”⁴⁶⁸. In 1995, it established a semi-official organization, the Asian Women’s Fund アジア女性基金 (AWF), to be intended as a vehicle to compensate former comfort victims, but the AWF was more regarded as a “charity payment” principally designed to cover the State’s official responsibility.

2.3 Women's International War Crimes Tribunal on Japan's Military Sexual Slavery

*To restore justice, human rights, and dignity to all victimized women, to contribute to end the cycle of impunity for violence against women in wartime and armed conflict situations*⁴⁶⁹, a Peoples’ Tribunal, the Women’s International War Crimes Tribunal 2000⁴⁷⁰ was held in Tokyo, Japan. It was established to consider the criminal liability of leading high-ranking Japanese military and political officials⁴⁷¹ and the separate State responsibility⁴⁷² for the accountability of rape and sexual slavery as crimes against humanity during the Japanese occupation in the Asia Pacific region in the 1930s and 1940s⁴⁷³. On the four-day trial, thirty-five former comfort women⁴⁷⁴ gave their testimony alongside with several experts and two former Japanese soldiers, involved in the use of such facilities during WWII. Even though, the Japanese government was also invited to participate it did not respond, therefore, a Japanese lawyer, acting as *amicus curiae* (independent adviser), defended the State’s position. The tribunal applied several international conventions, including the 1907 Hague Convention Respecting the Laws and Customs of Law on Land⁴⁷⁵, the 1921 International Convention for the Suppression of the Traffic in Women and Children, and the 1930 ILO Convention on Forced Labour⁴⁷⁶. The tribunal also explained the State violation of customary international law, including those

⁴⁶⁷ Kazuko Watanabe, *Trafficking in Women's Bodies, Then and Now: The Issue of Military "Comfort Women"*, in *Women's Studies Quarterly, Teaching About Violence Against Women*, Vol. 27, No. 1/2, 1999, p. 19

⁴⁶⁸ Rosa Caroli, *ivi*, p. 135.

⁴⁶⁹ Charter of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, Incorporating Modifications agreed upon during the Hague Meeting, 26-27 October 2000, Preamble

⁴⁷⁰ The Tribunal was organized by non-governmental organisations including VAWW-NET (Violence against Women in War Network) Japan and other Asian women’s and human rights organisations

⁴⁷¹ The Prosecutors and the Peoples of the Asia Pacific Region v. Emperor Hirohito et al.

⁴⁷² The Prosecutors and the Peoples of the Asia Pacific Region v. the Government of Japan

⁴⁷³ Christine Chinkin, *Toward the Tokyo Tribunal 2000*, Women’s Caucus for Gender Justice, available at <http://www.iccwomen.org/wigidraft1/Archives/oldWCGJ/tokyo/chinkin.html>, accessed 12/11/2018

⁴⁷⁴ Comfort women came from North and South Korea, the Philippines, China, Taiwan, Indonesia, East Timor, Malaysia, including Japan

⁴⁷⁵ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

⁴⁷⁶ Convention concerning Forced or Compulsory Labour, no. 29, 28 June 1930

prescribed in the 1907 Hague Convention and 1926 Slavery Convention⁴⁷⁷. On the final day, following the testimony and other evidence presented by the prosecutors and applying the international laws, the tribunal found Emperor Hirohito and nine named officials “*guilty of responsibility for rape and sexual slavery as a crime against humanity, under Counts 1-2 of the Common Indictment, and guilty of rape as a crime against humanity under Count 3 of the Common Indictment*”⁴⁷⁸. It also found the Japanese government liable for harms inflicted by creating, building, managing, and promoting the comfort station system and for engaging in organized attempts to hide the system *as recognized under Article 4 of the Charter*⁴⁷⁹. The Tribunal concluded by recommending the Japanese government to make a *full and frank apology* and compensate surviving former comfort victims⁴⁸⁰. It is also worth noting that the judges not only applied international law, but also considered “*the principles of law, human conscience, humanity and gender justice*” as guidance for the Tribunal’s deliberations⁴⁸¹. Considering that the Tribunal did not have authority to enforce legal effect, the result was still a major accomplishment both for human rights activists and feminists, as well as for the surviving victims⁴⁸². According to the international community, the most serious offense Japan committed, by creating comfort stations, was the organized sexual slavery system and, thus, the violation of *jus cogens*⁴⁸³ norms. For instance, enslavement of women is recognised as a *jus cogens* violation, regardless of who commits it; rape and sexual slavery can be considered torture, therefore, a *jus cogens* violation, and international law also identifies sexual slavery and sexual violence as *jus cogens* war crimes themselves⁴⁸⁴.

2.4 The Trade in Women’s Bodies, Now: Sex Trafficking and the JK Business

As a matter of fact, the practice of military sexual abuse and trafficking of women did not end with the comfort women in WWII but, rather, has expanded. As we have seen in the previous section, more contemporary form of trafficking in women have appeared such as the adoption of *Japayuki-san*, in fact, the

⁴⁷⁷ Convention to Suppress the Slave Trade and Slavery, 25 September 1926

⁴⁷⁸ Judgment of the Women’s International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery in the matter of the Prosecutors and the Peoples of the Asia-Pacific Region vs. Emperor Hirohito et al. and the Government of Japan, available at <http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/judgmentannounce.html>, accessed 12/11/2018

⁴⁷⁹ Charter of the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, *op. cit.*, art. 4 (a) (b).

⁴⁸⁰ Sara De Vido, *op. cit.*, p. 156

⁴⁸¹ Dianne Otto, *Impunity in a Different Register: People’s Tribunals and Questions of Judgement, Law and Responsibility*, in Karen Engle, Zinaida Miller, D. M. Davis, *Anti-Impunity Agenda and Human Rights*, Cambridge University Press, 2016, p. 303. See also Sara De Vido, *op. cit.*, p. 156

⁴⁸² Rumi Sakamoto, *The Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery: A Legal and Feminist Approach to the ‘Comfort Women’ Issue*, *New Zealand Journal of Asian Studies* 3, 1st June 2001, p. 49

⁴⁸³ Vienna Convention on the Law of Treaties with annex, no. 18232, 23 May 1969, art. 53. *Jus cogens* are peremptory norms of general international law that are “*accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*”. In other words, Customary international law refers to international obligations arising from established international practices and from a general and consistent sense of legal obligation.

⁴⁸⁴ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, *Berkeley Journal of Gender, Law & Justice*, Volume 16, Issue 1, September 2001, p. 185-186. See also Sue R. Lee, *Comforting the Comfort Women: Who Can Make Japan Pay*, Penn Law: Legal Scholarship Repository, 2014, p. 529-530

materialism and market economy have created a consumerist idea that legitimises the objectification of women's bodies to meet the demand for sexual and labour exploitation, as the militaristic ethic did for comfort women. Some women trapped in the current system have been hooked on drugs, some have contracted HIV, and others have been killed by their pimps or have committed suicide. Generally, the increasing number of women and girls, who are either forced or willing to move abroad, has led many destination countries to place restrictions on legal immigration, forcing migrants to depend on services provided by trafficking organizations to circumvent the new, and more stringent, conditions. The cost of these services is one way to *convert* a willing economic migrant into a trafficked person. Usually at their arrival in Japan, victims have their documents taken away and forced to work in "snack bars" under the surveillance of *mama-san*, where clients can purchase, snacks, drinks, and women for sexual purposes⁴⁸⁵. What today's women have in common with the comfort women of WWII is that all of them have been tricked, imprisoned, raped, and forced to work as prostitutes, completely stripped of their rights and freedom. Moreover, in recent years there is a growing concern on the issue of children, in particular of young girls involved in the sex industry presented in *enjo-kosai* or compensated dating. This Japanese term refers to a practice where an older man offers money or expensive gifts to a young girl or woman in return for companionship⁴⁸⁶. Other forms of child sexual exploitation are "JK business" (*joshi-kosei* "high school girls"), where businesses offer dating services as well as "hidden options" with high school girls aged between 15 and 18 years old and the widespread phenomenon of *joshi-kosei osanpo*, high school girls walking date. To prevent these underground activities, the Japanese government has established key achievements such as a new Interagency Taskforce to combat child sex trafficking in "JK businesses" and in forced pornography; active regulations and a new oversight instrument for the Act on Proper Technical Intern Training and Protection of Technical Intern Trainees (TITP reform law), with the purpose of establishing criminal penalties for certain labour abuses, increase oversight and accountability within the program, and expand applicants' freedom to change employers at will, together with several improvements⁴⁸⁷. Among the main legal instruments regarding the exploitation of children in prostitution we can find:

1. the 1947 *Child Welfare Act* offers broader protection, criminalise whoever commits an obscene act against a child, delivers a child to another, knowing that the child will be abused or forced in sexual activities, or keeps a child with the intent to commit an act harmful to the minor⁴⁸⁸.

⁴⁸⁵ Kara Patterson, *Sex Trafficking from Thailand To Japan: Human Beings Or Illegal Goods?*, Dalhousie Journal of Legal Studies, 2003, p. 184

⁴⁸⁶ Kevin Ryu and Andrea Varrella, *Japan Country overview A report on the scale, scope and context of the sexual exploitation of children*, ECPAT International, 2018, p. 8

⁴⁸⁷ U.S Trafficking Report 2018, *op. cit.*, p. 246

⁴⁸⁸ The Child Welfare Act, Act no. 164, 12th December 1947, Section 6 Miscellaneous Provisions art. 34, available at <http://www.ilo.org/dyn/travail/docs/2036/Child%20Welfare%20Act%201947.pdf>, accessed 13/11/2018.

2. the 1999 Act on the Regulation and Punishment of Acts relating to Child Prostitution and Child Pornography, and for Protecting Children, and its 2014 amendments. Pursuant art. 2, child prostitution is “the act of performing sexual intercourse or similar acts, such as the touching of genital organs” in exchange of remuneration to the child, the intermediary, or the person responsible for the child⁴⁸⁹. Under art. 4, a person who engages in child prostitution may be imprisoned and required to engage in manual labour for up to five years or fined up to three million yen (approximately US\$30,000)⁴⁹⁰. While, for facilitation or solicitation of prostitution of a child, the offender may be imprisoned and required to engage in hard labour for up to five years or fined up to five million yen (approximately US\$50,000)⁴⁹¹. The Act also penalises whoever engages in the business of permitting or soliciting child prostitution with imprisonment, including hard labour, for up to seven years and a fine up to ten million yen (approximately US\$100,000)⁴⁹². In accordance with art. 8, buying or selling a child for the purpose of sexual intercourse or producing child sexual abuse material is prohibited, and offenders shall be sentenced to a maximum imprisonment with labour for up to 10 years.

2.5 Japan’s Framework to Combat Trafficking in Persons

In order to prevent and eradicate human trafficking in Japan and protect victims of trafficking through the establishment and implementation of anti-trafficking measures, the government founded the Inter-Ministerial Liaison Committee Regarding Measures to Combat Trafficking in Persons under the Cabinet in April 2004. Due to the strong concerns of the international community, Japan further enhanced anti-trafficking efforts and on December 2014 the Ministerial Meeting Concerning Measures Against Crime developed the 2014 Action Plan, a revised version of the 2009 Action Plan to Combat Trafficking in Persons⁴⁹³. Essentially, the main objective of the 2014 Action Plan is to provide government with appropriate and comprehensive measures to deal with trafficking in persons. On the same day, at the Ministerial Meeting it was decided to convene as required the Council for the Promotion of Measures to Combat Trafficking in Persons, including Cabinet Ministers of relevant ministries⁴⁹⁴. At the moment, the government the Council for the Promotion of Measures to Combat Trafficking in Persons and under the coordination of the Cabinet

⁴⁸⁹ The Act on Punishing Acts related to Child Prostitution and Child Pornography, and on Protecting Children, Act no. 52, 26th May 1999, art. 2. English translation available at <https://www.ilo.org/dyn/natlex/docs/WBTEXT/53924/65175/E99JPN02.htm> , accessed 13/11/2018

⁴⁹⁰ *ivi*, art. 4

⁴⁹¹ *ivi*, art. 5

⁴⁹² *ivi*, art. 6

⁴⁹³ In principal, the Action Plan covers comprehensive scope to combat human trafficking, consisting of three main aspects: I. Importance of Measures to Combat Trafficking in Persons; II. Through Understanding of the Current Situation of Trafficking in Persons; III. General and Comprehensive Measures to Combat Trafficking in Persons. The 2009 Action Plan to Combat Trafficking in Persons is available at the Ministry of Foreign Affairs of Japan at https://www.mofa.go.jp/policy/i_crime/people/action.html

⁴⁹⁴ Council for the Promotion of Measures to Combat Trafficking in Persons, *Measures to Combat Trafficking in Persons (Annual Report)*, May 2017, p. 3

Secretariat, the Cabinet Office, the National Police Agency, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Education, Culture, Sports, Science and Technology, the Ministry of Health, Labour and Welfare, the Ministry of Agriculture, Forestry and Fisheries, the Ministry of Economy, Trade and Industry, the Ministry of Land, Infrastructure, Transport and Tourism, and the Japan Coast Guard are taking all necessary measures under their own jurisdictions to prevent trafficking in persons⁴⁹⁵. Other relevant measures to combat trafficking in human beings are:

- a) the *Prostitution Prevention Law* (1956), pursuant art. 3 of the Anti-Prostitution Law, a person should not engage in prostitution, and by virtue of art. 7 forced prostitution is criminalised, including under threat or use of violence and whoever induce a person into prostitution under the use of deception, embarrassment, or taking advantage of influence through kinship.
- b) the *Act on Control and Improvement of Amusement and Entertainment Businesses* (1948), the Ministry of Justice pursued stricter mandatory criteria⁴⁹⁶ on the *entertainment visa* since the majority of individuals, including children, enter Japan on such visas and eventually become the victims of sex trafficking.

a. Penal Code of 1907

At the moment, the available Japanese Penal Code of 1907 and its revised bill of amendments and other related laws criminalise trafficking in persons as follow:

*A person who kidnaps another by force or enticement for the purpose of transporting another from one country to another country shall be punished by imprisonment with work for a definite term of not less than 2 years*⁴⁹⁷.

Through the revised Criminal Code, art. 226 is currently divided into three main sections:

1. art. 226 forbids abduction and seizure with the intent of transporting a person outside the residing territory and concerns any victim of trafficking, regardless of the nationality or location (Crimes of Abduction and Kidnapping for the Purpose of Transportation from Country of Location)⁴⁹⁸;
2. art. 226 (2) prohibits criminal activities that involve the selling and buying of human beings⁴⁹⁹;

⁴⁹⁵ *ivi*, p. 4

⁴⁹⁶ The Immigration Office does not admit *entertainers* inside the territory if the employers and full-time workers of the enterprise contracting with *entertainers* include: a person engaging in illegal employment, a person submitting a false application for a foreigner to gain permission of landing within 5 years, a person who has received penalty or is within five years of the end of a suspension of the execution of sentence, charged of a crime from articles 74 to 74-8 of the Immigration Control and Refugee Recognition Act or from articles 6 to 13 of the Anti-Prostitution Law, or a person who is a member of a crime syndicate or is within 5 years of dropping out of a crime syndicate.

⁴⁹⁷ Japanese Penal Code, Act no. 45 of 1907, Amendment of Act No. 54 of 2007, Chapter XXXIII Crimes of Kidnapping and Buying or Selling of Human Beings available at

<http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&re=02&vm=04> , accessed 13/11/2018

⁴⁹⁸ Tomoya Kamino, *Japanese Law and Policy against Human Trafficking*, in Miyoko Tsujimura & Emi Yano, *Gender & Law in Japan*, 2007, Tohoku University Press, Sendai, p. 86

⁴⁹⁹ *Ibid.*

3. art. 226 (3) prohibits the conveyance of an abducted or sold person, outside the country of origin (Crimes of Transportation of Abducted Persons)⁵⁰⁰.

Moreover, art. 227 (Crimes of Delivery of Abducted Persons) of the Japanese Criminal Law prohibits any act including delivery, reception, transfer, and harbour in order to comply with art. 3 of the UN Trafficking Protocol⁵⁰¹. After the revisions of art. 3 related to the crimes perpetrated by Japanese nationals outside Japan and art. 3 (2) covering the crimes pursued by non-Japanese Nationals against Japanese nationals outside Japan, both articles 226 and 227 punish illegal criminal activities committed by Japanese citizens outside Japan and by foreigners against Japanese nationals⁵⁰², specifically those involving forced indecency, rape, kidnapping of minors and/or for profits, buying and selling of human beings, and any attempts thereof⁵⁰³. However, there is no provision of double criminality⁵⁰⁴ in the Japanese legal system. The Act of Extradition does not require a Japanese fugitive, who has allegedly committed crimes, to be extradited to stand trial, unless there are extradition agreements in place⁵⁰⁵. The Penal Code also contains provisions related to the exploitation of children in prostitution under Chapter XXII, which covers Crimes of Obscenity, Rape and Bigamy through art. 177 on rape, art. 176 on forced indecency or assault, and art. 178 on quasi-forced indecency and quasi-rape charging sex offenders for harsher punishment.

b. Immigration Control and Refugee Recognition Act of 1951

A bill of amendments on the Immigration Control and Refugee Recognition Act was submitted by the Japanese State to protect trafficking victims⁵⁰⁶. The Act, under art. 2 (7), establishes a provision to define trafficking in human beings following those of Japan Criminal Law and the UN Trafficking Protocol⁵⁰⁷. Since the amendment in 2005, the Immigration Bureau has allowed trafficking victims a special permission to stay in Japan⁵⁰⁸. For instance, following art. 5 (Denial of Landing) it permits victims of trafficking to land in Japan or art. 12 (1) (2) (Special permission for Landing) which provides the Minister of Justice the power to give

⁵⁰⁰ *Ibid.*

⁵⁰¹ Before the amendment art. 227 (Crimes of Receipt of Abducted Persons) only forbade acts of receipt, harbouring, or hiding.

⁵⁰² Tomoya Kamino, *op. cit.*, p. 86

⁵⁰³ The Code applies for the crimes of: forcible indecency, forcible indecency causing death or injury, rape, quasi forcible indecency, quasi rape, gang rape; attempts, homicide, injury, injury causing death, capture, confinement, unlawful capture or confinement causing death or injury, kidnapping of minors, kidnapping for profit, kidnapping for ransom, kidnapping for transportation out of a country, buying or selling of human beings, transportation of kidnapped persons out of a country, delivery of kidnapped persons; attempts, constructive robbery, robbery through causing unconsciousness, death or injury on the occasion of robbery, rape on the scene of robbery; attempts, and causing death thereby.

⁵⁰⁴ A double criminality requirement means that the relevant act is punishable in both the country where it was originally committed and where he or she is actually detained.

⁵⁰⁵ Law of Extradition, Law no. 68, Ministry of Justice 1953, art. 2 Restrictions on extradition. English translation available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/39360681.pdf> , accessed 13/11/2018

⁵⁰⁶ Immigration Control and Refugee Recognition Act, Cabinet Order no.319, 1951, Latest Amendment Law no.43, 2006. English unofficial translation available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/38859/96288/F2141814987/JPN38859.pdf> , accessed 13/11/2018

⁵⁰⁷ Tomoya Kamino, *op. cit.*, p. 88.

⁵⁰⁸ *Ibid.*

special permission to victims to disembark. Also, according to art. 50 (1) (3) the Minister of Justice may grant special residence permission to an irregular resident if she or he resides in Japan or has entered Japan “*under the control of another due to trafficking in persons*”. On the other hand, those who have committed trafficking in persons may be deported (art. 24 (4) (c)) or denied permission for landing in Japan (art. 5 (1) (7) (2)). This amendment corresponds to art. 7 of the UN Protocol, which stipulated for member States to “*consider adopting legislative or other appropriate measures that permit victims of trafficking to remain in its territory, temporarily or permanently, in appropriate cases*”. In Japan’s case, the Immigration Control and Refugee Recognition Act permits extensive discretion to the Minister of Justice to grant special residence permission.

3. Democratic People's Republic of Korea

The present section of Chapter 3 is devoted to the understanding of the Democratic People’s Republic of Korea (hereafter DPRK or NK) situation on women fleeing the territory, the extreme conditions they are forced into, and their punishment upon repatriation. Such as the case in Japan, this study is based on English books on NK, as I do not possess the knowledge of the language, and every reference to the DPRK Criminal Code is solely referred to English translations. Before these analyses, we are going to briefly provide an historical background of the country starting by the end of WWII. In 1948 with the aid of the Soviet Union, the first Supreme Leader of NK Kim Il Sung established a new Communist State known as the Democratic People’s Republic of Korea. Kim Il Sung vision was to transform its impoverished country into an independent Communist State and this ambition was demonstrated in *juche* 주체, 主體⁵⁰⁹, a Marxist-Leninist philosophy of self-reliance. However, NK’s lack of natural resources and extreme farming condition, due to its geographical position, could not sustain its appearance of self-sufficiency, thus, the need to rely to the Soviet Union and China for the most basic supplies such as food, oil, coal, and other materials. Years later in the early 1990s, the decline in trade with its allies heavily afflicted the agricultural sector of NK and the sudden fall in food production, the government was forced to reduce and ration food supply through the Public Distribution System (PDS) by launching various campaigns such as “*porridge eating*”, “*let’s eat two meals a day*”, and “*tighter belt*”⁵¹⁰. The widespread famine also caused by extreme weather condition and natural disasters between 1993 and 1995, pressed the DPRK government to seek help from international food aid and

⁵⁰⁹ The Juche ideology or simply “Kim Il-sungism” and “the one-and-only ideology system” (yuil sasang chegye) is based on the philosophical principle that man is the master of everything and decides everything. It is the man-centred world outlook and also a political philosophy to materialise the independence of the popular masses, namely, a philosophy which elucidates the theoretical basis of politics that leads the development of society along the right path. More information available at the official webpage of DPRK http://www.korea-dpr.com/juche_ideology.html , accessed 20/11/2018

⁵¹⁰ Norma Kang Muico, *An Absence of Choice: The sexual Exploitation of North Korean Women in China*, Anti-Slavery International, 2005, p. 1

assistance⁵¹¹. Experts estimated that more than two million to three million of people died of malnutrition and starvation during 1995 and 1998⁵¹². The increase food crises demanded all women to participate in the nation-building labour mobilisations in *the name of the equality of man and woman*⁵¹³. Thus, North Korean women become the main providers of the family livelihood through peddling, vending or private trading. Generally, most North Korean women themselves would think that it was basic and natural for women to get married, serve their husbands and raise children. Therefore, in hard times, they would feel a sense of responsibility for the family well-being and take part in economic activities. This superficial gender role-reversal, however, did not change the fundamental patriarchal male-dominant structure due to women's belief not to defy the status and the authority of husbands as the head of the family⁵¹⁴. Today, North Korean women are suffering from two main factors: additional workloads and the rapidly deterioration of life's quality. Hunger caused hundreds of thousands of North Koreans to flee into neighbouring countries, especially China, in search for food and work. In addition, at the brick of starvation frequent is the practice of selling women and young girls to brokers. Up to date, according to the U.S Department of State, NK not only has not met the minimum standard against trafficking, remaining on Tier 3, but the government also refuses to cooperate with either the OHCHR Seoul Office or the UN Special Rapporteur on the situation of human rights in NK, Tomás Ojea Quintana⁵¹⁵. Exact number of North Korean defectors who are forced into human trafficking in China and other neighbouring countries are difficult to estimate, however, studies over the past five years have demonstrated the DPRK is a source country for women, men, and children subjected to forced sexual exploitation and forced labour⁵¹⁶.

3.1 Women for single men: exploitation of North Korean Women in China and their Status

Since the mid-1990s, an increasing number around 100.000 to 300.000 North Koreans have fled to neighbouring countries such as Russia and China, driven not only by political persecution but also economic and food crisis⁵¹⁷. Of these, 30.000 to 50.000 hope to defect in South Korea, but the number of those who accomplished it is very low and many of them are still now struggling to do so. The main practical method of

⁵¹¹ Daniel Goodkind and Loraine West, *The North Korean Famine and Its Demographic Impact*, in *Population and Development Review*, Vol. 27, No. 2, June 2001, Population Council, pp. 219-238

⁵¹² Barbara Crosette, website, *Korean Famine Toll: More than two million*, New York Times, August 1999, available at <https://www.nytimes.com/1999/08/20/world/korean-famine-toll-more-than-2-million.html>, accessed 20/11/2018

⁵¹³ Prior to the revision of the 1998 Socialist Constitution, art. 62 of the 1972 Constitution stipulated that "*All men and women shall enjoy equal social rights and status [...] the state shall liberate all women from heavy burdens of household chores and guarantee all conditions for their social advancement*". Whereas, art. 77 of the revised 1998 Constitution states that "*Women shall have the same social status and rights as men [...] the state shall provide all conditions for their social advancement*"

⁵¹⁴ Lim Soon Hee, *The Food Crisis and the Changing Roles and Attitudes of North Korean Women*, Korea Institute for National Unification, 2005, p. 33

⁵¹⁵ Human Rights Watch, *World Report 2018 events of 2017*, p. 399

⁵¹⁶ U.S Trafficking Report, 2018, p. 256

⁵¹⁷ Sung Ho Ko, Kiseon Chung and Yoo-seok Oh, *North Korean Defectors: Their Life and Well-Being after Defection*, in *Asian Perspective*, Vol. 28, No. 2, 2004, p. 66

escaping NK is through China and it is roughly estimated that 80% of defectors are women and girls who have become *commodities for purchase*⁵¹⁸. Women and young girls, who do not possess the financial resources to bribe border guards, often indebt themselves or fall prey to smugglers or traffickers through coercion, deception, or abduction to be sold as brides or sexually exploited. Due to the OCP, demand for young and fertile women in male-rural China has skyrocketed, making North Korean women prime targets in the sex industry market and forced marriage. These women accept this fate hoping either they can make a living of their commercial trade, involuntary marriages⁵¹⁹, or if the chance arises flee to South Korea⁵²⁰. However, even if they get married to PRC citizens, due to their undocumented and illegal condition as defectors, they are not granted North Korean refugees' privilege and rights such as immunity from deportation. In other words, for the Chinese government these individuals are considered only cross-borders or illegal economic migrants rather than refugees⁵²¹. It comes without saying that these women also cannot participate in any Chinese civil processes such obtain a legal job or register their half-Chinese children nor access to health care or other forms of assistance. There are rare cases where Korean wives are granted a *hùkǒu* certificate enabling some residential rights such as allowing half-Korean children to attend school⁵²². However, the majority of found North Korean women are forcibly repatriated and those who are not, are physically and sexually abused, locked up or chained to prevent them from escaping or forced into prostitution⁵²³. These women tend not to seek help from Chinese authorities because their identification would mean immediate repatriation to NK where the crime of defection is punishable with death sentence. As literatures suggest, China's continued practice of deporting North Koreans only contributes to fuel illegal forced marriages and

⁵¹⁸ Jillian Janflone, *Women for Wives: State Enabled Exploitation in China and North Korea*, Human Trafficking Centre, February 2016. Article available at <http://humantraffickingcenter.org/women-for-wives/>, accessed 23/11/2018

⁵¹⁹ David Hawk, *The Hidden Gulag the Lives and Voices of "Those Who are Sent to the Mountains" Exposing North Korea's Vast System of Lawless Imprisonment*, Committee for Human Rights in North Korea, p. 114.

⁵²⁰ South Korea is one of the few countries in Asia to be a party to the 1951 UN Refugee Convention and its 1967 Protocol. Although, it continues to reject the vast majority of non-North Korean asylum seekers entering the country, it accommodates all those fleeing the North and grants them citizenship through the *Promotion and Resettlement Support Act for North Korean Refugees* and the *Enforcement Decree of the North Korean Refugee Protection and Settlement Support Act*.

⁵²¹ S. James, *The Sex Trafficking Industry of North Korean Women in China*, 2018. Article available at <https://www.linkedin.com/pulse/sex-trafficking-industry-north-korean-women-china-james-smith>, accessed 23/11/2018

⁵²² The Commission of inquiry on human rights in the DPRK estimates that 20,000 to 30,000 children born to North Korean women living in China, are mostly "effectively deprived of their rights to birth registration, nationality, healthcare and enrolment in school because their birth cannot be registered without exposing the mother to the risk of refoulement". UN General Assembly, *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, A/HRC/25/63, 7 February 2014, para. 491. Available at <https://www.ohchr.org/en/hrbodies/hrc/coidprk/pages/reportofthecommissionofinquirydprk.aspx>. See also Congressional-Executive Commission on China, *Annual Report 2018*, One Hundred Fifteenth Congress Second Session, October 2018, U.S. Government Publishing Office, p. 193.

⁵²³ S. James, website, *The Sex Trafficking Industry of North Korean Women in China*, 2018. Article available at <https://www.linkedin.com/pulse/sex-trafficking-industry-north-korean-women-china-james-smith>, accessed 23/11/2018

commercial sex exploitation⁵²⁴. Determining the status of North Korean refugees living in China has become an increased international issue as the Chinese government keeps refusing the UN High Commissioner of Refugees⁵²⁵ (UNHCR) and the UN Refugees Agency from assessing whether North Koreans can qualify for refugee status⁵²⁶. In spite of international pressure, the PRC is still unwilling to give the status of refugees because the government insists that North Korean defectors are not “*political refugees*” but “*economic floaters*” who are not qualified for legal protection, despite substantial evidence that the worst inhumane treatment (like torture, imprisonment, forced labour, execution) take place among repatriated victims⁵²⁷. The perspective of the Chinese government means that the *principle of refoulement* is to be applied to all North Koreans who have cross the Chinese borders, and following the principle of sovereignty, forced repatriation of those *workers* is necessary to *maintaining national security, social order and border controls*⁵²⁸. By treating North Korean defectors as illegal “*economic migrants*”, the PRC fails to meet its obligation to protect refugees as a State party to the 1951 UN Refugee Convention and its 1967 protocol⁵²⁹. The 1986 bilateral agreement on Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order and the Border Areas⁵³⁰ (revised in 1998) signed by both China and NK is an additional motive for repatriating defectors. The agreement essentially views whoever crosses the other’s territory without permission as criminals, requesting cooperation between China and NK in *handling criminals* crossing borders through extradition, deportation, and the sharing of information about those who might disrupt national

⁵²⁴ Roberta Cohen, *China’s Forced Repatriation of North Korean Refugees Incurs United Nations Censure*, International Journal of Korean Studies, Vol. XVIII, No. 1, 2014

⁵²⁵ The UNHCR always opposed forcible returns, but it did not initially support the idea to consider refugees North Koreans in China who fled starvation. It was only a year later, in 2003 in the Opening Statement of the 54th Session of the Executive Committee, that the UNHCR began to acknowledge the unique situation of North Koreans citizens.

⁵²⁶ UNHRC, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, 7 February 2014, A/HRC/25/CRP.1, pp. 127 - 130. In December 2013 a letter addressed to China’s Deputy Permanent Representative to the UN Office in Geneva, Commission of Inquiry Chairman Michael Kirby drew attention to a 1995 agreement established between China and the UNHCR that allowed for “*UNHCR to conduct refugee status determination for asylum-seekers.*” The letter asked for clarification as to why China continued to refuse UNHCR access to areas where North Korean refugees are believed to reside, despite China’s agreement in the 1995 accord to “*allow UNHCR personnel unimpeded access to asylum seekers*”. See, United Nations Human Rights Council, “*Report on the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea,*” Annex to the report Correspondence with China, 7th February 2014, A/HRC/25/63, available at www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/A.HRC.25.63.doc, accessed 20/11/2018

⁵²⁷ Sung Ho Ko, Kiseon Chung and Yoo-seok Oh, *North Korean Defectors: Their Life and Well-Being after Defection*, in *Asian Perspective*, Vol. 28, No. 2, 2004, p. 72

⁵²⁸ Roberta Cohen, *China’s Forced Repatriation of North Korean Refugees Incurs United Nations Censure*, International Journal of Korean Studies, Vol. XVIII, No. 1, 2014, p. 69

⁵²⁹ Human Rights Watch, World Report 2018, p. 401

⁵³⁰ DPRK Ministry of State Security and PRC Ministry of Public Security, Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas. The two Ministries in the hope of further developing the friendly cooperation between the public security and state security agencies of both countries, have reached an agreement on mutual cooperation issues relating to the work of maintaining national security and social order within the border areas. Available at http://www.nkfreedom.org/UploadedDocuments/NK-China-bilateral_treaty.pdf

security by escaping into the other's border⁵³¹. Despite the adoption in 2013 of a legal provision on refugees, the *Administration Law on Entry and Exit*, declaring on art. 46 that immigrants *applying for refugee status, during the screening period of refugee status, may stay temporarily in Chinese territory* through provisional identity cards issued by public security bodies⁵³², no application of such provision was applied to North Koreans. On the contrary, it only emphasised the criminalisation of their border crossing and the obligation for Chinese citizens, companies or other entities to report to local security officials any defector inside the Mainland. Based on South Korea news media Daily NK, it was reported that after Kim Jong-un visit in March 2018 to China, Chinese authorities increased the monetary reward for reporting North Korean defectors hiding with the territory⁵³³. To further impede North Korean defectors to flee to South Korea, Chinese authorities have intensified crackdowns on organizations and Korean Christian missionaries and churches in three northeast provinces: Heilongjiang, Jilin, and Lianing⁵³⁴. Against any of the Chinese government beliefs, the recognition of refugee status would be of extreme significance because its deprivation means that North Korean defectors are not provided the same protections and rights as normal refugees. Theoretically speaking, some, if not all, of the North Koreans who flee to China are *refugees* or *asylum seekers* entitled to international protection. They fall within the precise definition of the 1951 Refugee Convention⁵³⁵ either because directly fleeing persecution; are members of a low *songbun* social class suffering from severe socioeconomic deprivation; or are *refugees sùr place* because of a *well-founded fear of persecution* upon return given the criminal nature of leaving without permission or because of their membership in a religion, social group or political opinion that would result in their punishment⁵³⁶. It is worth noting that China is also contravening its obligation under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

⁵³¹ UN General Assembly, *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, A/HRC/25/63, 7th February 2014, para. 451. <https://www.ohchr.org/en/hrbodies/hrc/coidprk/pages/reportofthecommissionofinquirydprk.aspx>

⁵³² Response of the Chinese Government to Questions Concerning the Combined 3rd and 4th Periodic Reports on the Implementation of the Convention on the Rights of the Child, Section 1 (24). <https://www.ohchr.org/en/hrbodies/hrc/coidprk/pages/reportofthecommissionofinquirydprk.aspx>

⁵³³ Daily NK, website, *Chinese authorities raise reward money for North Korean defectors*, 24 April 2018. Article available at <https://www.dailynk.com/english/chinese-authorities-raise-reward-m/>, accessed 23/11/2018

⁵³⁴ Congressional-Executive Commission on China, *Annual Report 2018*, One Hundred Fifteenth Congress Second Session, October 2018, U.S. Government Publishing Office, p. 192

⁵³⁵ United Nations Conference of Plenipotentiaries on The Status of Refugees and Stateless Persons, Convention and Protocol relating to the Status of Refugees, Geneva, Switzerland, July 1951. According to art. 1 (2) of the 1951 UN Refugee Convention, a refugee is a person with a substantiated fear "*of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*". She or he flees "*because of the threat of persecution and cannot return safely to their homes in the prevailing circumstances*". Available at <https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+1967%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfce1d47>

⁵³⁶ *Ibid.* See also Roberta Cohen, *China's Forced Repatriation of North Korean Refugees Incurs United Nations Censure*, International Journal of Korean Studies, 2014, p.

Punishment to refrain from repatriating persons if there are well-founded bases “for believing that they would [...] be subjected to torture⁵³⁷”.

3.2 The DPRK Government legal actions

In the wake of growing international uproar and partly in response to its internal changes, the NK government has, since the original enactment in 1950, been revising its Criminal Code several times, the most important revisions are the 2004 Criminal Law which received a somewhat positive evaluation for taking more lenient attitudes on human rights compared to its former revisions⁵³⁸ and the 2009 Criminal Law. The main focus is not to analyse the entire Criminal Code of NK, but to deliver a general understanding of the government actions towards defectors spurred in the last thirty years. Again, this evaluation is mainly based on English textbooks and articles. Prior to more contemporary revisions, according to the previous Penal Code of 1987, North Koreans who fled their country were usually regarded as traitors or criminals if they left NK with no official authorisation. Based on this, art. 47 of the 1987 North Korean Criminal Code affirms that any citizen that attempts to defect into a foreign or enemy’s country: “shall be committed to a reform institution for not less than seven years” or in the event that *an extremely grave concern* occurs, “he or she shall be given the death penalty⁵³⁹”. Moreover, art. 117 also included the reversed case in which a person crossed the NK’s border *without permission* to be punished to a reform institution for up to three years. The continuous repatriation from China of North Korean defectors caused the DPRK government to ease sentences and revise its penal code. On that account, in cases of illegal border crossing under art. 167 of the Administrative Penalty Act⁵⁴⁰, the People’s Security Control Act, or under NK’s immigration laws, a short-term of unpaid labour is imposed to the repatriated victim. Also, under art. 221 of the 2004 revised Criminal Code on the penalisation of illegal border crossing, forced labour is imposed up to five years. However, in circumstances such deemed grave for the DPRK, like North Korean residents coming into contact with South Korean nationals or Christian churches, or having made attempts to enter South Korea, then art. 63 on treason applies and, as a consequence, a minimum of five years imprisonment or even an unlimited term of reformed labour or capital

⁵³⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UN General Assembly resolution 39/46 of 10 December 84, entry into force 26 June 87, art. 3 states that, “No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. China signed the Convention on 12th December 1986 and ratified it on 4th October 1988.

⁵³⁸ Han Myung Sub, *North Korean Human Rights Laws and their Application*, in *Reports on Human Rights in North Korea*, 2014, p. 56. Available at <https://www.ibanet.org/HumanrightsNorthKoreareport.aspx>, accessed 26/11/2018

⁵³⁹ T. Kumar, *China's Repatriation of North Korean Refugees Before the Congressional-Executive Commission on China*, Amnesty International, USA, Washington DC, 2012, p. 7

⁵⁴⁰ Administrative Penalty Act, art. 167 Violations of Travel Order, specifies that: “If a person violates a travel order or enters controlled areas or crosses the border lines without authority to do so, the person will be subject to a penalty, a warning or stern warning, or unpaid labour for three months or less and labour education. In cases where the person commits a grave offence, unpaid labour for three months or more and labour education will be imposed”. More information on the Administrative Penalty Act is available in the Korean Bar Association, Report on Human Rights in North Korea 2014, International Bar Association, 2014, p. 58

punishment is exacted, in fact, illegal border crossers are sent to *Kwan-li-so* political prison camps (further discussed on the following section) or executed. Since 2009 and, most of all, after Kim Jong-un became the Supreme Leader, even stricter actions on public security have been adopted, resulting in NK's Defence Commission (NDC) to issue in 2010 the "*Instruction 0082*" to the Chinese border region, authorising the military units to shoot and kill defectors on site if they tried to defect to China⁵⁴¹. In addition, in 2014 the Supreme Leader also ordered, through the Command of the Central Military Commission of the Workers' Party of Korea, harsher punishment to whoever commits treason against the *Socialist Fatherland*⁵⁴², therefore, demanding all the border guards of the Korean People's Army, the SSD, and the People's Home Army to strict border controls and impose merciless punishment⁵⁴³.

3.3 North Korean Defectors' punishment upon repatriation

For the Ministry of People's Security, the action of crossing neighbouring countries' borders is viewed as a crime of "*treachery against the nation*⁵⁴⁴", even if the reason for fleeing is hunger. Therefore, punishments such as torture, imprisonment by reform through labour for more than five years or, even, death execution are performed against any individual who commits treason, and this is especially expressed in art. 62 on Treason against the country of the revised 2009 Criminal Code⁵⁴⁵. Furthermore, North Koreans who contact or try to contact Chinese-Korean churches or South Korean (or Korean-American) citizens, or even expose themselves to South Korean culture are viewed by DPRK authorities as political offenses and technical violations of NK's law. Art. 233 asserts the punishment towards North Koreans, adding in art. 234 that worker of the border supervision who assist defectors in crossing borders will be punished through labour reform for a period less than two years and if the *act is committed repeatedly or in exchange for money or goods*, determines a five years' detention. According to survivals from North Korean border-crossers, all those forcibly repatriated from China are detained and interrogated for a couple of days or several weeks, in detention centres or police stations (*Ku-ryu-jang*) operated by the National Security Agency (*Kuk-gabo-wi-bu* or shortened to *Bo-wi-bu*) or the People's Safety Agency (*In-min-bo-an-seong* or commonly referred to as *An-jeon-bu*)⁵⁴⁶. These people are subjected to beatings, torture, sexual humiliation, degrading treatment⁵⁴⁷, and

⁵⁴¹ Korean Bar Association, *Report on Human Rights in North Korea 2014*, International Bar Association, 2014, p. 231.

⁵⁴² DPRK's Socialist Constitution, amended and supplemented socialist constitution of the DPRK, adopted on 5th September 1998, First session of the 1st Supreme People's Assembly. *The DPRK is a socialist fatherland of Juche which embodies the idea of and guidance by the great leader Comrade Kim Il Sung*.

⁵⁴³ Korean Bar Association, *op. cit.*, p. 231

⁵⁴⁴ Human Rights Watch, *World Report 2018*, p. 401

⁵⁴⁵ The Criminal Law of the Democratic People's Republic of Korea, last amendment in 2009, art. 62, English translation available at

<https://www.hrnk.org/uploads/pdfs/The%20Criminal%20Law%20of%20the%20Democratic%20Republic%20of%20Korea%202009%20%281%29.pdf>, accessed 30/11/2018

⁵⁴⁶ T. Kumar, *China's Repatriation of North Korean Refugees Before the Congressional-Executive Commission on China*, Amnesty International, USA, Washington DC, 2012, p. 5

⁵⁴⁷ The Special Rapporteur on the human rights situation in the DPRK in his 2013 report to the Human Rights Council A/HRC/22/57, stated that: *Grave human rights violations in the prison camps (or) even the mere existence of such camps,*

as reported by former detainees, many of them die in detention or are sexually abused, while, pregnant women are given injection to induce abortion and infanticide (perpetrated by state authorities) if they were impregnated by Chinese men, testimonies even reported that prison officials force other female prisoners to assist in the baby killings⁵⁴⁸. Also, during interrogation a full body search is carried out, the detainees are subject to rectal or vaginal cavity searches (even by hand) for any hidden money and forced to perform numerous 'stand-up and squats' while naked, and if they cried out in pain or humiliation they were beaten with a wooden stick. Women who admitted having swallowed money or valuables were forced to drink detergent water to induce vomiting or diarrhoea. Then, they would be isolated and given buckets to collect vomit or excrement until the swallowed valuables were retrieved⁵⁴⁹. After the interrogation and examination, depending on the number of times the person had been in China, depending on their background (if the person had been serving in the military or was a government official the interrogation and sentencing appear to be more severe), and depending on the situation, they are sent in extra-judicial detention facilities including:

- *Kwan-li-so* political penal labour camps no. 15 and 18 located in the mountains or valleys where North Koreans suspected of wrong doing and wrong-thinking are deported, without trial, to disappear and subjected to forced labour in mines, logging, state farming and factory work. The striking feature of this detention is the penal philosophy of "collective responsibility" or "guilt by association" (*yeon-jwa-je*) where up to three generations may be punished.
- *Kyo-hwa-so* penitentiaries or re-education labour camps, where persons deemed to have committed felony criminal and political offenses are sent for fixed-term forced labour often under very strict regime and brutal conditions.
- *Jip-kyul-so* shorter-term detention facilities for repatriated North Korean women who are incarcerated for one to three months, but no more than six months. Here hard labour coupled with insufficient food and unhygienic conditions results in a high number of deaths. There are cases in which sick people are released earlier to prevent them from dying in custody only for removing the administrative burden of processing a death.

with slave-like conditions for political prisoners, may qualify as crimes against humanity under art. 7, para 1, of the Rome Statute, sub-paragraphs (c) enslavement, and (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law. See also, FIDH, *The death penalty in North Korea: In the machinery of a totalitarian State*, p. 10. Available at <https://www.fidh.org/IMG/pdf/en-report-northkorea-high-resolution.pdf> , accessed 30/11/2018

⁵⁴⁸ David Hawk, *The Hidden Gulag the Lives and Voices of "Those Who are Sent to the Mountains" Exposing North Korea's Vast System of Lawless Imprisonment*, Committee for Human Rights in North Korea, p. 122. See also, Norma Kang Muico, *An Absence of Choice: The sexual Exploitation of North Korean Women in China*, Anti-Slavery International, 2005, p. 11. Repatriated pregnant women carrying 'half-Chinese' babies or 'children of betrayers' are subjected to abuse and torture because of what North Korean authorities define as *indecent sexual liaison* with Chinese men.

⁵⁴⁹ David Hawk, *op. cit.*, p. 130. See also Korean Bar Association, *op. cit.*, p. 232.

- *Ro-dong-dan-ryon-dae* labour training facilities largely for repatriated Koreans, set up originally because the numbers of repatriated Koreans overwhelmed the *jip-kyul-so* detention facilities⁵⁵⁰

Prisoners in labour camps are entirely *incommunicado* meaning they cannot receive visits, correspondence, medicines, food, clothing from family members or friends. According to Amnesty International, several testimonies of former detainees at political prison camp 15 at Yodok reported the slavery-like conditions they were subjected to, including torture and other inhuman and degrading treatment often accompanied by public executions⁵⁵¹.

4. Republic of Korea

The Republic of Korea (from hereafter ROK or SK) over the past five years has been a source, transit, and destination country for men, women, and children subjected to sex trafficking⁵⁵². The ROK has experienced increasing immigration in the last two decades, and like China and Japan, the country's growing wealth has fuelled the demand of migrant labours, especially of women. Not only South Korean women are subjected to forced sexual exploitation in SK, where it has become the major source of entertainment for men in Korea's patriarchal and male-dominant culture, but those who manage to go abroad are exploited and forced into prostitution in salons, massage parlours, bars, restaurants, or even through internet-advertised escort services⁵⁵³. In response to human trafficking, the ROK has demonstrated a high level of policy efforts to prosecute perpetrators of human trafficking and provide assistance for victims fulfilling the requirements for providing necessary assistance to victims trafficking, such as legal consultation, medical care, repatriation assistance, vocational training and (temporary) residency. Such assistance is also available to foreign nationals and victims of human trafficking, including male trafficked victims who are, in principle, not punished for the acts committed as a result of their situations of being trafficked⁵⁵⁴. Therefore, the Tier-ranking evaluating anti-trafficking policy rank the ROK as one of the leading countries in anti-trafficking performance even though it has not ratified the UN Trafficking Protocol⁵⁵⁵.

4.1 Gender inequality in Korea's culture and women stigmatisation

Like in our previous studies, trafficking in women reflects the gender inequality in SK. In modern society, the hunt for pleasure pervades many parts of Korean males' lives and creates a huge demand for sex services. Men frequent brothels or other establishments that sell sexual services after drinking with male friends and

⁵⁵⁰ Norma Kang Muico, *op. cit.*, p. 9

⁵⁵¹ T. Kumar, *China's Repatriation of North Korean Refugees Before the Congressional-Executive Commission on China*, Amnesty International, USA, Washington DC, 2012, p. 6

⁵⁵² U.S Trafficking Report 2018, *op. cit.*, p. 258

⁵⁵³ *Ibid.*

⁵⁵⁴ *Ivi*, p. 257

⁵⁵⁵ Seo-Young Cho, *Human Trafficking in South Korea—Experience, Challenges, and Policy* in *Eu-Asia Dialogue, Trafficking in Human Beings Learning from Asian and European Experiences*, Konrad-Adenauer Stiftung and European Union, Singapore, 2014, p. 39. See also U.S Trafficking Report 2018, p. 256.

co-workers. Business clients and/or partners are entertained in bars with female hostesses providing sex services and, therefore, increase the demand for prostitution. Furthermore, numerous studies have appointed this country to be one of the major origin countries of sex tourists. Tourists and businessmen from SK and from other States purchase commercial sex and prostitutes, often underaged girls who become prostitutes presumably against their will⁵⁵⁶. While, men can easily find sexual gratification in Korea, the society stigmatises prostituting women as morally corrupt. Confucianism had emphasised female chastity in the Korean society, and even the old prostitution policy labelled women engaged in prostitution as *Yullak-Haeng-Wi*, those who perform morally depraved act that “*vitiate public morals*”⁵⁵⁷. It was not until 2000 that the country finally took the initiative to address human exploitation. In response to the growing demand for sexual pleasure and the tragic working conditions of women in prostitution, a women’s rights movement, under the name of Korean Women’s Associations United⁵⁵⁸ (KWAU), was established in 2000 in order to expose the horrific realities of the nation’s sex industry⁵⁵⁹, especially after the accident that saw the death of some Korean prostitutes in Gusan’s brothel district. It was reported that in this brothel prostitutes were sleeping in an enclosed room with fortified metal bars windows when suddenly a fire broke out. With no chance of escaping these women burned alive⁵⁶⁰. Even though the public officials in Gusan were aware of the inhumane conditions these women were forced into, they remained silent and tolerated procurers to illegally function in exchange for bribes. Outraged, KWAU and other NGOs helped the families to claim justice against corrupted public officials and procurers who forced the women to perform sex services. More crucially, this case finally raised public awareness about the exploitation of women⁵⁶¹. After four years of exhausting attempts to find a compromise between KWAU and the National Assembly, two laws were passed on February 2004 first, the *Act on the Punishment of Procuring Prostitution and Associated Acts*⁵⁶²

⁵⁵⁶ *Ibid.*, p. 41

⁵⁵⁷ Law Against Morally Depraved Behaviours (윤락행위등방지법), Statutes of South Korea, Act no. 771, chap. 1, art. 1, 1961. See Ji Hye Kim, *Korea’s New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature’s Intent to Protect Prostitutes from Abuse*, Pacific Rim Law & Policy Journal Association, 2007, p. 498

⁵⁵⁸ KWAU is an umbrella organization affiliated by 7 chapters and 30 member organizations striving to achieve gender equality, democracy, and peaceful reunification in the Korean peninsula by facilitating solidarity and collective actions among women’s groups since its establishment in 1987. More information available on the official website <http://women21.or.kr/kwau/6858?ckattempt=1>, accessed 07/12/2018

⁵⁵⁹ Ji Hye Kim, *Korea’s New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature’s Intent to Protect Prostitutes from Abuse*, Pacific Rim Law & Policy Journal Association, 2007, p. 501

⁵⁶⁰ Mindy Belz, website, *No way out: A deadly fire in South Korea sheds new light on the scandal of forced prostitution around the world*, World Magazine, February 2002, article available at https://world.wng.org/2002/02/no_way_out, accessed 07/12/2018

⁵⁶¹ Ji Hye Kim, *Korea’s New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature’s Intent to Protect Prostitutes from Abuse*, Pacific Rim Law & Policy Journal Association, 2007, p. 502

⁵⁶² Act on the Punishment of Acts of Arranging Sexual Traffic (성매매알선 등 행위의 처벌에 관한 법률), Act No. 7196, 23th March 2004, last amended by Act no. 10697, 23th May 2011. English translation available at http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=22187&type=part&key=9, accessed 07/12/2018

(Punishment Act), and second, the *Act on the Prevention of Prostitution and Protection of Victims Thereof*⁵⁶³ (Protection Act). In recent years, particularly in 2017, to decrease the demand for sexual activities, the ROK's government provided schools, administration agencies, local governments, and public structures with anti-prostitution and trafficking education programmes; and publicised the illegality of child sex tourism (predominant among South Korean men) in airports, train stations, and travel agencies⁵⁶⁴.

4.2 Anti-trafficking policy in South Korea

a. The punishment Act and the Protection Act

Until 2013, domestic human trafficking law did not include all of the elements contained in the UN Trafficking Protocol's definition⁵⁶⁵. Instead, we could find the act toward punishing "sexual traffic"⁵⁶⁶ and a separate act on preventing such traffic and protecting victims⁵⁶⁷, with the solely purpose of dealing against commercial sexual exploitation, more precisely eliminating the act of buying and selling sex⁵⁶⁸. The former focuses on penalising procurers and traffickers, while the latter focuses on protecting persons engaged in prostitution⁵⁶⁹. The special laws reflect international standards that considered sex trade as violence perpetrated on women and so potentially eligible for victim status. The laws establish tougher penalties on brothel owners and buyers, while protecting victims. These new laws emphasise the responsibility of the State to protect women's rights. Victims of sexual traffic are those who are coerced into prostitution through force or deception⁵⁷⁰ and those trafficked for the sole purpose of being sexually exploited, therefore, the alleged victims are not accountable for the act of prostitution⁵⁷¹. In addition, the Special Laws on Sex Trade⁵⁷² calls for the Korean government to establish support centres providing shelters for sex trafficking victims and prostitutes⁵⁷³. Moreover, detention or deportation orders can be halted for a certain period of time when

⁵⁶³ Act on the Prevention of Sexual Traffic and Protection, etc. of Victims Thereof (제 36 편 사회복지 성매매방지 및 피해자보호 등에 관한 법률), Act no. 7212, 22th April 2004, last amended by Act no. 10997, 4th August 2011. English translation available at <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/86766/98422/F912272643/KOR86766.pdf>, accessed 07/12/2018

⁵⁶⁴ U.S Trafficking Report 2018, *op. cit.*, p. 258

⁵⁶⁵ Douglas Maclean, *Marriage Migrants and Commercial Marriage Trafficking in South Korea: Mapping the Current Legal Regime and Gaps in Addressing Exploitation*, KLRI Journal of Law and Policy, Korean Legislation Research Institution, Vol. 4 no. 1, 2014, p. 19.

⁵⁶⁶ Act on the Punishment of Acts of Arranging Sexual Traffic, *op. cit.*

⁵⁶⁷ Act on the Prevention of Sexual Traffic and Protection, etc. of Victims Thereof, *op. cit.*

⁵⁶⁸ The Punishment Act uses the term Sung-Mae-Mae (성매매), which describes the buying and selling of sex. The term matches the definition of prostitution, which is the act or practice of engaging in sexual activity for money or its equivalent.

⁵⁶⁹ Ji Hye Kim, *Korea's New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature's Intent to Protect Prostitutes from Abuse*, Pacific Rim Law & Policy Journal Association, 2007, p., p. 506

⁵⁷⁰ Act on the Prevention of Sexual Traffic and Protection, etc. of Victims Thereof, *op. cit.*, art. 2 (4)

⁵⁷¹ *ivi*, art. 6 (1)

⁵⁷² The two new laws together are referred together as "Special Laws on Sex Trade" or "Anti-Prostitution Legislation" (성매매방지법)

⁵⁷³ Dong-Hoon Seol and Geon-Soo Han, *Foreign women's life and work in the entertainment sector of Korea from the human trafficking perspective*, in Shiro Obuko and Louise Shelley, *Human Security, Transnational Crime, and Human*

the victim's testimony is necessary for trial, when the victim attempts to obtain compensation, or when circumstances related to her "condition" merit⁵⁷⁴. Unfortunately, these laws are essentially blind to acts of human trafficking that fall outside the sex trafficking issue. For instance, by taking the case of marriage migrants sold into forced prostitution they would be protected under the law, while those sold into forced marriages would be not and similarly excluded are victims of domestic servitude. Even the lack of payment or non-monetary consideration is an impediment to applying law on sexual traffic⁵⁷⁵.

b. Criminal Act

Finally, in early 2013 the South Korea's National Assembly passed the anti-trafficking legislation of chapter 31 of the criminal code⁵⁷⁶ on seizing, enticing, and trafficking of persons, prohibiting all forms of human trafficking including both sex and labour trafficking⁵⁷⁷. The new legislation also introduces universal approaches in anti-trafficking policy that specify that crimes of human trafficking committed by Korean nationals abroad can be also punished under the South Korean law⁵⁷⁸. Furthermore, under the new law, not only sex trafficking, but also labour trafficking demands more stringent punishment of convicted traffickers, with a maximum sentence of 15 years in prison (previously to 5-10 years) meeting the international standards imposed by the UN Trafficking Protocol⁵⁷⁹. On the other hand, if we take into account the recognition of SK's government of the three pillars of trafficking (act, means, and purposes), the means is limited only to physical means, without considering as evidence of human trafficking other means such as threatening family members, debt bondage, abusing victims' vulnerable situations, deception, etc., despite the definition provided by the UN Trafficking Protocol⁵⁸⁰.

Trafficking Asian and Western Perspectives, Routledge Transnational Crime and Corruption Series, New York, 2011, p. 153

⁵⁷⁴ Act on the Prevention of Sexual Traffic and Protection, etc. of Victims Thereof, *op. cit.*, art. 11 (1) (2)

⁵⁷⁵ *Ivi*, art. 2 (1) defines sexual traffic "an act [...] in return for receiving or promising to receive money, valuables or other property gains". See also Douglas Maclean, *Marriage Migrants and Commercial Marriage Trafficking in South Korea: Mapping the Current Legal Regime and Gaps in Addressing Exploitation*, KLRI Journal of Law and Policy, Korean Legislation Research Institution, Vol. 4 no. 1, 2014, p. 21-23

⁵⁷⁶ Criminal Act, Act no. 10259, 5th April 2013, went into effect on 6th June 2013. English version available at https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG, accessed 09/12/2018.

⁵⁷⁷ *ivi*, art. 288 (2) states that "A person who obtains and maintains another under the control of his/hers or a third person by means of the threat, use of force or other forms of coercion, or by means of fraud, deception or enticement for the purpose of labour exploitation, sex trafficking, sexual exploitation, or the acquisition of organs, shall be punished by imprisonment for at least two years up to fifteen years", and art. 289 (3) "A person who buys or sells another for the purpose of labour exploitation, sex trafficking, sexual exploitation, or the acquisition of organs shall be punished by imprisonment for at least two years up to fifteen years".

⁵⁷⁸ *ivi*, art. 296 (2) "articles 287 through 292 and art. 294 shall apply to aliens who commit any of the crimes in these Articles outside the territory of the Republic of Korea".

⁵⁷⁹ Seo-Young Cho, *Human Trafficking in South Korea—Experience, Challenges, and Policy* in *Eu-Asia Dialogue, Trafficking in Human Beings Learning from Asian and European Experiences*, Konrad-Adenauer Stiftung and European Union, Singapore, 2014, p. 43

⁵⁸⁰ *ivi*, p. 44

CONCLUSION

Victims of human trafficking are unknown, faceless, and displaced from society. Significant steps to have been made combat trafficking in persons, but victims of this crime are still frequently rejected by the public's concern and often left forgotten. In spite of the ratification of global and regional anti-trafficking frameworks and enactment of significant national laws to curb the exploitation and abuse of human trafficking, limitations of anti-trafficking law enforcement measures in the East-Asia region are most apparent when perpetrators cannot be held accountable and trafficking remains an endemic security issue, threatening States and societies. Whether a nation chooses to proscribe, permit, or regulate trafficking in persons, robust legal frameworks, while absolutely vital to maintain peace and security, are not sufficient or entirely effective in eradicating the exploitation and abuse of women and children. Based on the evidence presented in this paper, while there is enough national legislation in the countries, the main problem is the limited capability of law enforcers, labour inspectors, and other officials tasked to suppress cases of exploitative situations, especially of women, young girls and children, which causes a perpetuating chain of inadequate criminal justice response, law enforcers' lack of understanding of relevant international and national anti-trafficking laws, limited monetary funding and resources, skewed implementation of laws, and above all lack of coordination among public agencies and other relevant organizations. After a thorough research, we can determine that governments should work together to strengthen legislation to facilitate the investigation and the prosecution of trafficking cases and the denunciation of all activities associated with trafficking. The restructuring of the enforcement side of the legislation not only by East-Asian and ASEAN countries but also from other nations, could promote better results in terms of the number of convicted violators and it would improve the efforts towards the identification of victims and provide assistance and support. Many of the survivors of human trafficking – at least those who are seeking support – are left feeling as if they are the real criminals, while in truth, they are vulnerable victims that have been entrenched in a system of manipulation, crime, abuse by their captors against their will. Therefore, strong collaborations among existing government and non-government humanitarian agencies would improve the assistance and provide support services for victims of trafficking – as the majority of survivors of trafficking often suffer complex trauma substantial enough to cause long-term psychological and physical effect – and, consequently, promote “a victim-centred⁵⁸¹” and “trauma-informed approach⁵⁸²”, crucial in establishing trust between the

⁵⁸¹ The victim-centred approach seeks to minimise re-traumatisation associated with the criminal justice process by providing the support of victim service centres and understand the vast impact of traumas on victims, empowering survivors as engaged participants in the process, and providing survivors an opportunity to play a role in seeing their traffickers brought to justice, as well as crafting special response measures in addressing their peculiar needs (U.S Department of States, 2017).

⁵⁸² A trauma-informed approach includes an understanding of the physical, social, and emotional impact of trauma on the individual, as well as on the professionals who help them (*Cit.* U.S Department of States, 2017).

victims and law enforcers and in combating trafficking in persons⁵⁸³. Another continuous recurrence seen in East-Asian states is the complicity of public authorities, officials, and criminal justice actors in trafficking in persons. It would be, therefore, highly recommended to adopt strategies to investigate and prosecute these actors' complicity, in order to discourage public authorities from scheming with criminal organizations. Complicit and corrupted government officials should face the same criminal liability and prosecution of traffickers or any other agent involved in the exploitation of human beings. In fact, reliable prosecution of corrupted public individual is a fundamental element to support anti-trafficking regime, knowing that corruption is a basic requirement for illegal organization to move people across regions' borders and transnationally. Given the tremendous challenges regional states are presented with, we contend that it is important for ASEAN members States and the broader East-Asian region to work together and fully utilise regional cooperation and provide common standards for the protection of victims. If governments across the countries manage to share their knowledge, resources, and competence, the prevention of trafficking and the prosecution of perpetrators can be exhaustively implemented together with protective measures to address the vulnerabilities of victims of trafficking, without having one prevailing over the other. Lastly, the practice of trafficking is also deeply embedded in the cultural perceptions, ideas, and attitudes towards gender inequality and discrimination against women only *because they are women*⁵⁸⁴. By all means, the principle of non-discrimination based on gender equality, although it is proclaimed in almost all of national legislations, it should be also recognised by all the remaining countries who have yet to acknowledge such principle as in the case of some ASEAN countries⁵⁸⁵.

⁵⁸³ U.S Department of States, *Engaging Survivors of Human Trafficking*, Office to Monitor and Combat Trafficking in Persons, 27 June 2017. Available at <https://www.state.gov/j/tip/rls/fs/2017/272009.htm> , accessed 15/12/2018.

⁵⁸⁴ Sara De Vido, *Women's Rights and Gender Equality in Europe and Asia*, in Yumiko Nakanishi, *Contemporary Issues in Human Rights Law Europe and Asia*, SpringerOpen, 2017, p. 164

⁵⁸⁵ *Ivi*, p. 143. Therefore, the principle of non-discrimination is excluded in the constitutions of Brunei Darussalam, Lao PDR, Philippines, and Thailand. Whereas, Singapore and Indonesia, despite having a provision on non-discrimination, do not mention gender as basis for discrimination.

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