



Freedom, Security & Justice:
European Legal Studies

Rivista giuridica di classe A

2023, n. 1

EDITORIALE
SCIENTIFICA



DIRETTORE

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Ordinario di Diritto Internazionale e di Diritto dell'Unione europea, Università di Salerno Titolare della Cattedra Jean Monnet 2017-2020 (Commissione europea)
"Judicial Protection of Fundamental Rights in the European Area of Freedom, Security and Justice"

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Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu

Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017



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A LEGAL ANALYSIS OF THE CONTRIBUTING FACTORS TO TRAFFICKING IN WOMEN: POINTS OF STRENGTH AND WEAKNESS OF THE RECENT DEVELOPMENTS IN EUROPE

Sara De Vido*

SUMMARY: 1. Introduction. – 2. Migration, trafficking and women: building the connections. – 2.1. Migration and trafficking. – 2.2. Gendered migration and trafficking. – 3. Root causes *vs* contributing factors: searching for a method of analysis. – 4. A contributing factors analysis of the proposed amendments to the EU Anti-Trafficking Directive. – 5. Contributing factors to trafficking in persons, especially women and children: violence against women and girls. – 5.1. The proposed amendment to the 2011 EU Anti-Trafficking Directive. – 6. Contributing factors to trafficking in persons, especially women and children: illegal adoption. – 6.1. The proposed amendment to the 2011 EU Anti-Trafficking Directive. 7. Contributing factors to trafficking in persons, especially women and children: the “gender” digital dimension. – 7.1. The proposed amendment to the 2011 EU Anti-Trafficking Directive. – 8. Contributing factors to trafficking in persons, especially women and children: the unsafe migration framework. – 8.1. What the proposal is not willing to cover: reinforcing the migration framework. – 9. Concluding remarks.

1. Introduction

Trafficking in persons is a widespread phenomenon, a transnational crime and a violation of human rights¹.

Double blind peer reviewed article.

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¹ On human trafficking, see, *ex multis*, S. SCARPA, *Trafficking in human beings*, Oxford, 2008; E. DECAUX, *Les formes contemporaines de l'esclavage*, Leiden, 2009; A. GALLAGHER, *The international law of human trafficking*, Cambridge, 2011; V. ROTH, *Defining human trafficking and identifying its victims: a study on the impact and future challenges of international, European and Finnish legal responses to prostitution-related trafficking in human beings*, Leiden, 2011; J. ALLAIN, *Slavery in international law. Of human exploitation and trafficking*, Leiden, 2012; G. VAZ CABRAL, *La traite des êtres humains: Réalités de l'esclavage contemporain*, Paris, 2013; S. FORLATI (ed.), *La lotta alla tratta di esseri umani, fra dimensione internazionale e ordinamento interno*, Napoli, 2013; C. CLESSE, *La traite des êtres humains*, Bruxelles, 2013; J. ELLIOTT, *The role of consent in human trafficking*, London, 2014; D. BORG JANSSON, *Modern slavery*, Leiden, Boston, 2015; V. STOYANOVA, *Human trafficking and slavery reconsidered: conceptual limits and States' positive obligations in European law*, Cambridge, 2017; J. PLANITZER, H. SAX (eds.), *A Commentary on the Council of Europe Convention on action against trafficking in human beings*, Cheltenham, 2020; V. MILANO, *The human rights-based approach to human trafficking in international law: an analysis from a victim protection perspective*, Madrid, 2020; C. BRIDDICK, V. STOYANOVA, *Human*

It entails economic costs². Despite an increasing number of people trafficked in the world over the past decade, the UNODC *Global Report on Trafficking in Persons* of 2022 (Global Report) showed that the number of detected victims fell in 2020 for the first time in 20 years as a consequence of the pandemic³. This does not necessarily mean that the phenomenon decreased, though. According to the Global Report, the lockdowns potentially pushed trafficking further underground and constrained law enforcement capacities to target the crime⁴. A 24 per cent reduction, compared to 2019, was also registered in 2020 in the detection of victims trafficked for sexual exploitation. The reason is quite adamant, being victims of sexual exploitation mainly used in public venues which suffered from the closures and limitations decided by law to counter the contagion. As stressed in the Global Report, however, trafficking for sexual exploitation did not disappear but was rather pushed into less safe locations, where it is harder to detect the crime⁵. The return to normality does not necessarily eliminate this more concealed forms of trafficking. In terms of numbers, nearly two-thirds of detected victims of trafficking for sexual exploitation are women, and another 27 per cent are girls. Around 10 per cent are males⁶.

In Europe, where data refer to 2021, the situation has returned to the pre-pandemic period. The EUROSTAT statistics, published in February 2023⁷, highlight a general trend: the majority of victims of trafficking in human beings in the European Union (EU) are women and girls (68,4 per cent) and sexual exploitation remains the predominant form of exploitation, with an increase in labour exploitation. Even though an increase in convictions for trafficking has been reported, the number of convicted persons continue to remain much lower than the number of those that are likely to engage in criminal activity.

The fight against this transnational crime is a priority in the EU: trafficking in human beings and sexual exploitation of women and children is among the Eurocrimes for which harmonisation is requested within the EU (Article 83(1) of the Treaty of the Functioning of the European Union, TFEU), on which Directive No. 2011/36/EU⁸ (the EU Anti-

trafficking and refugees, in C. COSTELLO, M. FOSTER, J. MCADAM (eds.), *The Oxford handbook of international refugee law*, Oxford, 2021, pp. 553-568.

² European Commission, *Study on the Economic, Social and Human Costs of Trafficking in Human Beings within the EU*, Brussels, 2020.

³ UNODC, *Global Report on trafficking in persons*, New York, 2022, https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf (last access of all websites 25. February 2023). See also UN Special Rapporteur on trafficking in persons, especially women and children, COVID-19 Position paper, *The impact and consequences of the COVID-19 pandemic on trafficked and exploited persons*, 8 June 2020.

⁴ UNODC, *Global Report*, cit., p. 3.

⁵ *Ibid.*

⁶ *Ibid.*, p. 33. The report also took into account the number of transgender persons trafficked. They count for 2 per cent of detected victims who endure trafficking for sexual exploitation, in the nine countries in the Americas and Western and Southern Europe that reported data to UNODC for 2020.

⁷ Available at the following website: <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20230208-2>.

⁸ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework

Trafficking Directive) is legally based; within the common immigration policy, Member States are required to ensure the prevention of illegal immigration and trafficking in human beings (Article 79 (1) and (2)(d) TFEU). After having adopted the EU Strategy on combatting trafficking in human beings 2021-2025⁹, the European Commission presented a proposal for amendments to the Anti-Trafficking Directive in December 2022 “to better prevent and combat trafficking in human beings and to protect its victims under the legal framework in place in the Union”¹⁰.

The purpose of this contribution is first to build the legal connections between anti-trafficking law, women and international refugee law, through a systemic interpretation of relevant international and regional provisions. The paper will then move to “contributing factors” to trafficking and a) distinguish the root cause analysis from the contributing factors analysis in order to understand what nourishes the transnational crime of trafficking in persons; b) explain why the contributing factors analysis can be used as framework of investigation of the proposal of the European Commission, with the purpose of highlighting its points of strength and weakness. This contribution will identify four of these factors: violence against women (forced marriage), illegal adoptions, internet and communication technologies, “unsafe” migration frameworks. It will further and innovatively contextualise these factors in light of the amendments proposed by the European Commission in December 2022. It eventually suggests that working on a safer migration framework in the EU is the key aspect for the prevention of the transnational crime.

As methodology, this contribution applies the contributing factors analysis to legal issues related to trafficking in persons, migration and women, and uses as legal instruments of reference a combination of international and regional hard law and soft law acts. With regard to the latter, these pages will particularly focus on the Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking of 2010¹¹, the Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000¹², the Committee on the Elimination of Discrimination against Women

Decision 2002/629/JHA, in *OJ L 101*, 15.4.2011, pp. 1-11. See C. GABRIELLI, *La direttiva sulla tratta di esseri umani tra cooperazione giudiziaria, penale, contrasto all'immigrazione illegale e tutela dei diritti*, in *Studi sull'integrazione europea*, 2011, n. 3, pp. 609-631.

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025, 14 April 2021, COM(2021)171 final.

¹⁰ Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 19 December 2022, COM(2022) 732 final, 2022/0426(COD).

¹¹ Recommended Principles and Guidelines on Human Rights and Human Trafficking, text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E/2002/68/Add. 1), and its commentary of 2010.

¹² UNODC, *Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, New York, 2020, https://www.unodc.org/documents/human-trafficking/2020/TiP_LegislativeGuide_Final.pdf.

(CEDAW) General Recommendation No. 38 (GR 38)¹³ and its related guidelines¹⁴, also taking into account reports and studies prepared by the EU, the International Migration Organization (IMO) and the UN Special Rapporteur on Trafficking in persons, especially women and children (SR on Trafficking).

2. Migration, trafficking and women: building the connections

The legal connection between trafficking, migration and women has not been expressly acknowledged in international legally binding instruments, which separately address issues of international criminal law, refugee law and human rights law¹⁵. However, as much as migration is a common characteristic of globalization, so is crime as linked to migration¹⁶. Gender plays a role in understanding the way patriarchal structures of societies influence the decision to migrate; how migration policies are formulated; and women's and men's differing trafficking experiences¹⁷. This part will show how the connections between migration, trafficking and women can be established through a systemic interpretation of the relevant provisions adopted at the international and regional level.

2.1. Migration and trafficking

In the 1951 United Nations Convention on the status of refugees (1951 Refugee Convention), no explicit reference to trafficking in persons is provided. Article 1A(2) defines a refugee as a person that:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

It was a soft law act to build the connection between migration, refugee status and trafficking. The *Guidelines on International Protection* (the "2006 Guidelines") stressed how trafficked people might present the requirements to ask for refugee status¹⁸. Even

¹³ CEDAW, *General Recommendation No. 38 (2020) on Trafficking in Women and Girls in the Context of Global Migration*, 20 November 2020, CEDAW/C/GC/38.

¹⁴ *Guidelines on CEDAW General Recommendation No. 38*, available at the website: <https://www.ohchr.org/sites/default/files/documents/hrbodies/cedaw/gr38/guidelines-cedaw-gr38.pdf>

¹⁵ I. ATAK, J.C. SIMEON, *Human trafficking. Mapping the legal boundaries of international refugee law and criminal justice*, in *Journal of International Criminal Justice*, 2014, n. 12, pp. 1019-1038.

¹⁶ D. B. JANSSON, *Modern slavery*, Leiden, Boston, 2015, p. 50.

¹⁷ T. BASTIA, *Stolen lives or lack of rights? Gender, migration and trafficking*, in *Labour, Capital and Society / Travail, capital et société*, 2006, n. 2, pp. 20-47, p. 26.

¹⁸ UNHCR, *Guidelines on International Protection: the application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, HCR/GIP/06/07, 7 April 2006.

though the persecutory nature of the acts associated with trafficking must be assessed in the individual case, “inherent” in the trafficking experience are such forms of “severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment”: “such acts constitute serious violations of human rights which will generally amount to persecution”¹⁹. The 2006 Guidelines also pointed out that the “forcible or deceptive recruitment of women and children for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence, which may constitute persecution”²⁰. Possible re-trafficking and reprisals that victims may face in case they are deported to their country of origin can also be considered as amounting to persecution²¹. Re-trafficking predominantly occurs when a person is deported by immigration agencies without being identified as a victim of trafficking. As reported in an IOM report, a number of these people can be later re-trafficked, because they remain in a position of (also economic) vulnerability and/or they lose the support of the family and local community, suffering from stigmatisation²².

Concerning the “well-founded fear of persecution” based on one or more of the 1951 Refugee Convention grounds, victims of trafficking can fall under the category of “particular social group”, which is the “classic” all-encompassing expression which however fails to appreciate the complexity of individual trafficking cases. As it was noted, the criteria on trafficked people being member of a particular social group are “still not clearly established in law”²³. Trafficking in persons also presents another peculiarity. Victims of trafficking may not have left the country *because of* the fear of being persecuted, but “such a fear may arise after leaving their country of origin” and in such cases, “it is on this basis that the claim to refugee status should be assessed”²⁴. In other words, an individual’s well-founded fear of persecution must be related to one or more of the Convention grounds but can emerge during the journey to a country of destination which is different from the country of origin.

The legal distinction between trafficking in persons and crimes related to the phenomenon of migration, even though, as anticipated, trafficking *is* related to migration, was made particularly clear in the adoption of two different protocols to the UN Convention against Transnational Organised Crime of 2000: the Protocol to Prevent, Suppress and Punish *Trafficking in Persons*, especially Women and Children (the

¹⁹ *Ibid*, para. 15.

²⁰ *Ibid*, para. 19.

²¹ I. ATAK, J.C. SIMEON, *op. cit.*, p. 1026.

²² IOM, *The Causes and Consequences of Re-Trafficking: Evidence from the IOM Human Trafficking Database*, 2010, p. 37. https://publications.iom.int/system/files/pdf/causes_of_retrafficking.pdf

²³ I. ATAK, J.C. SIMEON, *op. cit.*, p. 1028.

²⁴ 2006 Guidelines, *cit.*, para. 25.

Trafficking in Persons Protocol)²⁵ and the Protocol against the Smuggling of Migrants.²⁶ The Trafficking in Persons Protocol, ratified by 181 countries²⁷, defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (Article 3(a)).

The Trafficking in Persons Protocol contains a reference to migration issues in Article 14 (saving clause):

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

When a State is party to both the 1951 Refugee Convention and the Trafficking in Persons Protocol, the legal relation between the two is explained by Article 14 of the latter, which coordinates the provision of the Protocol with the obligations stemming from the 1951 legal instrument. The Protocol “does not narrow or diminish any rights, obligations, or responsibilities; it only adds to them to the extent that is provided for in the text”²⁸. In cases where a victim of trafficking in persons is also a refugee, the Convention and Protocol relating to the Status of Refugees apply in addition to the Trafficking in Persons Protocol²⁹. The principle of *non-refoulement*, enshrined in Article 33 of the 1951 Refugee Convention, provides that no State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where her or his life or freedom would be threatened on account of the person’s race, religion, nationality, membership of a particular social group, or political opinion; it has consolidated, according to legal scholarship, as a customary and even *jus cogens* norm³⁰. The principle of *non-refoulement*

²⁵ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, entered into force on 25 December 2003.

²⁶ *Protocol against the Smuggling of Migrants by Land, Sea and Air*, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, entered into force on 28 January 2004.

²⁷ As of February 2023.

²⁸ Legislative Guide, *op. cit.*, para. 55.

²⁹ *Ibid.*, para. 58.

³⁰ See, among others, H. LAUTERPACHT, D. BETHLEHEM, *The scope and content of the principle of non-refoulement: opinion*, in E. FELLER, V. TÜRK, F. NICHOLSON (eds.), *Refugee protection in international law, UNHCR’s Global consultations on international protection*, Cambridge, 2003, pp. 89-177; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Geneva, 2007; J. WOUTERS, *International legal standards for the protection from refoulement*, Cambridge, 2009; F. SALERNO, *L’obbligo internazionale di non-refoulement dei richiedenti asilo*, in *Diritti umani e diritto internazionale*, IV, 2010, pp. 487-515; A. ZIMMERMANN, *The 1951 Convention relating to the status of refugee and its 1957 Protocol: A commentary*, Oxford, 2011, pp. 14-15; UNHCR, *Handbook on procedures and criteria for determining refugee status and guidelines on international protection, under the 1951 Convention and the 1967 Protocol relating to the status of refugees*, Geneva, February 2019; J. ALLAIN, *The jus cogens*

could apply, for example, if a trafficked victim fears persecution in his or her country of origin, for example in the form of re-trafficking, reprisals from traffickers or criminal networks, ostracism, social exclusion or discrimination to an extent that would amount to persecution, harassment, threats or intimidation³¹.

Another pivotal soft law act is the *Global Compact for Safe, Orderly and Regular Migration*, adopted by the UN General Assembly in 2018, contains Objective No. 10 that reads: “Prevent, combat and eradicate trafficking in persons in the context of international migration”³². Objective 9, which refers to the transnational response to smuggling of migrants, relates to the crime of trafficking, by explaining the importance of distinguishing between the crimes of smuggling of migrants and trafficking in persons, “while recognising that smuggled migrants might also become victims of trafficking in persons, therefore requiring appropriate protection and assistance”³³.

Moving to the regional level, there is no legal instruments on the recognition of refugee status within the Council of Europe system³⁴. Nonetheless, the 2005 Convention on action against trafficking in human beings provides that State parties “shall take appropriate measures, as may be necessary, to enable migration to take place legally”³⁵. The regional legal instrument was anticipated in 2003 by a recommendation of the Parliamentary assembly of the Council of Europe “on migration connected with trafficking in women and prostitution”³⁶.

At EU level, there has been a stronger acknowledgment of the connections between trafficking and migration. Article 79 TFEU provides that the EU develops a common immigration policy aimed at, among others, the prevention of and “enhanced measures” to combat illegal immigration and trafficking in human beings. In the text of the provision, trafficking becomes disentangled from illegal immigration, which constituted the legal basis for the adoption of Directive 2004/81³⁷. Trafficking in human beings and sexual exploitation of women and children is also one of the Eurocrimes for which

nature of non-refoulement, in *International Journal of Refugee Law*, 2001, n. 13, pp. 533-558; G. GOODWIN-GILL, J. MCADAM (eds.), *The refugee in international law*, 4.ed., Oxford, 2021.

³¹ IOM, *The IOM Handbook Direct Assistance for Victims of Trafficking*, 2007, p. 71; UNODC, *Toolkit to Combat Trafficking in Persons*, pp. 362-363. With regard to regional jurisprudence, the European Court of Human Rights found that European Union law embraced the principle of *non-refoulement* and applied it to cases in which persons were subjected to border checks before being admitted to the territory of an EU Member States (in that respect, *M.K. et al. v. Poland*, judgment of 23 July 2020, applications no. 40503/17, 42902/17, 43643/17; *D.A. et al. v. Poland*, judgment of 8 July 2021, application no. 51246/17).

³² Resolution adopted by the General Assembly on 19 December 2018, *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, 11 January 2019, p. 6.

³³ *Ibid.*

³⁴ Three Council of Europe Conventions have been adopted on refugee issues, which received however a low number of ratifications: European Agreement on transfer of responsibility for refugees (ETS No. 107), Protocol to the European Convention on consular functions concerning the protection of refugees (ETS No. 061A); European Agreement on the abolition of visas for refugees (ETS No. 031).

³⁵ Article 5(4) of the Convention. No reference is incorporated in the Council of Europe Convention against trafficking in human organs, adopted in 2015 in Santiago de Compostela (CETS No. 216).

³⁶ ETS No. 197.

³⁷ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, in *OJ L 261*, 6.8.2004, pp. 19–23.

minimum rules for the definition of the criminal offence and sanctions can be adopted at EU level (Article 83 TFEU). After the Lisbon treaty, human trafficking is considered as an area of action that concerns not only immigration, but also prevention and suppression of transnational crimes, and protection of human rights³⁸. In the 2011 Anti-Trafficking Directive, the link with migration is emphasised by looking at the protection of victims from prosecution or punishment for criminal activities, such as offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking.

2.2. Gendered migration and trafficking

The gendered experience of migration characterises all phases: it starts with the reasons underlying the decision of fleeing a country, it continues during the journey, it persists after the arrival in the country of destination³⁹. The use of language that is not gender-neutral in the definition of refugee does not come as a surprise, given the time in which the 1951 Refugee Convention was adopted, but it is clear that the provisions of the Convention were not conceived to deal with cases of gender-based violence against women⁴⁰. Despite the silence of the 1951 Refugee Convention on the gender character of migration flows, the gendered dimension of trafficking has been incorporated both in the CEDAW and in the Trafficking in Persons Protocol. Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) reads that “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”. This vague and short provision, whose formation emerges from the *travaux préparatoires*, can be explained because “when the Convention was drafted, these issues were already addressed in international treaties, specifically the 1949 Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others” and, “due to the existing coverage under international law, the Convention drafters believed that trafficking needed only brief mention”⁴¹.

³⁸ A. DI PASCALE, *Articolo 79*, in A. TIZZANO, *Trattati dell’Unione europea*, Milano, II ed., 2014, pp. 846-858, p. 856.

³⁹ See also Objective No. 7 of the *Global Compact for Safe, Orderly and Regular Migration*, cit.: “(b) Establish comprehensive policies and develop partnerships that provide migrants in a situation of vulnerability, regardless of their migration status, with necessary support at all stages of migration, through identification and assistance, as well as protection of their human rights, in particular in cases related to women at risk, [...] victims of violence, including sexual and gender-based violence”.

³⁷ Cfr. N. KELLY, *Gender-related persecution: assessing the asylum claims of women*, in *Cornell International Law Journal*, 1993, no. 26, pp. 625-674, p. 627; S. DE VIDO, *Un approccio di genere alle migrazioni nella prospettiva del diritto internazionale alla luce della Convenzione di Istanbul del Consiglio d’Europa*, in O. PALLOTTA (ed.), *Crisi climatica, migrazioni e questioni di genere. Problemi giuridici*, Napoli, 2022.

⁴¹ M.A. FREEMAN, C. CHINKIN, B. RUDOLF, *Article 6*, in M.A. FREEMAN, C. CHINKIN, B. RUDOLF (eds.), *The UN Convention on the elimination of all forms of discrimination against women. A commentary*, OUP, 2012, pp. 169-196; N. BISTRA, I. ZEJNELI, *CEDAW right of non-discrimination and State obligations in*

As for the UN Trafficking in Persons Protocol, one of its purposes is “to prevent and combat trafficking in persons, *paying particular attention to women and children*” (Article 2(a))⁴². Article 6(4) of the Trafficking in Persons Protocol requires that States parties take into account the age, gender and special needs of victims of trafficking, in particular the special needs of children, in providing appropriate housing, counselling and information, medical, psychological and material assistance, employment, education and training.

As for soft law instruments, the United Nations *CEDAW* General Recommendation No. 19 contained three relevant paragraphs on the relationship between gender, migration and trafficking⁴³. One referred to poverty and unemployment as root causes of trafficking⁴⁴; a second one looked at poverty and unemployment as factors of the increase in prostitution⁴⁵; a third one stressed the link between war and armed conflict with trafficking⁴⁶. The step forward in the legal framework that embraces migration, gender and trafficking is represented by GR 38 adopted in November 2020, which interprets Article 6 CEDAW. GR 38 highlights how migrant women and girls are particularly vulnerable and exposed to being intercepted by criminals for the purpose of exploitation and includes a series of recommendations divided into: management of the root causes of traffic in women and girls; the protection of victims’ rights; gender-sensitive judicial proceedings; data gathering and legal, political and institutional framework; dissemination and reporting activities; treaty ratification.

Moving to the regional level, references to the gendered aspect of trafficking are clear in the Council of Europe Convention of 2005: State parties have legal obligations to “discourage the demand that fosters all forms of exploitation of persons, especially women and children” (Article 6), and to duly taking into account the special situation of women and child in the identification of victims (Article 10).

In the EU, the Anti-Trafficking Directive acknowledges in the preamble “the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes” and that gender-specific measures must be adopted⁴⁷.

3. Root causes vs contributing factors: searching for a method of analysis

Having set the international and European legal framework of the connections between immigration, trafficking and women, the focus now turns to the elements that

connection to trafficking in women, in *Advances in Social Sciences Research Journal*, 2016, n. 3, pp. 201-209.

⁴² Emphasis added.

⁴³ CEDAW *General Recommendation No. 19: Violence against women*, 1992.

⁴⁴ *Ibid.*, para. 14.

⁴⁵ *Ibid.*, para. 15.

⁴⁶ *Ibid.*, para. 16.

⁴⁷ See also the European Commission’s *Study on the gender dimension of trafficking in human beings*, 2016, <https://op.europa.eu/en/publication-detail/-/publication/b2412e8e-eb82-11e5-8a81-01aa75ed71a1>.

lead to trafficking, in order to identify the methodological instrument to approach the amendments to the 2011 EU Anti-Trafficking Directive, and contextualise them within the migration movement.

A reference to *factors* that put individuals in a condition of vulnerability is included in Article 9(4) of the Trafficking in Persons Protocol, which states that:

States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the *factors* that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

In the first comprehensive recommendation enshrined in the second part of GR 38⁴⁸, the CEDAW Committee calls upon States parties to address the *root causes* of trafficking in women and girls by mobilising public resources and strengthen public services areas that support the achievement of gender equality, by promoting women's and girls' human rights and their sustainable development in order to reduce the risk of *factors leading to trafficking*⁴⁹.

Within the European system, the 2005 Council of Europe Convention acknowledges the “responsibility and important role of media and civil society in identifying the demand as one of the *root causes* of trafficking in human beings”⁵⁰. The EU Anti-Trafficking Directive refers alternatively to the root causes of trafficking and to “push and pull factors” in its preamble⁵¹.

From a legal perspective, it seems that talking about root causes and contributing factors does not make any difference. Conceptually, however, it is first worth differentiating between the two. According to the *Root Cause Analysis*, “root cause is that most basic reason for an undesirable condition or problem which, if eliminated or corrected, would have prevented it from existing or occurring”⁵². It is the main reason for the occurrence of the phenomenon. A contributing factor is commonly considered as a secondary cause, whose elimination leads to the reduction of the *likelihood* of the phenomenon⁵³. Initially developed as retrospective incident investigation framework and as a quality management engineering tool, the *Root Cause Analysis* is now widely used in different sectors, including health management, to establish cause-effects nexuses. It can also be applied to legal matters, given the frequent – but widely imprecise – use in legal instruments of the words cause and “factors that contribute to”.

The root cause of trafficking of women and girls, especially for the purpose of sexual exploitation, can be identified in inequality and discrimination on the basis of sex/gender, which is aggravated by contributing factors that, by making persons more vulnerable, lead to trafficking. Alternatively, we might even argue that there is not a unique root cause of trafficking, but that several interrelated contributing factors represent the root cause. In other words, acting on simply one of the contributing factors will not suffice to eradicate

⁴⁸ GR 38, cit., para. 47.

⁴⁹ *Ibid.*

⁵⁰ Article 6, letter b).

⁵¹ Preamble, recitals no. 2 and 3.

⁵² P.F. WILSON, L.D. DELL, G. ANDERSON, F. GAYLORD, *Root Cause Analysis*, Milwaukee, 1993, p. 9.

⁵³ *Ibid.*

the phenomenon, which is deeply entrenched in a system of causes that together, and not taken singularly, is at the root of the crime. As an author argued:

The growth of trafficking in persons has been attributed to many causes, including poverty, lack of sustainable livelihoods, structural inequalities in society, gender discrimination, war and armed conflict, and other forms of natural or constructed disasters. However, it is critical to understand that these factors are not in themselves the causes of trafficking; they merely exacerbate the vulnerability of marginalized and disadvantaged groups and render them increasingly more susceptible to a variety of harms⁵⁴.

For example, scholars identified one of the contributing factors in the disproportionate effect of economic restructuring on women, “combined with increased demand in receiving countries for domestic workers, care workers, sex workers or semi-skilled jobs that require ‘nimble fingers’ and a willingness to work informally or for proportionally low wages”, that led to an increase in female economic migration and vulnerability to trafficking⁵⁵. Article 9(4) of the Trafficking in Persons Protocol contains a non-exhaustive list of factors, “such as poverty, underdevelopment and lack of equal opportunity”. Factors that contribute to trafficking by making people more vulnerable are several, including a demand for cheap labor and sexual services, shortage of organ transplants, lack of adequate labor and migration laws, limited mobility, restrictive migration laws and policies, war and conflict, natural disasters, climate change⁵⁶, gender-based violence, child abuse, and failures to protect fundamental human rights and civil liberties. Being elaborated in a vague manner, the provision means that States parties to the Trafficking in Persons Protocol have legal obligations to address the factors that determine conditions of vulnerability to trafficking “with a great degree of flexibility as to how the obligations are to be implemented”⁵⁷. This degree of “flexibility” can be translated in legal terms as due diligence obligations⁵⁸ to address the contributing factors to trafficking. In the Recommended Principles and Guidelines on human rights and human trafficking, principle 5 reads as follows: “States and intergovernmental organisations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty, and all forms of discrimination”⁵⁹. This principle is complemented by Guideline 7, which identifies measures that States could take to address the contributing factors, including “review of policies that may compel people to take dangerous migration decisions” and “promotion of legal, non-exploitative migration”⁶⁰.

⁵⁴ J. SANGHERA, *Unpacking the trafficking discourse*, in K. KEMPADOO, J. SANGHERA, B. PATTANAIK (eds.), *Trafficking and prostitution reconsidered: new perspectives on migration, sex work, and human rights*, Boulder and London, 2005, pp. 3-24, p. 7.

⁵⁵ A.M. RUSSELL, “Victims of Trafficking”: *The feminisation of poverty and migration in the gendered narratives of human trafficking*, in *Societies*, 2014, n. 4, pp. 532-548, p. 537.

⁵⁶ IOM, *The Climate Change and Human Trafficking Nexus*, IOM, 2016.

⁵⁷ Legislative Guide, cit., para. 285.

⁵⁸ On due diligence, see, among others, R. PISILLO MAZZESCHI, “Due Diligence” e responsabilità internazionale degli Stati, Milano, 1989; ID., *Responsabilité de l’État pour violation des obligations positives relatives aux droits de l’homme*, in *Recueil des cours de l’Académie de droit international*, 2008, vol. 333, pp. 175-506; SFDI, *Le standard de due diligence et la responsabilité internationale*, Paris, 2018.

⁵⁹ Recommended Principles and Guidelines, Commentary, cit., p. 105 ss.

⁶⁰ *Ibid.*, p. 106.

4. A contributing factors analysis of the proposed amendments to the EU Anti-Trafficking Directive

To critically examine the proposed amendments to the EU Anti-Trafficking Directive, this paper endorses the contributing factors analysis as the appropriate methodological tool, which, by highlighting what enhances vulnerability, allows us to reflect on the missing point in the discussion at European Union level, namely the need for a safe migration framework. The methodology used in these pages goes beyond a mere description of the provisions of the EU proposal and contextualises the analysis in the migration framework, eventually providing some remarks on possible improvements to the text.

The Anti-trafficking Directive was adopted on 15 April 2011 and has never been amended since then. In 2020, the Security Union Strategy stressed the difficulties in identifying, prosecuting and convicting trafficking in human beings and launched a reflection on a new comprehensive approach to combat the crime⁶¹. In 2021, the European Commission adopted the EU Strategy on Combatting Trafficking in Human Beings 2021-2025⁶², which a) posited that the full implementation of the Anti-Trafficking Directive is a priority of the European Commission; b) requested an evaluation of the level of implementation of the Directive and, based on the latter; c) proposed a revision of the 2011 legal instrument. The proposal shares the same legal basis as amended act, namely Articles 82(2) and 83(1) TFEU. With regard to the specific provisions, the proposal: i) includes forced marriage as a particular form of violence against women and girls and illegal adoption within the list of minimum forms of exploitation; ii) explicitly refers to the online dimension within the Directive; iii) introduces a mandatory regime of sanctions on legal persons differentiated for standard offence and for aggravated offences; iv) refers to the legal framework on freezing and confiscation; v) formally establishes a National Referral Mechanisms and National Focal Points for the referral of victims; vi) establishes new offences concerning the use of services which are the object of exploitation with knowledge that the person is a victim of trafficking; vii) introduces a reporting requirement for the new Article 18a; viii) requires a yearly data collection and reporting on indicators in the area of trafficking in human beings⁶³. The analysis provided in these pages will be limited to points i), ii), vi), and will be contextualised in the framework of migration.

⁶¹ Communication of the Commission, *A better workplace for all: from equal opportunities towards diversity and inclusion*, 19 July 2017, C(2017) 5300 final, p. 9.

⁶² EU Strategy, cit.

⁶³ European Commission, Explanatory memorandum of the proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, COM(2022) 732 final, p. 9.

5. Contributing factors to trafficking in persons, especially women and children: violence against women and girls

Gender-based violence against women and girls is a form of discrimination against women and a violation of human rights⁶⁴. Trafficking in women and girls is *per se* a form of violence against women, but violence against women and girls is also a *factor* that increases vulnerability to trafficking and exploitation of prostitution⁶⁵. States have legal obligations to address violence against women, stemming from the CEDAW – being violence against women a form of discrimination addressed by the CEDAW⁶⁶ – and from relevant treaties that States ratified, such as the Council of Europe Istanbul Convention adopted in 2011 and entered into force in 2014 (Istanbul Convention). According to the latter Convention, States parties are obliged to criminalise “the intentional conduct of forcing an adult or a child to enter into a marriage” (Article 37(1) Istanbul Convention). The Convention also prohibits the intentional conduct of luring or forcing an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage (Article 37(2))⁶⁷. Article 32 of the Istanbul Convention is also relevant: “Parties shall take the necessary legislative or other measures to ensure that marriages concluded under force may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim”.

The former UN Special Rapporteur on Violence against Women, its Causes, and Consequences highlighted those cases in which young women, who live outside their home countries or regions, are sent home under a deceptive pretext and with the intent of forcing them into marriage should be regarded as trafficking in women and girls⁶⁸. Sham marriages, which are legally differentiated from early and forced marriages, are also a matter of concern in Europe. In the *Report on National Legislation and Eurojust Casework Analysis on Sham Marriages*, the drafters pointed out the difficulties in detecting sham marriages. In around ten years, Eurojust dealt with 39 cases of sham marriages, but much more are supposed to exist: the problem is that they become of relevance only when the connection with a criminal activity emerges⁶⁹.

⁶⁴ On this issue, the legal scholarship is enormous. On CEDAW, M.A. FREEMAN, C. CHINKIN, B. RUDOLF, *op. cit.*; on the Istanbul Convention, S. DE VIDO, M. FRULLI (eds.), *The Istanbul Convention. A Commentary*, forthcoming, Cheltenham, 2023.

⁶⁵ Recommended Principles and Guidelines, Commentary, cit., p. 111.

⁶⁶ In that respect, GR No. 19, cit., and CEDAW General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 (1992), 26 July 2017, CEDAW/C/GC/35.

⁶⁷ On the provisions of the Convention related to forced marriages, A. BONFANTI e C. RAGNI in S. DE VIDO, M. FRULLI (eds.), *op. cit.*, forthcoming.

⁶⁸ *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Erturk: intersections between culture and violence against women*, A/HRC/4/34, 17 January 2007, para. 56.

⁶⁹ EUROJUST, *Report on national legislation and Eurojust casework analysis on sham marriages*, 2020, p. 12. See also a project that involved Estonia, Ireland, Latvia, Lithuania and Slovakia: M. VIUHKO, A. LIETONEN, A. JOKINEN, M. JOUTSEN (eds.), *Exploitative sham marriages: exploring the links between human trafficking and sham marriages in Estonia, Ireland, Latvia, Lithuania and Slovakia*, Helsinki, 2016.

Trafficking in women may be linked to domestic violence: this is the case in which a woman or a girl is trafficked by a member of the family, but also when domestic violence constitutes a “push factor” that creates conditions of vulnerability. The Global Report of 2022 identified domestic violence as vulnerability factor for traffickers, as well. In Australia, it was reported that female traffickers experienced themselves economic deprivation and domestic violence from a very young age⁷⁰.

5.1. The proposed amendment to the 2011 EU Anti-Trafficking Directive

Article 1 of the 2022 Proposal states that the Directive 2011/36/EU is amended as follows:

(1) in Article 2, paragraph 3, “or forced marriage, or illegal adoption” is added at the end of the paragraph.

Article 2 of the EU Anti-Trafficking Directive requires Member States to take the necessary measures to ensure the punishment of the intentional acts thereby included, namely, following the UN Trafficking in Persons Protocol’s definition, “the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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”. According to para. 3, “exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs”.

As highlighted in the previous paragraph, forced and/or child marriages constitute a contributing factor to trafficking. As a consequence of the proposed amendment, forced marriage is brought within the definition of “exploitation”, which is, as Article 2(3) of the EU Anti-Trafficking Directive clearly acknowledges, an open list. This is a very interesting and important outcome that raises nonetheless three interrelated questions, which can be understood by systemically looking at the recent developments in EU legislations, pushed by the von der Leyen Commission. The first one is: what is forced marriage? And, secondly, related to the former: should we consider all early marriages as forced marriages?

According to the definition provided by the Office of the High Commissioner for Human Rights, forced marriage is a marriage “in which one and/or both parties have not personally expressed their full and free consent to the union”⁷¹. Child or early marriage is any marriage “where at least one of the parties is under 18 years of age”. In

⁷⁰ Global Report 2022, cit., p. 123.

⁷¹ Available at the website <https://www.ohchr.org/en/women/child-and-forced-marriage-including-humanitarian-settings>

the joint General Recommendation No. 31 elaborated by the CEDAW and CRC Committees, a child marriage can also be considered as a form of forced marriage because at least one of the two parties has not expressed full, free and informed consent.⁷² The Istanbul Convention defines forced marriage as “the intentional conduct of forcing an adult or a child to enter into a marriage”. At the EU level, forced marriage⁷³ is mentioned in the preamble of the Victims’ Rights Directive⁷⁴ as a form of violence “that is directed against a person because of that person’s gender, gender identity or gender expression or that affects persons of a particular gender disproportionately”⁷⁵. The Committee on women’s rights and gender equality for the Committee on Foreign Affairs took steps toward an EU external strategy against early and forced marriages when it condemned child, early and forced marriages and other harmful coercive practices imposed on women and girls, recognising that they constitute a “real problem” within the EU⁷⁶. On 4 July 2018, the European Parliament adopted a resolution which acknowledged that child, early and forced marriages represent a “serious violation of human rights and, in particular, women’s rights”⁷⁷, then it called on Member States and third countries to “set the minimum uniform age for marriage at 18 years”, and “to adopt necessary administrative, legal and financial measures to ensure effective implementation of this requirement”⁷⁸. It encouraged the ratification of the Istanbul Convention and asked Member States to include a complete ban on child, early and forced marriages⁷⁹. The resolution also encouraged Member States “to guarantee migrant women and girls an autonomous residence permit which is not dependent on the status of their spouse or partner, in particular for victims of physical and psychological violence”⁸⁰. The EU legislation does not define forced marriage, which is not *per se* problematic, if we consider the possibility of using other international legal instruments, including the Istanbul Convention, which has not been ratified by the EU but has been signed by all EU Member States, as means of interpretation⁸¹.

⁷² Joint general recommendation/general comment No. 31 of the UN Committee on the Elimination of Discrimination against Women and No. 18 of the UN Committee on the Rights of the Child on harmful practices, 4 November 2014, CEDAW/C/GC/31-CRC/C/GC/18.

⁷³ And not “sham marriages”, which are very difficult to detect as shown above.

⁷⁴ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, in *OJ L 315*, 14.11.2012, pp. 57–73.

⁷⁵ *Ibid.*, recital no. 17.

⁷⁶ Opinion of the Committee on Women’s Rights and Gender Equality for the Committee on Foreign Affairs Towards an EU external strategy against early and forced marriages—next steps 2017/2275(INI) Rapporteur Daniela Aiuto, 18 April 2018, paras. 1–3.

⁷⁷ European Parliament Resolution of 4 July 2018, Towards an EU external strategy against early and forced marriages—next steps (2017/2275(INI)), letter A.

⁷⁸ *Ibid.*, para. 1.

⁷⁹ *Ibid.*, para. 6.

⁸⁰ *Ibid.*, para. 12.

⁸¹ However, see, with regard to the difference in the marriageable age and the difficulties in the application of the Istanbul Convention, S. DE VIDO, L. SOSA, *Criminalisation of gender-based violence against women in 31 European States, including ICT-facilitated violence*, 2021, <https://www.equalitylaw.eu/downloads/5535-criminalisation-of-gender-based-violence-against-women-in-european-states-including-ict-facilitated-violence-1-97-mb>. Also, with regard to family reunification

The third question is: are forced marriages a form of exploitation? The European Commission explained that the purpose of the proposal containing amendment to the Anti-Trafficking Directive is “to expand the non-exhaustive list of forms of exploitation explicitly mentioned in the Directive as to include forced marriage and illegal adoption, in order to ensure that national legal systems cover an increasing number of trafficking purposes paper of the commission”⁸². It follows that forced marriages are not considered as a form of sexual exploitation. We might agree on that, given the absence of a legally defined concept of sexual exploitation at the international level. However, the European Commission offered, some months before the proposal under discussion in these pages, a definition of sexual exploitation in the proposal for an EU Directive on countering violence against women and domestic violence⁸³:

The term “sexual exploitation” in Article 83(1) TFEU can be understood as any actual or attempted abuse of a position of vulnerability, differential power or trust, including, but not limited to, profiting monetarily, socially or politically from a sexual act with another person. The exploitative element can refer to the achievement of power or domination over another person for the purpose of sexual gratification, financial gain and/or advancement⁸⁴.

This broad definition, which is functional for the purposes of including in the directive rape and female genital mutilation as offences to be harmonised at EU level, seems to cover cases of early and forced marriages as well, because: i) inevitably include a sexual act; ii) exploit a position of vulnerability (the one of the spouse, usually a girl); iii) determine the “achievement” of domination on the vulnerable spouse for sexual gratification and/or advancement (which might also be the use of the Reunification Directive⁸⁵). The choice of the Commission in proposing the amendment to the Anti-Trafficking Directive went however in another direction and was aimed at stressing the multiple forms of exploitation that exist and that are insufficiently covered by the legal instruments in force. The alternative could have been to include forced marriages within the definition of sexual exploitation, so as to address it in both directives, and, through a coordination between legal instruments, to progressively determine a significant improvement of the conditions of girls and young women that are mostly targeted by this practice⁸⁶.

issues, S. DE VIDO, *Against a Girl's Will: Child marriages, immigration and the Directive on family reunification*, in E. BERGAMINI, C. RAGNI (eds.), *Fundamental rights and best interests of the child in transnational families*, Cambridge, Antwerp, Chicago, 2019, pp. 115-137.

⁸² European Commission, Explanatory memorandum, cit., p. 3.

⁸³ Proposal for a Directive of the European Parliament and the Council on combating violence against women and domestic violence, COM/2022/105 final.

⁸⁴ *Ibid.*, para. 2.

⁸⁵ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, in *OJ L 251, 3.10.2003, p. 12–18*.

⁸⁶ M.G. GIAMMARINARO, *Understanding Severe Exploitation requires a Human Rights and Gender-Sensitive Intersectional Approach*, in *Frontiers in Human Dynamics*, 2022, n. 4, pp. 1-11.

6. Contributing factors to trafficking in persons, especially women and children: illegal adoption

Despite predominantly dealing with trafficking in women, this paper is also looking into illegal adoptions for two reasons. The first one is that “especially women and children” is a formula that has been used in many legal instruments, including the UN Trafficking in Persons Protocol. The connection between the situation of vulnerability of women and children should not be forgotten⁸⁷. The second one is that behind the phenomenon of illegal adoptions there might be cases of exploitation of women: it therefore might present a gender dimension⁸⁸.

The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded in 1993 (1993 Hague Convention), applies to children habitually resident in one ratifying State that are moved to another State party “either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin” (Article 2, a)⁸⁹. The consent of the persons, institutions and authorities involved is essential for the adoption to proceed. The Convention requires that consent for adoption must be “given freely” and must not have been induced by payment or compensation of any kind (Article 4). As it was reported, a common violation of this norm occurs when the birth parents are coerced into selling their children into orphanages⁹⁰. Examples are numerous: in China, six orphanages allegedly purchased children from traffickers, who acquired them through abduction⁹¹. According to Article 16 of the Convention, the country of origin of the child must prepare a report that includes information on identity, adoptability, family history and other relevant information. It was reported that in Cambodia, government officials issued documentation indicating that the parents of a child were unknown, in exchange for a sum of money⁹². In the report on Bulgaria, the UN Special Rapporteur on the sale and sexual exploitation of children stated that illegal practices persist in the country, despite the State being party to the Hague

⁸⁷ On the risk of considering women only as victims and not as agents, see, for example, N. POURMOKHTARI, *Global human trafficking unmasked: a feminist rights-based approach*, in *Journal of Human Trafficking*, 2015, n. 1, pp. 156-166; A. LANSINK, *Human rights focus on trafficked women: an international law and feminist perspective*, in *Gender-Based Violence Trilogy*, 2006, n. 1,2, pp. 45-56.

⁸⁸ In Nigeria, for example, “the unsupervised and unregulated opening of orphanages in Nigeria have given rise to an unprecedented rise in child trafficking and baby-making factories where young girls are illegally recruited, kept and forced to have sex with men, made pregnant and their babies forcibly taken away and given up for adoption with little or no pay”: R.C.B. OKOLI, N.S. UDECHUKWU, *Child adoption, child trafficking and illegal surrogate parenting practices in Nigeria: The need for social work intervention*, in *Journal of Social Work in Developing Societies*, 2019, n. 1(1), pp. 46-60, p. 46.

⁸⁹ R.L. BALLARD, N.H. GOODNO, R.F. COCHRAN, *The intercountry adoption debate: Dialogues across disciplines*, Cambridge, 2015.

⁹⁰ J. ALEXANDER, *Why the United States should define illegal adoption practices as human trafficking*, in *Houston Journal of International Law*, 2014, n. 36, 3, pp. 715-748, p. 721.

⁹¹ *Ibid.*

⁹² D.M. BLAIR, *Safeguarding the interests of children in intercountry adoption: assessing the gatekeepers*, in *Capital University Law Review*, 2005, n. 34, pp. 349-403, p. 386.

Convention⁹³. In particular, common practice is for single mothers to have their baby “offered” to families willing to adopt. At the moment of birth, or within seven days, the husband of the adoptive couple recognises the child as his own, so as his name to appear in the birth certificate. Later, the birth mother gives consent for adoption, and the adoptive mother adopts the child. This is an example of commodification of children, a practice that circumvents the adoption procedures, and violates the human rights of the child, who has, among others, the right to his/her identity.

There is no definition of illegal adoption in the 1993 Hague Convention. However, according to the Guide to good practice⁹⁴, elaborated by the Hague Conference on Private International Law, the term illegal adoption means “an adoption resulting from abuses, such as abduction, the sale of, traffic in, and other illegal or illicit activities against children. One of the main objects pursued by the Convention is to prevent such abuses”⁹⁵. The Hague Adoption Convention mentions indeed trafficking in its preamble, and the prevention of “abduction, sale of, or traffic in children” is among its scopes according to Article 1.

Can we consider illegal adoption as exploitation within the definition of trafficking? As an author reported, few would object that an adoption (even legal) that leads to prostitution or forced labour or other forms of exploitation, falls within the definition of trafficking. But what about an adoption that originates from a crime like trafficking that leads to providing a family to a child? In the process, the receiving couple may not even be aware of the origin of the child and that his/her adoptability was coerced to the point that “in most cases where the child is successfully adopted, it is difficult to argue that the child is being exploited”⁹⁶. However, if we take the perspective of the exploited birth family, would it not be possible to argue that exploiting the birth family equates to exploiting the child?

From a legal perspective, as Gallagher explains in her landmark book on trafficking, “the question of whether abusive, illegal, unethical, or otherwise undesirable adoption practices fall within the international definition of trafficking has been periodically raised since the definition was finalized, without satisfactory resolution”⁹⁷. Adoption is indeed not included in the list of exploitative behaviours of the UN Trafficking in Persons Protocol. The indeterminate concept of “other forms of exploitation”, however, leaves the list open. In the *travaux préparatoires*, there is a note according to which illegal adoption will fall within the scope of the Protocol – hence, Gallagher points out, will be considered an exploitative purpose under the third element of the definition – where it amounts to a

⁹³ Visit to Bulgaria Report of the UN Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, 14 February 2020, A/HRC/43/40/Add.1.

⁹⁴ Guide No. 1 under the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, available at <https://assets.hcch.net/docs/bb168262-1696-4e7f-acf3-fbbd85504af6.pdf>

⁹⁵ *Ibid.*, p. 16.

⁹⁶ J. ALEXANDER, *op. cit.*, p. 735.

⁹⁷ A. GALLAGHER, *op. cit.*, p. 40.

“practice similar to slavery” under the 1956 Supplementary Slavery Convention⁹⁸. The same author points out that the reference to the 1956 Convention, despite being vague, appears to support the view that adoption *per se* is not exploitative, but “only illegal adoption intended to result in the exploitation of the child (for example, through forced labor or sexual exploitation) will fall within the third element of the trafficking definition”, with the consequence that the process of recruiting and moving the child from one country to another for non-exploitative purposes does not amount to trafficking⁹⁹.

However, this is not a uniform interpretation of the nature of illegal adoption in light of the crime of trafficking in persons. The process itself of illegal adoption, implying a form of commodification of children, might meet the typical purposes of trafficking. An author defined the mechanism of buying and abducting children for purposes of intercountry adoptions, which is a violation of the rights of the child including the right “to preserve his or her identity”¹⁰⁰, as “child laundering”: “the characteristic form of such illicit behaviours and one in which the intercountry adoption system provided the motivation and means for kidnapping and buying children”¹⁰¹. Laundering recalls the process of laundering the money, hence to “hide” the illicit origin of the money, by “laundering” it and put it back into the legitimate economy. The author warns against the “adoption myth” that silences the voices of birth families, who might have been forced or coerced to leave or even sell their children. In that sense, illegal adoption *per se* would mean exploitation¹⁰², and children exploited in this way should enjoy the right to redress¹⁰³.

According to the 2016 report of the UN Special Rapporteur on the sale of children, child prostitution and child pornography, adoptions resulting from crimes such as abduction and sale of and trafficking in children, fraud in the declaration of adoptability, falsification of official documents or coercion, and any illicit activity or practice, such as

⁹⁸ Ibid. See also J. ALLAIN, *On the curious disappearance of human servitude from general international law*, in *Journal of the History of International Law*, 2009, n. 11, pp. 303-332; J.A.C. GUTTERIDGE, *Supplementary Slavery Convention, 1956*, in *The International and Comparative Law Quarterly*, 1957, n. 6(3), pp. 449-471; N.L. MCGEEHAN, *Misunderstood and neglected: the marginalisation of slavery in international law*, in *The International Journal of Human Rights*, 2011, n. 16(3), pp. 436-460.

⁹⁹ A. GALLAGHER, *op. cit.*, p. 41.

¹⁰⁰ UN Convention on the rights of the child, 20 November 1989, Article 8.

¹⁰¹ D.M. SMOLIN, *Child laundering as exploitation: applying anti-trafficking norms to intercountry adoption under the coming Hague regime*, in *Vermont Law Review*, 2007, n. 32, pp. 1-55, p. 2; ID., *Child laundering: how the intercountry adoption system legitimizes and incentivizes the practices of buying, trafficking, kidnapping, and stealing children*, in *The Wayne Law Review*, 2006, n. 52(1), pp. 113-200. See also E. LOIBL, *Trafficking in children for adoption purposes: a criminological analysis of the illegal adoption market*, in J.A. WINTERDYK, J. JONES (eds.), *The Palgrave international handbook of human trafficking*, London, 2020, pp. 401-417.

¹⁰² D.M. SMOLIN, *Child laundering*, cit., p. 15: “Is a child sold in such a manner exploited? Some would argue that if such a sale places a child in a ‘good home’, the child has been sold but not exploited. However, it seems more plausible to view the sold child, like the kidnapped child, as having been exploited. In both instances the child’s characteristics as young and ‘adoptable’ have been ‘used’, and in both cases the child has been harmed through the loss of her original family”.

¹⁰³ E.C. LOIBL, *The aftermath of transnational illegal adoptions: Redressing human rights violations in the intercountry adoption system with instruments of transitional justice*, in *Childhood*, 2021, n. 28 (4), pp. 477-491.

lack of proper consent by biological parents, improper financial gain by intermediaries and related corruption, constitute illegal adoptions and must be prohibited, criminalised and sanctioned as such¹⁰⁴. She seems to endorse in her report the position that illegal adoption is exploitation. Indeed, one of her final recommendations to States was to “adopt clear and comprehensive legislation that prohibits and criminalises illegal adoption as a separate offence, as well as the sale of and *trafficking in children that result in illegal adoptions*, with sanctions that reflect the gravity of the crimes”¹⁰⁵.

In September 2022, the gravity of the phenomenon of illegal adoptions was highlighted by a group of UN human rights experts, who posited that illegal intercountry adoptions may violate the prohibition of abduction, sale of or trafficking in children and the prohibition of enforced disappearances, after acknowledging the growing number of inconsistencies found in many adoption processes around the world¹⁰⁶.

6.1. The proposed amendment to the 2011 EU Anti-Trafficking Directive

As said above, Article 1 of the 2022 Proposal states that the Directive 2011/36/EU is amended in order to contemplate illegal adoptions among the “other forms of exploitation”. This is what emerges from the European Commission’s explanatory memorandum as well¹⁰⁷. No definition of illegal adoptions is provided. The EU has no competence with regard to adoption procedures, which fall under the competence of Member States and are covered by relevant international legal instruments¹⁰⁸. However, providing a definition in line with the international legal framework would avoid other risks, such as Member States discriminating against specific categories of people, who might be targeted because, for example, LGBTQAI+. As it was clear from the above, for an adoption to be “illegal”, it does not have to be contrary to any law of a defined country, but originate from the crime of trafficking. In other words, to provide an example, the adoption by a same-sex couple, which is contrary to the law of some countries, is illegal for that legal system, but cannot amount to trafficking or abduction. Such adoptions lead to issues of conflict-of-laws for their recognition in a legal system different than the one that issued the original certificate for adoption.

¹⁰⁴ Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Maud de Boer-Buquicchio, A/HRC/34/55, 22 December 2016, para. 25.

¹⁰⁵ *Ibid.*, para. 95 (b). Emphasis added.

¹⁰⁶ Available at the website <https://www.ohchr.org/en/press-releases/2022/09/illegal-intercountry-adoptions-must-be-prevented-and-eliminated-un-experts>

¹⁰⁷ Explanatory memorandum, cit., p. 3.

¹⁰⁸ On conflict of laws issues, see, *inter alia*, G. ROSSOLILLO, *Riconoscimento di ‘status’ familiari e adozioni sconosciute all’ordinamento italiano*, in *Diritti umani e diritto internazionale*, 2016, pp. 335-359; C. RAGNI, *Cross-border recognition of adoption: rethinking private international law from a human rights perspective*, in E. BERGAMINI, C. RAGNI (eds.), *op.cit.*, pp. 209-224.

Given that the 1993 Hague Convention has been ratified by all EU members¹⁰⁹, the EU might consider endorsing the definition provided in the Guide to good practice elaborated by the Hague Conference on Private International Law, reported in the previous paragraph: an illegal adoption is one “resulting from abuses, such as abduction, the sale of, traffic in, and other illegal or illicit activities against children”. As alternative, the EU could elaborate for the sake of clarity its own definition, which might consider two grounds of illegality: at the origin, meaning that the adoption is the product of an illegal act; at the destination, in all cases in which a legal procedure of adoption is used as a mechanism for exploitation of children.

7. Contributing factors to trafficking in persons, especially women and children: the “gender” digital dimension

This paragraph considers the digital dimension as a contributing factor to trafficking in persons, especially women and children. The online dimension is only apparently gender neutral. In GR 38 on trafficking in women and girls in the context of global migration, the CEDAW Committee notes that:

Digital technologies have opened new possibilities to bring positive impact on the society. At the same time, they are posing new security challenges at both individual and state levels¹¹⁰.

Internet and communication technology (ICT) (or modern communication technologies¹¹¹) is not *per se* a cause of trafficking but creates the environment which can be exploited by criminals to recruit victims. ICT is both empowering and threatening women: it has, in other words, a “gender” dimension¹¹². It empowers them by offering the opportunity to express an opinion, participate and be represented. It is also threatening at the same time because it can be a powerful tool to perpetrate violence against women. If digital technology becomes a means to perpetrate violence, victims can be discouraged from having access to the digital world, with the consequence of silencing women and girls¹¹³. With regard to crime under analysis, the ways in which traffickers operate in the digital world involves four stages: recruitment, transportation, exploitation of victims,

¹⁰⁹ Number of Contracting Parties to the Convention at the time of writing: 105, including all 27 EU Member States.

¹¹⁰ GR 38, cit., paras. 36-37. This part has not sufficiently been developed in the GR. It is not even included in the *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, cit. See however the *Legislative Guide*, cit., para. 92.

¹¹¹ This expression was used by Europol in the report, *The challenges of countering human trafficking in the digital era*, 2020, available at https://www.europol.europa.eu/cms/sites/default/files/documents/the_challenges_of_countering_human_trafficking_in_the_digital_era.pdf.

¹¹² See, for example, S. BENÍTEZ LARGHI, *Gender dimension of digital technologies*, in *GenderInSITE*, 2021, available at <https://genderinsite.net/sites/default/files/GenderDimensionOfDigitalTechnologies.pdf>; on the specific world of work, EIGE, *Gender Equality Index 2020: Digitalisation and the future of work*, available at <https://eige.europa.eu/publications/gender-equality-index-2020-report/gendered-patterns-use-new-technologies>

¹¹³ S. DE VIDO, L. SOSA, *op.cit.*

and subsequent management of illicit profits¹¹⁴. The phase of recruitment is particularly problematic. As stressed in a 2020 report by Europol, technology allows criminals to recruit victims “without face-to-face interaction, thereby reducing the risk of being detected by law enforcement agencies” and “social media platforms [...] are used as virtual catalogues by traffickers to identify new victims and develop grooming strategies, since a significant amount of information on the psychological and personal background of users (e.g. level of education, family ties, economic status, place of residence, network of friends, etc.) is frequently displayed (often with pictures included)”¹¹⁵. Recruitment can be both active and passive. The first one occurs when criminals post false job advertisement on job portals and social media platforms which are in principle reliable. *Mutatis mutandis*, criminals used similar false job advertisements at the end of the 19th century in several countries, including France and Switzerland, to promote la “traite des blanches” (trafficking of white women, at that time the predominant one in Europe)¹¹⁶. The phenomenon of false advertisements that hide human trafficking is not new, but ICT constitutes a “multiplier of crime”, or, better, a “multiplier of the effects of crime”.

The passive form of recruitment is even more dangerous, since it is less detectable by law enforcement authorities. As reported by EUROPOL, the method used is a form of “net fishing”: traffickers directly reply to announcements by job seekers looking for jobs abroad, they offer assistance and help with the travel arrangements, and it is only when the victims arrive in the new country that the scam is discovered¹¹⁷.

Young people are particularly exposed to digital risks. The 2015 report of the UN Special Rapporteur on the sale of children, child prostitution and child pornography, mentioned specific forms of exploitation and abuse such as solicitation of children and live streaming of child abuse posed by information technologies¹¹⁸. The SR on Human Trafficking, answering to the Draft General Comment No. 25 on Children’s Rights in relation to the Digital Environment by the Committee on the Rights of the Child in 2020, suggested including child trafficking as a “specific listed risk” so as to raise greater awareness of such abuse and exploitation, and to “highlight states’ positive obligations of due diligence in prevention of child trafficking in the digital environment”¹¹⁹. According

¹¹⁴ S. RAETS, J. JANSSENS, *Trafficking and technology: exploring the role of digital communication technologies in the Belgian human trafficking business*, in *European Journal on Criminal Policy and Research*, 2021, n. 27, pp. 215-238.

¹¹⁵ EUROPOL, *The challenges of countering*, cit., p. 2.

¹¹⁶ See the testimony by Ghénia Avril de Sainte-Croix (Savioz), *La Traite des Blanches* (1901), translated from French into Italian in S. DE VIDO, *La tratta delle bianche (1901)*, in *DEP*, 2019, n. 40, pp. 113-119. https://www.unive.it/pag/fileadmin/user_upload/dipartimenti/DSLCC/documenti/DEP/numeri/n40/08_Ghenia_Avril_de_Sainte-Croix.pdf; L. RENAULT, *La ‘traite des blanches’ et la Conférence de Paris au point de vue du droit international*, in *Revue générale de droit international public*, 1902, n. 9.

¹¹⁷ EUROPOL, *The challenges of countering*, cit., p. 4.

¹¹⁸ Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, A/HRC/28/56, 22 December 2014, paras. 38 and 42.

¹¹⁹ UN Special Rapporteur on human trafficking, *Comments by the Special Rapporteur to the draft General Comment on children's rights in relation to the digital environment*, December 2020, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/comments-special-rapporteur-draft-general-comment>.

to the SR, “such online exploitation, and recruitment, may also fall within the definition of the crime and serious human rights violation of trafficking”¹²⁰.

On the 30 July 2022, the UN Network on Migration called upon States on the one hand to “expand their efforts to prevent, combat and eradicate technology-facilitated trafficking in persons”, and, on the other hand, to use technology in the fight against trafficking, for example through the development of technology solutions and engage with relevant technology companies to address the possible use of technology for trafficking¹²¹.

7.1. The proposed amendment to the 2011 EU Anti-Trafficking Directive

The proposal of the European Commission under discussion devotes an entire amendment to the digital dimension of trafficking, adding a comma to Article 2 “offences concerning trafficking in human beings”:

Member States shall take the necessary measures to ensure that the intentional acts and means referred to in Article 2(1), and exploitation as set out in Article 2(3) shall include acts committed by means of information and communication technologies.

The European Commission welcomed the inputs of several stakeholders before formulating this amendment. In the preamble, the proposal mentions the “increasing number of offences concerning trafficking in human beings [...] committed or facilitated by means of information or communication technologies”¹²². It acknowledges that traffickers use internet to recruit, advertise or exploit victims, exercise control and organise transport, and that these tools can both be a source and an obstacle to the timely detection of the crime and the identification of the victims and perpetrators.

The Commission explains in the explanatory memorandum that the cyber dimension of the crime is already covered by the EU Anti-Trafficking Directive, which indeed does not differentiate between the online and offline dimension. As we said above, however, the online dimension has some specificities which can only be addressed by specifically looking at the technologies used to perpetrate this crime. The Commission openly states that the modification is aimed at reinforcing the “criminal response to one of the most serious changes in the threat landscape of this crime area”¹²³, but does not either change the level of penalties or suggest the inclusion of the cyber dimension as aggravating circumstance. States are free to adopt a stricter regime of sanctions, and also to incorporate trafficking committed or facilitated with ICT in the definition of the offence itself. It can be argued indeed that while an aggravating circumstance considers the seriousness of the crime and increases the penalty accordingly, the incorporation of the

¹²⁰ *Ibid.*

¹²¹ *Reclaiming digital spaces to counter human trafficking and protect its victims*, 30 July 2022, available at <https://migrationnetwork.un.org/statements/reclaiming-digital-spaces-counter-human-trafficking-and-protect-its-victims>

¹²² Preamble, recital n. 5.

¹²³ European Commission, explanatory memorandum, cit., p. 6.

cyber dimension in the definition itself of the offence puts emphasis on the elements of the crimes and is attached to corresponding repressive measures. The formulation of the amendment is sufficiently vague to allow States parties to decide what measures to adopt in order to counter trafficking committed or facilitated with ICT.

As suggested by the European Commission in the memorandum, the legal instrument, once and if approved, will be accompanied by appropriate non-legislative measures, including “fostering cooperation between the Commission and internet companies in the context of the EU Internet Forum”¹²⁴. Law enforcement authorities should also be adequately empowered to understand technological challenges and the constant evolution in means and practices. The *Anti-Human Trafficking Manual for Criminal Justice Practitioners*¹²⁵ elaborated a series of indicators for online platforms to identify ads that promote trafficking. It was also suggested to use keywords to explore websites to track trafficking and exploitation of prostitution, or to extract telephone numbers to examine connections between advertisements¹²⁶.

The new mandatory regime of sanctions against legal persons, enshrined in the proposal (Article 6) might also be a powerful tool to counter the activity of platforms, when and only if these companies are held liable for the commission of trafficking in persons. However, this might not often be the case. Highly likely is that the provider “hosts” an ad and might (or not) become aware of possible connections with criminal activity. To what extent can an ad be removed from the web, because it is (allegedly) promoting human trafficking? The answer goes beyond the scope of the analysis. However, it should be mentioned that the proposal is not located in a vacuum, but within a system of secondary legislation that also deals with activities in the digital world. According to the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)¹²⁷, when a provider of hosting services might become aware – for example through a system of notification or on its own - “relating to certain activity of a recipient of the service, such as the provision of certain types of illegal content”, that a “recipient may have committed, may be committing or is likely to commit a criminal offence involving a threat to the life or safety of person or persons”, including human trafficking, the provider of hosting services “should inform without delay the competent law enforcement authorities of such suspicion”¹²⁸. The Digital Services Act does not provide the legal basis for profiling of recipients of the

¹²⁴ *Ibid.*, p. 9.

¹²⁵ UNODC, *Anti-human trafficking manual for criminal justice practitioners - Module 2: Indicators of trafficking in persons*, <https://www.unodc.org/unodc/en/human-trafficking/2009/anti-human-trafficking-manual.html>.

¹²⁶ M. IBANEZ, D. SUTHERS, *Detection of domestic human trafficking indicators and movement trends using content available on open internet sources*, 47th Hawaii International Conference on System Sciences, 2014.

¹²⁷ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), in *OJ L 277*, 27.10.2022, pp. 1–102.

¹²⁸ Preamble, recital no. 56, and Article 18.

services with a view to the possible identification of criminal offences by providers of hosting services.

Against this backdrop, attention should also be paid to possible violations of human rights while countering the activity of (alleged and/or potential) traffickers online, such as limitations to the right to privacy. The advent of internet has clearly challenged the application of human rights law, indeed¹²⁹. At European level, the right to privacy is enshrined in Article 8 of the European Convention of Human Rights (ECHR). Owing to the evolution of technology, privacy shifted from a mere “right to be left alone” to a person’s right to control his/her own information¹³⁰. This shift entails both negative and positive obligations for States, as confirmed by the European Court of Human Rights (ECtHR), which has stressed that the protection of personal data falls under Article 8 of the Convention¹³¹, though not acknowledging a general right of access to personal data. In *S. and Marper v. the United Kingdom*, the Court posited that “the protection of personal data is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life”, and that “the domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article”, given that “the need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned”¹³². It is the Charter of Fundamental Rights of the EU (the Charter), adopted in 2000 and having the same legal value as treaties as of 2009, that explicitly mentions in its text “the right to the protection of personal data, the right to access to data which has been collected concerning him or her, and the right to have it rectified” (Article 8 of the Charter)¹³³. Data must be processed “fairly for specified purposes and on the basis of the consent of the person concerned or some other *legitimate basis* laid down by law”. A legitimate basis can consist in the repression of a crime. Article 8 of the Charter was inspired by Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹³⁴, which precedes the General Data Protection Regulation¹³⁵, on Article 8 ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection

¹²⁹ G.M. RUOTOLO, *Internet-ional Law. Profili di diritto internazionale pubblico della rete*, Bari, 2012, p. 113.

¹³⁰ S. RODOTÀ, *Repertorio di fine secolo*, Roma, 1999, p. 209.

¹³¹ European Court of Human Rights, *Leander v. Sweden*, judgment on 26 March 1987, application no. 9248/81.

¹³² European Court of Human Rights, *S. and Marper v. the UK*, judgment of 4 December 2008, applications no. 30562/04, 30566/04, para. 103.

¹³³ O. POLLICINO, M. BASSINI, *Articolo 8*, in R. MASTROIANNI AND OTHERS (eds.), *Carta dei diritti fondamentali dell’Unione europea*, Milano, 2017, pp. 132-159.

¹³⁴ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in *OJ L 281, 23.11.1995, pp. 31–50*.

¹³⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), in *OJ L 119, 4.5.2016, pp. 1–88*.

of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the EU Member States. The right to privacy can be limited provided that some specific requirements are met. According to Article 8 ECHR, restrictions must be in accordance with the law, necessary in a democratic society, in the interests of national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals, protection of the rights and freedoms of others. Restrictions must respect the principle of proportionality. Personal data can be stored provided that “such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored”¹³⁶.

Having said that, the legal implications of the proposal of amendments to the EU Anti-Trafficking Directive, when and if approved, could lead to the elaboration of additional material, such as guidelines for platforms – as suggested by the European Commission in its Strategy¹³⁷ – to inform and raise awareness of the risk of trafficking by identifying “red flags” of potential criminal activity.

8. Contributing factors to trafficking in persons, especially women and children: the “unsafe” migration framework

This paragraph shows that an “unsafe” migration framework constitutes a contributing factor to trafficking in persons, especially women. We consider as “unsafe” a system of State (and, within the limits of its competences, EU) policies and measures that increases vulnerability and exacerbates already existing patterns of discrimination present in societies. Migration flows do not create human trafficking *per se*, but nourish an environment characterised by an intersection of vulnerability and criminal behaviour aimed at different forms of exploitation.

CEDAW GR 38 highlighted the discriminatory nature of migration and asylum policies establishing measures such as increased border control, refusal of entry, pushbacks, expulsion or detention limit the movement of women and girls fleeing from crises and conflict zones. These restrictive policies “heighten [women’s] vulnerability to all forms of exploitation, in particular at points of transit, not least of which due to an increased need to use the services of people smugglers or other types of underground or criminal networks in order to move, both internally as well as internationally to evade border controls”¹³⁸. Neutral policies concerning migration might also increase women and girls’ vulnerability to trafficking. The CEDAW Committee pointed out that the ability for women to migrate is jeopardised by “gender-based stereotypes, discriminatory laws, discrimination and exploitation in recruitment, lack of available decent work and limited

¹³⁶ *Ibid.* See an account of the ECtHR jurisprudence in *Handbook on European data protection law*, 2018, p. 37 ss. <https://op.europa.eu/en/publication-detail/-/publication/5b0cfa83-63f3-11e8-ab9c-01aa75ed71a1>

¹³⁷ EU Strategy, cit.

¹³⁸ GR 38, cit., para. 24.

reliable information on migration”¹³⁹. A minimum income to obtain a visa might also reduce women’s capacity to migrate, given that they are often employed in low-wage and insecure employment. Other factors to consider are economic and legal dependency on an employer or a spouse, which create the conditions for exploitation¹⁴⁰. The CEDAW Committee recommended States establish a safe migration framework to protect women and girl migrants, including those with an irregular migrant status, from violations of their human rights at every stage of migration¹⁴¹. States party to the CEDAW were also called upon to support access to pathways for safe and regular migration to avoid exploitation, including sexual exploitation, considering the specific needs of women and children, and to ensure the rights of migrants within these pathways to protected formal employment opportunities.

GR 38 refers to the Global Compact for Migration, which expressly indicates, among the objectives for “safe, orderly and regular migration”, to “prevent, combat and eradicate trafficking in persons in the context of international migration”¹⁴². In particular, GR 38 endorsed four of its actions within this framework: the conclusion of bilateral agreements with destination countries for employment to ensure coordination between States Parties to strengthen cooperation on the regulation of working conditions which ensures the protection and promotion of the rights of women migrant workers; the participation of workers in the development of those agreements; the establishment of mechanisms of compliance in the country of destination to deal with the violation of women migrants’ rights; the training of officials in the diplomatic missions, labour and economic attachés and consular officials¹⁴³. GR 38 requires States to ensure that visa schemes do not discriminate against women¹⁴⁴, that labour recruiters, intermediaries and employment agencies are regulated and monitored¹⁴⁵, and that risks of dependency and vulnerability of migrant women workers in relation to their employers are mitigated¹⁴⁶.

Similar, though less focused on a gender perspective, are the recommendations presented by the International Migration Organization in its report of 2019, including, for example, increase protections for victims and vulnerable migrants (e.g. access to legitimate sources of work and/or finance along migration pathways and in destination countries); increase capacity and focus of guardians and first responders, through criminalisation of behaviours such as forced marriages, trafficking in persons and exploitation of prostitution¹⁴⁷. In particular, it is worth stressing that, according to the IMO recommendations, States must act with due diligence in order to redress the power imbalance between employers and employees by “prohibiting recruitment fees,

¹³⁹ *Ibid.*, para. 26.

¹⁴⁰ *Ibid.*, para. 27.

¹⁴¹ *Ibid.*, para. 56.

¹⁴² Global Compact for Safe, Orderly and Regular Migration, cit., p. 5.

¹⁴³ GR 38, cit., para. 57.

¹⁴⁴ *Ibid.*, para. 58.

¹⁴⁵ *Ibid.*, para. 59.

¹⁴⁶ *Ibid.*, para. 60.

¹⁴⁷ IOM, *Migrants and their vulnerability to human trafficking, modern slavery and forced labour*, 2019, p. 12.

prohibiting restrictions on mobility and withholding of identity documents, and promoting labour rights, inspections and protections”¹⁴⁸. Emphasis is placed on the world of work. With regard to the specific aspect of recruitment, the International Labour Organization (ILO), in 2019 issued *General Principles and Operational Guidelines for Fair Recruitment*, where States are invited to address the “entire spectrum of recruitment practices, including fraudulent and abusive practices that may lead to trafficking in persons and other forms of exploitation”, with a focus on the law on recruitment “throughout their operations, including in supply chains”¹⁴⁹. In the aviation industry, it is not only fundamental that flight attendants receive appropriate training to detect signs of human trafficking, but also that the network of suppliers – commercial aircrafts, air operators and aviation support service providers – is checked in order to avoid business with any party engaged in human trafficking. In that respect, the adoption of codes of conduct plays an important role¹⁵⁰.

At regional level, the ECtHR made some references in a few judgments on the “unsafeness” of the domestic migration framework, with specific regard to the crime of trafficking in persons. In *Rantsev v. Cyprus and Russia*, for example, the Court of Strasbourg acknowledged a number of weaknesses in the Cypriot immigration policy, in particular “the artiste visa regime”, which made it “very difficult for law enforcement authorities to take the necessary steps to combat trafficking”, and noted that “the artiste permit could be perceived as contradicting the measures taken against trafficking or at least as rendering them ineffective”¹⁵¹. The immigration measures in force in Cyprus were inadequate to protect individuals, like the applicant’s daughter, Oxana Rantseva, who died in Cyprus where she had moved to work. Her father complained that the Cypriot police had not done everything possible to protect his daughter, and that Russian authorities did not investigate his daughter’s trafficking. The Court found that Cyprus and Russia both violated Article 4 ECHR, and Cyprus also infringed the applicant’s daughter’s right to life protected by Article 2 ECHR. In other two judgments on trafficking (not only for the purpose of sexual exploitation), the Court acknowledged that “the legislation of States on immigration must respond to the concerns raised on the topic of incitement and aid to trafficking or on the tolerance towards trafficking”¹⁵².

¹⁴⁸ *Ibid.*

¹⁴⁹ ILO, *General principles and operational guidelines for fair recruitment & definition of recruitment fees and related costs*, Geneva, 2019, p. 15.

¹⁵⁰ See, in that respect, the Air Charter association’s Modern Slavery and Human Trafficking Statement, 28 April 2022, <https://network-airline.com/modern-slavery-and-human-trafficking-statement/>.

¹⁵¹ European Court of Human Rights, *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, application no. 25965/04, para. 291. See V. STOYANOVA, *Dancing on the borders of Article 4: human trafficking and the European Court of Human Rights in the Rantsev Case*, in *Netherlands Quarterly of Human Rights*, 2012, n. 30, 2, pp. 163-194.

¹⁵² European Court of Human Rights, *Chowdury et al. v. Greece*, judgment of 30 March 2017, application no. 21884/15, para. 87. Same words used in the *T.I. et al. v. Greece*, judgment of 18 July 2019, application no. 40311/10, para. 135. See also ECHR, *Guide on the case-law of the European Convention on Human Rights*, Strasbourg, 2022, p. 46 ff.

8.1. What the proposal is not willing to cover: reinforcing the migration framework

In the proposal for amendments to the Anti-Trafficking Directive, migration is only mentioned with regard to “other” relevant EU policies, in particular the EU framework regulating the issuance of a residence permit to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities¹⁵³. Considering the legal bases of the proposal – Articles 82 and 83 TFEU – it is not surprising that it does not specifically deal with migration issues. However, not even the preamble of the proposal refers to how unsafe migration frameworks contribute human trafficking to flourishing, and how the crime of smuggling can overlap with the crime of trafficking in many instances. The absence of any reference to migration is not satisfactory. Even a “soft” reference in the preamble would have highlighted the importance of tackling human trafficking in the context in which it is commonly perpetrated: during migration.

The EU Strategy on countering human trafficking caught this point, by acknowledging that “victims are also trafficked in mixed migration flows to the EU via all routes”, and that migrant smuggling is often intertwined with other forms of organised crimes, including trafficking¹⁵⁴. The New Pact on Migration and Asylum, which was launched by the European Commission on 23 September 2020¹⁵⁵, and applied in recent crises (Afghanistan and Belarus¹⁵⁶) is considered as a useful instrument to disrupt “traffickers’ business in moving victims for exploitation to Europe and fight smuggling networks”¹⁵⁷. Is it so, though? International partnerships with countries of origin, transit

¹⁵³ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, in *OJ L 261*, 6.8.2004, pp. 19–23.

¹⁵⁴ EU Strategy, cit., p. 17. See also FRA, *Handbook on European Law Relating to Asylum, Borders and Immigration*, 2020.

¹⁵⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final. T. GAZI, *The New Pact on Migration and Asylum: supporting or constraining rights of vulnerable groups?*, in *European Papers*, 2021, n. 6, pp. 167-175; M. BORRACETTI, *Il nuovo patto europeo sull’immigrazione e l’asilo: continuità o discontinuità col passato?*, in *Diritto, immigrazione, cittadinanza*, 2021, n. 1, pp. 1-27; M.C. CARTA, *Il “nuovo” patto europeo sulla migrazione e l’asilo: recenti sviluppi in materia di solidarietà ed integrazione*, in this *Journal*, 2021, n. 2, pp. 9-42; E. CELORIA, *La normalizzazione della detenzione amministrativa alle frontiere esterne dell’Unione nel nuovo Patto sulla migrazione e l’asilo*, in this *Journal*, 2021, n. 2, pp. 43-70.

¹⁵⁶ M. FORTI, *Questioni giuridiche e problemi di tutela dei diritti fondamentali nella risposta dell’Unione europea alle pratiche di strumentalizzazione dei flussi migratori*, in this *Journal*, 2022, n. 3, pp. 245-265.

¹⁵⁷ The Pact does not specifically identify vulnerable persons. However, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (*OJ L 337*, 20.12.2011, pp. 9–26) considers vulnerable persons “minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence”. See M. MARCHEGIANI, *Il nuovo patto sulla migrazione e l’asilo sotto il prisma della nozione di vulnerabilità*, in *ADiM Blog*, novembre 2020; C.

and destination is also seen as a key aspect in information and criminal intelligence sharing. Cooperation falls already within the system of EU foreign policy instruments, including the Global Strategy for the EU Foreign and Security Policy¹⁵⁸, the Action Plan on Human Rights and Democracy 2020-2024¹⁵⁹, the EU Gender Action Plan for external action (2021-2025)¹⁶⁰. For example, new legislation on counter-smuggling of migrants and trafficking in human beings has been adopted in Niger and Mauritania, with the support of the EU¹⁶¹.

The narrative of EU migration policies is focused on borders and securitization¹⁶², rather than on providing legal ways for asylum seekers to enter the territory of one of the EU Member States and ask for refugee status¹⁶³. In other words, EU law deals more with the protection of those that have already entered the territory of the EU to search for international protection, rather than to regulate and provide legal accesses into it¹⁶⁴.

As it was argued, the New Pact on Migration and Asylum shows very little innovation, and it is more aimed at systematising the already existing legal framework

SCISSA, *Il nuovo Patto sulla migrazione e l'asilo dalla prospettiva della vulnerabilità: un'occasione mancata*, in *Freedom, Security & Justice*, 2021, n. 2, pp. 351-387.

¹⁵⁸ A global strategy for the European Union's foreign and security policy, 14 November 2016, 14393/16.

¹⁵⁹ EU Action plan on human rights and democracy, 2020 – 2024, https://www.eeas.europa.eu/sites/default/files/eu_action_plan_on_human_rights_and_democracy_2020-2024.pdf

¹⁶⁰ *The EU's new action plan on gender equality and women's empowerment in external relations 2020–2025 (GAP III)*.

¹⁶¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Report on Migration and Asylum, Brussels, 29.9.2021 COM(2021) 590 final, p. 19.

¹⁶² F. ASDERAKI, E. MARKOZANI, *The securitization of migration and the 2015 refugee crisis: from words to actions*, in A. TZIAMPIRIS, F. ASDERAKI (eds.), *The new Eastern Mediterranean transformed*, Cham, 2021, pp. 179-198; P. SALVATI, *The “inward-looking” securitization of the EU external migration policy in the New Pact on Migration and Asylum: a critical appraisal from a perspective of international law with reference to migration from Africa*, in this *Journal*, 2021, n. 2, pp. 305-323; A. VATTA, *The EU Migration Policy between Europeanization and Re-Nationalization*, in S. BALDIN, M. ZAGO (eds), *Europe of Migrations: Policies, Legal Issues and Experiences*, Trieste, 2017, pp. 13-31. See, also, with regard to the interplay between migration, sovereignty and human rights, A. DI STASI, *Migrazioni internazionali, Stato, sovranità, diritti umani: questioni giuridiche aperte*, in *Iura and legal systems*, 2021, pp. 11-16.

¹⁶³ F.L. GATTA, *Vie di accesso legale alla protezione internazionale nell'Unione europea: iniziative e (insufficienti) risultati nella politica europea di asilo*, in *Diritto, immigrazione, cittadinanza*, 2018, n. 2, pp. 1-41. See also, *ex multis*, M. GARLICK, J. KUMIN, *Seeking asylum in the EU: disentangling refugee protection from migration control*, in B. MARTENCZUK, S. VAN THIEL (eds.), *Justice, Liberty, Security: new challenges for EU external relations*, Bruxelles, 2008; F. CHERUBINI, *Asylum in the EU*, London, 2016; K. HAILBRONNER, D. THYM (eds.), *EU immigration and asylum law. A commentary*, 2nd ed., Monaco, 2016; A. ADINOLFI, *La libertà di circolazione delle persone e la politica dell'immigrazione*, in G. STROZZI, R. MASTROIANNI (eds.), *Diritto dell'Unione europea, parte speciale*, Torino, 2020; C. BERTOLINI, *Le politiche europee in tema di controlli delle frontiere, asilo e immigrazione, a dieci anni dal Trattato di Lisbona*, in *federalismi.it*, 2020, n. 19, pp. 361-379.

¹⁶⁴ EU Strategy, cit., p. 3.

rather than providing solutions¹⁶⁵. The ECtHR also acknowledged the weakness of the “Dublin system”¹⁶⁶.

The Directive 2004/81/EC on residence permits issued to third-country nationals who are victims of THB or the subjects of smuggling, that is only mentioned in the memorandum attached to the proposal, is aimed more at countering illegal migration rather than protecting victims of trafficking. The purpose of the legal instrument is indeed to encourage trafficked and smuggled persons to denounce their traffickers and smugglers by providing them with protection and assistance during criminal proceedings; it gives a “reflection period” in which the trafficked person cannot be expelled and can decide whether to cooperate or not with the authorities. It was argued that “the Directive is not a human rights document, or a victim protection scheme, but an instrument designed to combat irregular migration”¹⁶⁷.

This approach, more repression- and securitisation- oriented, is confirmed by recent declarations by EU institutions. The President of the European Commission announced at the beginning of 2023 a “new anti-smuggling partnership with key third countries” to repress smuggling; stressed the importance of “faster and dignified returns”; encouraged the implementation of the Dublin roadmap and European solidarity in the management of migrants; pointed out the role played by the external dimensions¹⁶⁸. In the conclusion of February 2023, the European Council confirmed the political agenda on migration: “increased external action, more effective control of EU external borders, and internal aspects, in compliance with international law, EU principles and values, and the protection of fundamental rights”¹⁶⁹. With regard to trafficking, the European Council stressed that the fight against this crime “will be further reinforced” in cooperation between Member States and with Europol, Frontex and Eurojust as “key partners”¹⁷⁰.

9. Concluding remarks

This paper used the contributing factors analysis to provide a first insight into the EU proposal for amendments to the EU Anti-Trafficking Directive. It applied a non-legal

¹⁶⁵ C. FAVILLI, *Una nuova politica d’immigrazione per rafforzare il processo di integrazione europea*, in *La nuova giuridica*, 2022, n. 1, pp. 42-59, p. 54. See, also, ID., *La solidarietà flessibile e l’inflessibile centralità del sistema Dublino*, in *Diritti umani e diritto internazionale*, 2021, n. 1, pp. 85-101; ID., *Le politiche di immigrazione e asilo: passato, presente e futuro di una sovranità europea incompiuta*, in *AISDUE*, 2022, IV, pp. 227-248.

¹⁶⁶ See, for example, European Court of Human Rights, *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, application no. 30696/09, in particular paras. 344 ff.

¹⁶⁷ L. RUBIO GRUNDELL, *EU anti-trafficking policies: from migration and crime control to prevention and protection*, EUI, policy brief, 9/2015, p. 6. See also S. CARRERA, E. GUILD, *Irregular migration, trafficking and smuggling of human beings: policy dilemmas in the EU*, Centre for European Policy Studies, 2016.

¹⁶⁸ Speech by President von der Leyen at the European Parliament Plenary on the preparation of the Special European Council meeting of February, in particular the need to develop sustainable solutions in the area of asylum and migration, 1. February 2023, https://ec.europa.eu/commission/presscorner/detail/%20en/speech_23_526

¹⁶⁹ Special meeting of the European Council (9 February 2023) – Conclusions, Brussels, 9 February 2023 (OR. en) EUCO 1/23.

¹⁷⁰ *Ibid*, para. 25.

methodological tool to a rigorous legal analysis to emphasise points of strength and weakness of the EU proposal. If, on the one hand, the proposal is capable of addressing three main contributing factors to human trafficking, namely forced marriages, illegal adoptions, and ICT *modus operandi* of traffickers, on the other hand, it misses the opportunity to refer to the need for safe legal migration ways into the European Union. Even though the legal basis could not cover migration issues, a reference in the preamble of the EU Anti-Trafficking Directive to the promotion of a safe migration framework would have acknowledged (at least) the existing gap. As it was shown in the paper, the encouraged “faster returns” might be counterproductive, especially if authorities are not trained to identify victims of this transnational crime. The risk of re-trafficking is common, and a return might put a person in an even more vulnerable position. If repression is fundamental to break the criminal networks in Europe, it is also true that without guaranteeing safe and legal access to Europe, providing information to those migrating, check the reliability of recruiting agency, the crime of trafficking will not be addressed properly. Treating trafficking as illegal border crossing produces another consequence: the need to adequately distinguish “real” trafficked persons, which is not always an easy task, especially when victims of trafficking fear the effects of their report to the authorities¹⁷¹. Another risk is the “racialization of the culprits”, which are commonly identified as primarily foreign criminal networks and which diminishes the importance of looking into structural causes of the phenomenon, such as economic disparity and the global level, labour precariousness and gender inequality¹⁷². In other words, the analysis should lead the EU to work on the “gendered and racialized nature of labour migration and working conditions” in multiple sites, on the respect of human rights and on a parallel social protection for those working in the EU¹⁷³.

Tackling human trafficking in Europe is not only a matter of criminal law, but it is precisely an issue of contributing factors, which cannot be solved by simply establishing cooperation with third countries for safe returns or for the adoption of stronger domestic legislation. The coordinated effort required in Europe involves multiple stakeholders, Member States and EU institutions, and endorses a victim-centred, gender- and trauma-sensitive approaches, which can take into account of the structural inequality and the mechanisms of a labour market that create the environment for human trafficking to flourish and continuously violate the human rights of trafficked victims, especially women and children.

¹⁷¹ L. RUBIO GRUNDELL, op. cit., p. 8.

¹⁷² *Ibid.*, p. 9.

¹⁷³ *Ibid.*, p. 10. As it was reported, “even where according to the legislation, psycho-social, legal, educational, medical, financial and reintegration support is available to presumed and identified trafficked people amongst the migrant population, in practice there are few specialised programmes due to a lack of funding”: R. FORIN, C. HEALY, *Trafficking along migration routes to Europe: bridging the gap between migration, asylum and anti-trafficking*, Wien, 2018, p. 105.

ABSTRACT: The purpose of this contribution is first to build the legal connections between anti-trafficking law, gender and international refugee law. The paper will then move to “contributing factors” to trafficking with the objectives of: a) distinguishing the root cause analysis from the contributing factors analysis; b) explaining why the contributing factors analysis can be used as framework to investigate the proposal of the European Commission for amendments to the EU Anti-Trafficking Directive, presented in December 2022, with the purpose of highlighting its points of strength and weakness. The paper will identify four of these factors: forced marriages, illegal adoptions, ICT, and an “unsafe” migration framework. It eventually suggests that working on a safer migration framework in the EU is a key aspect for the prevention of this transnational crime.

KEYWORDS: Trafficking – EU proposal – contributing factors – women’s rights – migration.