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A VICTIM-CENTERED APPROACH TO HUMAN TRAFFICKING

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ABBREVIATIONS

SCC	Spanish Criminal Code
Art.	Article
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
GRETA	Group of Experts on Action against Trafficking in Human Beings
ECtHR	European Court of Human Rights
ICC	International Criminal Court
Palermo Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing and UN Convention against Transnational Organized Crime (15 November 2000)
HT	Human Trafficking
NGO	Non-Governmental Organization
USA	United States of America
ILO	International Labour Organization

*“A right is not what someone gives you;
it’s what no one can take from you”*

- Ramsey Clark

I. INTRODUCTION

This paper will focus on the analysis of human trafficking as one of the most serious forms of human rights violations nowadays, a global phenomenon that is not limited by borders. This crime has an impact on people's rights as well as on all spheres and areas of their life.

When someone thinks about human trafficking, they see it as a crime that happens far from our regular daily life, or something that has been left in the past. Nevertheless, nowadays human trafficking is a crime of a very serious magnitude and this can be demonstrated by the fact that it has been named the most pervasive of all criminal markets globally (Global Organized Crime Index 2021, p. 15).

First of all, I'm going to explain the theoretical bases of the crime in order to put it into context: its definition, its origin and evolution, its elements, its forms and its legal framework.

Second, I mention the factors that contribute to this crime, as well as the global data available regarding human trafficking and the complexity of this phenomenon. In relation to this, I comment on some approaches proposed by different authors and I argue that the conventional system is not suitable to respond to a crime that has these characteristics.

Taking into consideration that the actual international instruments don't approach human trafficking accurately, the aim of this project is to highlight the need to put into practice a victim-centered and human rights based approach instead of using the traditional and ineffective methods based on criminal law and prosecution.

Finally, to justify my position that it is more effective to implement prevention and protection measures, I mention three countries that have successfully implemented this kind of measures as an example, and I explain a real practical case of the ECtHR.

II. THE INTERNATIONAL CONCEPT OF HUMAN TRAFFICKING

The first official definition of human trafficking was provided by the United Nations, it can be found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, made available for signature and ratification in November 2000, which complements the UN Convention against Transnational Organized Crime.

This Protocol defines “trafficking in persons” in its article 3.a) as:

The recruitment, transportation, transfer, harboring 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.

At that time, the international community was aware that having an international definition of the phenomenon doesn’t necessarily mean that applying the Palermo Protocol worldwide would be an easy task. However, having a common definition of the crime was a correct first step towards making progress in that specific area. It is impossible to address and combat a crime without agreeing on its characteristics in the first place (Jansson, 2015, p. 61).

It should be noted that the Palermo Protocol is a law enforcement instrument, which means that its primary goal is to ensure that the rules it contains are obeyed. From my personal point of view, I would like to comment that a human rights and victim-centered perspective might have been a better option, as I will develop below.

III. ORIGIN AND EVOLUTION OF THE CONCEPT

Despite the fact that the term “human trafficking” has only recently been defined, it is a reality that has existed alongside humans ever since the beginning of time. It has existed in various forms throughout history and is strongly related to prostitution, exploitation and slavery and because of this, it is quite common to confuse this crime with these similar phenomenons. The difference between these will be discussed in chapter V.

For instance, slavery was acceptable in Ancient Greece for both economic and social reasons, this society saw it as an unavoidable fact, an indispensable reality. Even the famous philosopher Aristotle acknowledged the existence of slavery as a natural occurrence, and the incapacity of natural slaves to make reasonable choices regarding their own life.

He stated in his work *Politica* that “he who, being a man, does not belong by nature to himself but to another, is by nature a slave” (García Valdés, 1988, pp. 58-59). Another quote that has caught my attention is the one in which he affirms that “commanding and obeying are not only necessary, but also convenient, and from birth some are destined to obey and others to command” (García Valdés, 1988, p. 56). These quotes are perfect examples of how slavery was perceived at the time.

The earliest form of international human trafficking, which was legal and allowed at the time, began in the 15th century with the African slave trade, involving American and European continents as purchasers and groups of African people as items of trade.

The 19th century saw the emergence of a new type of slavery known as “white slavery”. This is defined in the international framework as the punishable act of recruiting white women of any age, through deception or use of violence, to drag them into the exercise of prostitution or related vices (Tagle Lopez, 2004, p. 200).

Nowadays, the slavery of any human being is called human trafficking because we are referring to a crime that does not discriminate against race, gender, age or social condition.

As we can see, what we call human trafficking nowadays already has a previous history, it has existed for a long time but not in the same way or with the same name. This crime, as we know it today, possesses certain characteristics that enable us to distinguish it from its other forms that were utilized in previous centuries. It has changed its forms due to factors such as globalization, advancements in transportation and the creation of new technologies (Fiscalía General del Estado, 2022).

These factors have contributed to the disguise and invisibilization of human trafficking (Gonzalez, 2010, p. 7) and that's why sometimes, we are not aware of the magnitude of this problem. Taking all this into consideration, we can confirm that human trafficking is the slavery of the 21st century.

A similar expression can also be found in the Manual on the Investigation of the Crime of Human Trafficking, developed by the United Nations Office on Drugs and Crime (UNODC, 2009, p. 28), which mentions that "*human trafficking is considered a form of modern slavery*", it's a crime that turns the person into an object that can be commercialized.

Because of that specific expression, it is very common to confuse the two terms. It's important to take into consideration that although slavery always supposes a phenomenon of human exploitation, not all forms of human exploitation are considered slavery. In other words, slavery is part of what is considered human trafficking today, but not all kinds of human trafficking fit into the category of slavery (Perez Alonso et. al, 2020, p. 32).

IV. ELEMENTS OF HUMAN TRAFFICKING

Human trafficking is a major global problem, and undoubtedly the fastest growing criminal activity among all forms of organized crime. As we have seen in the definition of “human trafficking”, its constituent elements are: the act, the means and the purpose.

Table 1

The elements of human trafficking classified according to article 3 of the Palermo Protocol:

THE ACT	THE MEANS	THE PURPOSE
<ul style="list-style-type: none"> - The capture or recruitment. - The transport. - The transfer. - The welcoming or hosting of people. - The reception. 	<ul style="list-style-type: none"> - Threat. - Use of force or coercion. - Rapture / abduction. - Fraud. - Delusion / deception. - Abuse of power or a situation of vulnerability. - The granting or receipt of payments and benefits. 	<ul style="list-style-type: none"> The intention or objective. - Prostitution or other forms of sexual exploitation. - Forced labor or services. - Slavery or similar practices. - The servitude. - The removal of organs.

As we can see, human trafficking is a serious violation of human rights and constitutes a crime that consists of a set of actions, which are committed through means, in order to achieve an objective or purpose. It is important to note that the consent of the trafficked persons becomes irrelevant where any of the means described in the Table are present.

In addition, it should be mentioned that trafficking in children (which means trafficking of persons under the age of 18) has a different consideration in international law. The Information Leaflet No. 36, developed by the Office of the High Commissioner for Human Rights (OHCHR) in 2014 states that the peculiarity of trafficking in children is that it does not require the existence of “means”, it is sufficient to demonstrate the existence of an “action” specifically aimed at the exploitation of the minor.

A) The act:

These actions can be carried out by individuals operating on their own or by large organized criminal groups. This means that in some cases every step of the process is executed by the same person, while in other cases the tasks are divided and assigned to different people.

First of all, recruitment means selecting a victim and persuading them to accept a proposal. In other words, removing the victim from their usual environment through fraudulent methods, through advertisements, recruitment or travel agencies or sentimental manipulation, for example. Promises of work offers are one of the most used methods of recruitment.

It may happen that the person performing this work is someone who belongs to the victim's trusted environment, such as one of their family members, friends or acquaintances.

Second, transport and transfer involve the displacement of victims from the place of origin to the place of destination by any means of transport, generating the necessary conditions for it to happen successfully and according to the plan: managing travel documentation, providing assistance to obtain it (visas, passports) or using vehicles for the transfer (Ministerio de Trabajo, Empleo y Seguridad Social de Argentina, s.f.).

Last but not least, when hosting and receiving a victim, the goal is to pick them up at airports or stations and take them to temporary accommodation in order to ensure their availability and deny them their independence by putting them under constant supervision.

B) The means:

The actions described above must be carried out through different means. Before anything else, I would like to clarify that violence can take two forms: it can be both physical and moral. One refers to the use of physical pressure on the victim in an effort to invalidate their ability to make rational decisions, while the other one deals with intimidation, which entails threatening them with actual and immediate harm to himself or to a person in his entourage (Médicos del Mundo Navarra, 2021).

Second, abduction consists of kidnapping someone and holding them against their will (Real Academia Española, s.f.).

Third, when it comes to fraud or deception, the reality is distorted as regards the activity to be carried out or the conditions under which such activity will be carried out. In other words, the victim is made to believe something that turns out to be fake.

The next one is abuse, which means that a person or a group of people, who hold a position of power or superiority target another person or group who is more vulnerable in society and exploits them, taking advantage of their unfavorable circumstances.

Finally, the delivery or receipt of payments in order to get the approval of the person in charge of the victim is a kind of sale or exchange of victims between traffickers.

C) The purpose:

All the actions listed above, together with the means, are carried out with the intention or of subjecting the victims to any of the following purposes mentioned in the Palermo Protocol: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or similar practices, servitude, removal of organs...

However, there is still a debate going on among practitioners (MDM Navarra, 2021) regarding the different forms of exploitation that can be carried out as a result of human trafficking that are not listed in the Palermo Protocol. These are trafficking for the purpose of begging, forced marriages and the commission of criminal activities.

I believe that they should also be taken into consideration and because of that I will dedicate a section to each one of these forms of exploitation in the next chapter, in addition to the ones that have already been mentioned in Table 1.

V. FORMS OF HUMAN TRAFFICKING

I would like to begin this chapter by explaining human trafficking is a phenomenon based on supply and demand, and authors such as PEREZ CEPEDA (2002) confirm this by arguing that “human trafficking is developed to meet the demands that come from the areas in which slavery exists in our contemporary society” (p. 122).

I completely agree with this statement because, if we take into consideration the rules of supply and demand, certain groups of people are being exploited in order to offer some services that other groups of people in society request. This means that if there was no demand, there wouldn't be any need for exploitation to satisfy that demand.

On the one hand, the offer consists of people willing to risk being victims of traffickers in order to improve their living circumstances because of their socioeconomic situation, which is impacted by poverty, unemployment or lack of education. On the other hand, the demand is made up of the various needs that are present in industrialized nations, such as the need for unskilled labor and the satisfaction of sexual desires.

Although it is not the object of this work, I consider it necessary to establish punitive measures to discourage and reduce demand. For example, using the services of someone who is a victim of trafficking with the knowledge that the person is trafficked should be criminalized. After all, this crime is not only made up of the victims and the traffickers who take advantage of their situation. There is a third element in the middle that connects them: the clients that consume these services, and who are just as guilty as the traffickers.

As a result, supply will always match demand, which means that whenever there is demand, there will also be supply to meet those needs. Taking this into consideration, human trafficking will be categorized according to the tasks that the victim performs.

A) Trafficking for sexual exploitation:

This modality consists in the provision of sexual activities by victims. This means that they are used for prostitution, sex tourism and pornography (Organización Internacional para las Migraciones & United States Agency for International Development, 2011). In such cases, the victim cannot make their own decisions regarding the schedule, fees, clients and services, due to the control over him or her and the conditions under which they are exploited.

Trafficking for sexual exploitation often gets confused with prostitution. However, even though it may seem that the purpose is the same (which is offering sex services), these two are not the same thing at all. On the one hand, prostitution refers to someone's personal and voluntary decision to engage in the sex industry. On the other hand, being a victim of trafficking for sexual exploitation means that the person is being forced to participate in sexual activities and doesn't have the option to decide anything by themselves.

B) Trafficking for forced labour or services:

According to the International Labour Organization (2021) "any work or service required of an individual under the threat of any penalty and for which that individual has not voluntarily offered themselves." is considered to be forced labor. This definition can be found in article 2 of the Forced Labour Convention Convention 29 of the ILO (1930). The type of work that needs to be done will vary depending on the gender of the victims in this form of trafficking, which indicates that the methods and motives used to traffic men and women are different.

Forced labor is typically performed by men in the manufacturing, construction and agricultural industries. Contrarily, the majority of people who are trafficked for the purpose of domestic servitude are women and girls. Both men and women are forced to work very long hours for an extremely low or no salary, while living in unacceptable conditions (Voronova & Radjenovic, 2016).

C) Slavery or similar practices:

First of all, art. 7.2.c) of the Rome Statute of the International Criminal Court defines slavery as “the exercise of the attributes of the right of ownership over a person.” One of the most important international instruments in relation to this is the UN Slavery Convention, signed in Geneva on September 25, 1926, which provides a similar definition as the previous one and states that the contracting parties undertake to strive for the complete suppression of slavery in all its forms (article 2).

These are international definitions, but as a more specific national example (which will be discussed in later chapters) we can find a more complete definition in paragraph k) of article 607 bis of the Spanish Criminal Code (2010), which states that “slavery shall mean the situation of a person over whom another person exercises, even de facto, all or some of the attributes of the right to property, such as buying, selling, lending or bartering them”. This means that the perpetrator subjects the victim to a situation of absolute availability, thus taking away his status as a person.

D) Servitude:

The Inter-Institutional Commission against Commercial Sexual Exploitation and Trafficking in Persons of Honduras (CICEST, 2021) defines it as that “state of dependence or subjugation of the will in which the perpetrator by any means induces, obliges or conditions the trafficked person to perform acts, work or provide services.” This Commission has an important role because it promotes strategies aimed at the prevention of human trafficking, while also ensuring respect for the rights of victims.

The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery signed in Geneva on September 7, 1956, mentions different types of servitude. Among all of them, debt bondage remains the most prevalent one according to the Report of the Special Rapporteur on contemporary forms of slavery elaborated by the United Nations (2022).

According to this report, someone enters the condition of debt bondage when their labor is demanded as repayment of a loan given in advance, but actually, the value of their labor is not applied towards the liquidation of the debt, which makes the repayment impossible. In this situation, the laborers are trapped into working for very little remuneration to “repay the loan”, and consequently, what was made to look like an agreement ends up being a form of exploitation by taking advantage of the victim’s labor and vulnerability.

E) The removal of organs:

Although this form of exploitation is not as famous as other ones we have analyzed, it is a shocking phenomenon due to the clandestine involvement of medical and healthcare professionals and because it entails considerable risks for both public and individual health (Gawronska et al., 2022).

The Istanbul Declaration on Organ Trafficking and Transplant Tourism (2009) defines organ trafficking as “the procurement, transport, transfer, concealment or reception of living or deceased persons or their organs by threat, use of force or other forms of coercion, directed to exploitation by extracting organs for transplantation.”

This occurs mainly because of the disparity between the demand and supply of organs, which has resulted in patients trying to obtain an organ illegally. In general, organ sellers are poor and vulnerable, and they only take part in this because they are forced or because they see it as a last resort to improve their desperate economic situation. In addition, they are not aware of the future deterioration and health consequences that this activity will cause.

F) Begging:

Begging is the act of soliciting items in the street, such as for food, clothing, medicines and essentially money (Montalvo et al., 2017). The victim is transferred to perform this act and is forced to beg against their choice, while the trafficker makes money from this activity.

In this situation, children are disproportionately affected, because they make up a significant portion of all begging victims. There are no reliable statistics on the exact percentage, because if we take into consideration that the most affected people are younger children, that makes it even harder for them to have their voices heard. Adults may fall prey to this sort of HT as well, although disabled individuals are more likely to do so (Cherneva, 2011).

G) Forced marriage:

Forced marriage is the union between two people without the full and free consent of at least one of them. This phrase describes situations where people -regardless of their age- are forced to marry each other against their will (ILO & Walk Free Foundation, 2017).

Most of these victims are women and girls, who are lured by false promises of work, transported, and then received by the men who bought them; they are threatened and forced by their parents, family members or community members and handed over to their husbands and in-laws (McCabe & Eglen, 2020, p. 12). Families facing physical and economic insecurity may fall prey to traffickers who claim to offer their children a safer place and job opportunities.

H) Carrying out criminal activities:

As indicated by the International Criminal Police Organization (INTERPOL, s.f.), this form of trafficking allows criminal networks to profit safely through a range of illicit activities. Victims are forced to perform various illegal activities which, in turn, generate economic profits, for example credit card fraud, shoplifting, pickpocketing, or carrying drugs.

These activities can be crimes committed both in the process of being trafficked, for example, illegal border crossing or carrying false identity documents, and those that are not directly related to trafficking but which the victims have been forced to commit as a consequence of the limitation of freedom of will that trafficking implies already in the exploitation phase (Villacampa Estiarte & Torres Rosell, 2016, pp. 774-775).

Now that the different forms of exploitation have been analyzed, I would like to finish this chapter by mentioning another figure that often gets confused with human trafficking, which is the smuggling of migrants.

The definition of smuggling of migrants was first established in the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime (2000).

This Protocol establishes the following definition:

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

As we can see, the definition of smuggling of migrants seems to suggest that those smuggled are voluntary participants in the process (Aljehani, 2015). This means that they are not being coerced to change their country of residence, they are willing to participate in that movement and this is the main element that differentiates this phenomenon from human trafficking.

In addition, smuggling of migrants always implies transnational border crossing, while in HT it's not necessarily required. It is important to understand this distinction because any confusion between the two would lead to implementation of the wrong legal framework.

VI. THE PROTECTED LEGAL ASSET

Now that the theoretical aspect of human trafficking has been analyzed, we must ask ourselves which are the most fundamental human rights that are violated by this crime and consequently the interests that need the most protection.

In this chapter, I'm going to analyze the different doctrinal positions regarding the protected legal asset, which is a good in the life of people that is considered valuable at a level that deserves a legal guarantee, in order not to be breached by the action of a third party (Legal Concepts webpage, s.f.). In the field of human trafficking, the problem of the protected legal asset becomes complex, not because of its lack, but rather because of its broad content.

Before anything else, we can compile a list of the human rights most impacted by human trafficking, together with the legal frameworks that assert and protect those rights:

Universal Declaration of Human Rights (United Nations, 1948)

- The right to life, freedom and security (art. 3).
- The right not to be subjected to slavery, servitude or forced labor (art. 4).
- The right not to be subjected to torture and inhuman or degrading treatment (art. 5).
- The right to an adequate standard of living (art. 25).

The International Covenant on Economic Rights (United Nations, 1966)

- The right to fair and satisfactory working conditions (art. 12).

Declaration of the Rights of the Child (United Nations, 1959)

- The right of the child to special protection (principle 2).

It is debated in the Spanish doctrine whether the specific interests protected in this criminal figure would be dignity, moral integrity, freedom or if this should be viewed as a multi-offensive crime (Moya Guillem, 2016, p. 526).

First of all, as for dignity, the Preamble to the Universal Declaration of Human Rights (UN, 1948) states that "it's inherent to all members of the human family." Similar to this, the Spanish Constitutional Court has stated, it is the respect due to every human being and his right to live a dignified life, the esteem that every person deserves for the mere fact of being one (Uriarte, 2011, p. 16).

GONZALEZ PEREZ (2017) justifies the value of the dignity of the person by referring to two other authors: first, in the words of KANT, precisely because a man as a person has dignity, he is placed above everything that can be used as a means to obtain something (p. 21). Second, LEGAZ says that "the value of the person consists in more than merely existing, in having dominion over one's life" (p. 15). Next, the author himself states that the dignity of the person is not superiority of one man over another, but of every man over other beings that lack reason.

As for freedom, BEDMAR CARRILLO (2012) defends that this would be the protected legal asset because in the different phases of human trafficking the victim's freedom to act is affected, as well as their freedom of decision and of self-determination. In other words, the victim loses all of their decision-making capacity (pp. 91-92).

Finally, professor MOYA GUILLEM (2016), who specializes in law and criminology, indicates that HT must be considered a multi-offensive crime because it consists of the conversion of the person into an object of exchange and that violates several of the person's rights (p. 542). In this debate, I agree with her because I consider that each of the modalities of human trafficking implies, in addition to the ones that have already been mentioned, the endangerment of a different legal right, for example:

- Trafficking for the purpose of sexual exploitation: the sexual freedom of the victim.
- Trafficking for the purpose of labor exploitation: the workers' rights.
- Trafficking for the purpose of organ removal: public health.

Therefore, as we have seen, trafficking in persons is a multi-criminal activity that violates basic rights such as life, dignity, freedom and moral integrity of the person, putting them in degrading living conditions and involving them in a situation that nullifies them as persons (Cintas, 2011, p. 6).

VII. THE CORE COMPONENTS OF HUMAN TRAFFICKING

I consider that it's important to devote this chapter to two core components of human trafficking: consent and vulnerability. These two terms have been mentioned in the project and they will continue to appear because they have a significant importance in the field of human trafficking, and that's why I will dedicate a section to comment on each one of them.

A) Consent:

In legal terms, consent means a voluntary decision made by a capable person. In relation to this, RODRIGUEZ MORALES (2018) defines it as the basic principle of any commitment of a contractual nature, or the manifestation of the will of the person (p. 22).

The Palermo Protocol (2000) refers to the victim's consent in cases of human trafficking in its third article, which indicates that "once the use of deception, coercion, force or other prohibited means has been established, consent shall not be taken into account and may not be used as a defense."

It is evident from this article that there is no consensual trafficking because the victim's ability to exercise their free will was restricted by unlawful means. In conclusion, the consent gained in any of these ways is irrelevant because it was acquired through invalid means.

B) Vulnerability

As stated in Directive 2011/36/EU, "there is a situation of vulnerability when the person concerned has no real or acceptable alternative except accepting to be abused". In addition, BRITOS and HERNANDEZ (2017) refer to vulnerability as the unfavorable socioeconomic conditions that prevent the development of the population. It is generally accompanied by unsatisfied basic needs, lack of health and lack of education (p. 16).

In connection to this term, the UN Human Development Report (2014) indicates in its foreword that these vulnerabilities may be associated with gender, ethnicity or geographic location, for example. It also recognizes the unequal treatment that certain groups of people receive from the rest of society and how they face numerous limitations in their ability to cope with certain situations.

In the context of trafficking, specifically, the groups of concern are classified taking into consideration certain characteristics (UNODC, 2008), such as: children because they are not able to protect themselves, women because of their unequal social condition, and people who belong to certain social and cultural groups who face exclusion and do not have the same privileges as others in terms of education, employment, healthcare and other resources.

The needs of each group must be analyzed, since it is not the same, for example, for someone to be vulnerable because they are a woman, or for someone to be vulnerable because they are a woman, a minor and also an immigrant. This adds more and more layers of danger, which does not mean that there are people who are more important than others, but that we must think about how each group should be protected based on their situation and their needs.

In conclusion, I consider that it's fundamental to develop prevention strategies to increase the safety of people that find themselves in these vulnerable situations, while also focusing on reducing capacity and opportunity for traffickers to take advantage of them.

VIII. LEGAL REGULATION

A) International framework

The first relevant instrument to be mentioned at the international level is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done in New York on November 15, 2000 (the aforementioned Palermo Protocol).

This document is signed within the framework of the United Nations and, therefore, its signature includes a large number of countries. Nowadays, precisely, 181 States are Parties of this Protocol according to the United Nations Treaty Collection webpage.

The main objectives of this protocol, as indicated in article 2, are the following:

- (a) To prevent and combat trafficking in persons, paying special attention to women and children.
- b) To protect and assist the victims of such trafficking, with full respect for their human rights;
- (c) To promote cooperation among States Parties in order to achieve these ends.

This Protocol addresses two aspects in the following provisions: on the one hand, the criminalization of human trafficking in national legislations and its punishment, and on the other hand, offering protection and assistance to victims of trafficking.

The difference between these is that the first objective is expressed in mandatory terms, while the other one is only considered facultative. As a result of this, victim protection and prevention are deprioritized when compared to the stronger obligation imposed on states to fulfill the criminal law provisions of the Protocol (Vijayarasa, 2016).

In addition to this instrument, in the European framework we have the Convention on Action against Trafficking in Human Beings (Council of Europe Convention No. 197), done in Warsaw on May 16, 2005 (from now on referred to as the Warsaw Convention). This Convention covers a lower number of states because unlike the previous one, which is the most important one at a global level, this one concerns the Member States of the EU.

This Convention sets out its objectives in the first article:

- (a) To prevent and combat trafficking in human beings, ensuring gender equality;
- b) To protect the human rights of victims of trafficking, to design a comprehensive framework for the protection of and assistance to victims and witnesses, ensuring gender equality, and to ensure effective investigations and prosecutions;
- c) To promote international cooperation in the fight against trafficking in human beings.

2. In order to ensure effective implementation of its provisions by the Parties, this Convention establishes a specific follow-up mechanism.

As shown in the second point of the article, the Warsaw Convention sets up a specific monitoring mechanism for the actions of the Member States with the purpose to strengthen and ensure that they comply with their obligations in the fight against human trafficking. As part of this procedure, the Group of Experts on Action against Trafficking in Human Beings (GRETA) is created, which is responsible for ensuring that the parties implement the Warsaw Convention.

Some other important aspects of the Convention are the following measures, for example: the importance of the formal identification of the victims, the recuperation and reflection period given to them in order to decide if they are willing to cooperate with the authorities, and the assistance offered to them whether or not they finally decide to cooperate.

Finally, we have 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, replacing Council Framework Decision 2002/629/JHA.

The first article states the following:

This Directive establishes minimum rules concerning the definition of criminal offenses and sanctions in the area of trafficking in human beings. It also introduces common provisions taking into account the gender perspective in order to improve the prevention of this crime and the protection of victims.

The positive point of this Directive is that it adopted a human rights approach and took into consideration the position of vulnerability of the victims. However, a Report made by MARCHETTI and PALUMBO (2022), who belong to the Network of Europe's Leading Demographic Research Centres analyzes the situation 10 years after the Directive.

This report indicates that the Directive has not been implemented sufficiently on a national level, and highlights the lack of unconditional assistance for the victims, the non-application of the reflection period and the wrong implementation of the non-punishment principle. These problems exist because of the fact that European Directives are not directly applied the same way in all Member States, they need to be transposed, which explains the lack of uniformity and organization in the measures taken at the national level in each State.

B) Spanish framework

As a case study, I'm going to analyze the regulation of this phenomenon in the Spanish legislation (SCC, 2010). With the reform operated by Organic Law 5/2010¹, Title VII bis is created, with a single article: 177 bis. Its paragraph 1 indicates:

1. Shall be punished with 5 to 8 years of imprisonment for trafficking in human beings whoever, either in Spanish territory, either from Spain, in transit or bound for Spain, using violence, intimidation or deception, or abusing a situation of superiority or need or vulnerability of the national or foreign victim, or by giving or receiving payments or benefits to achieve the consent of the person who has control over the victim, captures, transports, transfers, harbors, or receives the victim, including the exchange or transfer of control over such persons, for any of the following purposes:
 - (a) The imposition of forced labor or services, slavery or practices similar to slavery, servitude or begging.
 - b) Sexual exploitation, including pornography.
 - c) Exploitation for criminal activities.
 - d) The removal of their bodily organs.
 - e) The celebration of forced marriages.

¹ Ley Orgánica 5/2010, de 22 de junio, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.

A situation of need or vulnerability exists when the person in question has no real or acceptable alternative but to submit to the abuse.

The wording of paragraph 1 of art. 177 bis refers to the conducts or modalities that correspond to the basic type of this crime, which are going to be punished with a penalty of five to eight years' imprisonment.

The aggravated modalities are explained in the following paragraphs (paragraph 4 to paragraph 11) and they refer to other aspects of the crime such as the vulnerability of the victim, the status of the active subject (authority, agent or public official) and whether they belong to a criminal organization, the liability of legal entities, provocation, conspiracy and proposal, recidivism and the exemption from liability for the victims (which will operate whenever the victim has been forced to commit any criminal activity or to participate in it).

However, these paragraphs won't be analyzed in depth because they are not as relevant as paragraph 1 and they are not related to the objective of the project.

As we can see in the Spanish case, human trafficking didn't have a specific regulation until 2010, which is quite late if we take into consideration that the Palermo Protocol was open to signature ten years prior to that (in the year 2000). The fact that an European country took ten years to regulate a crime that entails devastating consequences for humanity proves that human trafficking is not one of the priorities of many states.

In conclusion, this proves once again that the mere existence of international instruments regarding human trafficking is not enough if States don't implement the correct measures in their national regulation in order to combat and prevent this crime.

IX. SHOULD HUMAN TRAFFICKING BE CONSIDERED A CRIME AGAINST HUMANITY?

As already indicated in the previous chapter, the Palermo Protocol was adopted to promote uniformity and cooperation amongst states in order to prosecute traffickers and protect victims. Nevertheless, it has been demonstrated that it's not as effective as it was intended to be. One of the reasons why this has happened is that even though the protocol was agreed upon by states collectively, the responsibility of implementing and enforcing those measures falls upon the states domestically.

Therefore, due to the lack of success of addressing it through transnational laws, the solution would be to address the problem through international law. I agree with author D. TOLAR (2020) over the fact that human trafficking is not an ordinary crime, it can be ranked among the most serious crimes of concern to the international community as a whole (p. 131). For that reason, from my point of view, crimes of this magnitude should be addressed by the International Criminal Court and I'm going to explain why in the following paragraphs.

The ICC was established by the Rome Statute, which was adopted on 17 July 1998. According to art. 5 of the Rome Statute, it was created to help end impunity for the perpetrators of the most serious crimes of concern to the international community, which means that it has jurisdiction with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.²

Article 11 of the Rome Statute clarifies that the jurisdiction of the ICC is *ratione temporis*, which means that the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute, in other words, it does not apply retroactively.

² Article 5 of the Rome Statute

I would also like to mention article 7, which refers to crimes against humanity, and lists the following acts that will be considered as such when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or psychological health.³

From this article, we can extract and identify certain acts that are obviously related to the crime of human trafficking, such as enslavement, forcible transfer, sexual slavery and enforced prostitution. Declaring human trafficking as a crime against humanity would give the ICC jurisdiction to hear these cases.

I would like to clarify that this doesn't mean that the ICC can take the place of national courts, it is not intended to be a substitute. It is the obligation of each and every state to exercise its criminal jurisdiction over those responsible for international crimes, which means that the responsibility would still fall on the states in the first place. However, the ICC would be able to intervene and step in if a State is unable or unwilling to handle a case of HT.

³ Article 7 of the Rome Statute

A booklet called “Understanding the International Criminal Court” developed by the ICC (2020) itself explains this idea by indicating that “the ICC doesn’t replace national criminal justice systems; it complements them”, which is known as the principle of complementarity.

To finish this chapter, it can be concluded that human trafficking can rise to the level of a crime against humanity, and therefore, it may be subject to the jurisdiction of the ICC. This would entail a guarantee of a higher level of protection in those cases where the national criminal justice systems fail to prosecute perpetrators of HT or to protect its victims.

X. KEY ASPECTS TO UNDERSTAND THE COMPLEXITY OF HUMAN TRAFFICKING

In this chapter, I'm going to explain three points that are connected: first of all, why human trafficking occurs and which are the factors behind it. Second, the global data regarding this crime and the reasons why it's complicated to collect accurate information on it. Finally, I'm going to analyze the complexities of human trafficking because it's an unusual crime that has certain characteristics that distinguish it from others, which means that in order to address this offense, it is necessary to develop an approach that matches those characteristics.

A) Factors that contribute to human trafficking

In recognition of National Slavery and Human Trafficking Prevention Month, UNICEF created an article in 2017 that identified the contributing factors to human trafficking.

First of all, one of the most significant aspects of this crime is that it is the third most lucrative business for organized crime, behind drug trade and trafficking of weapons (Vasquez, 2013). This is due to the low costs of the activity and the extremely high profits of carrying it out.

Second, as we have already seen above, it's founded on the principles of supply and demand. When people are trafficked for the purpose of sexual exploitation, the desire for commercially available cheap sex encourages the use of strip clubs, pornography and prostitution. The same thing occurs in human trafficking for labor exploitation, workers are taken advantage of by businesses that demand cheap labor in order to provide consumers with the affordable items they want.

Last but not least, some inequities and gaps in society render some groups of individuals considerably more susceptible to exploitation, such as extreme poverty, lack of access to opportunities for education and employment, conflict, and violence. Issues like these are some of the frequent causes of migration in pursuit of better living circumstances.

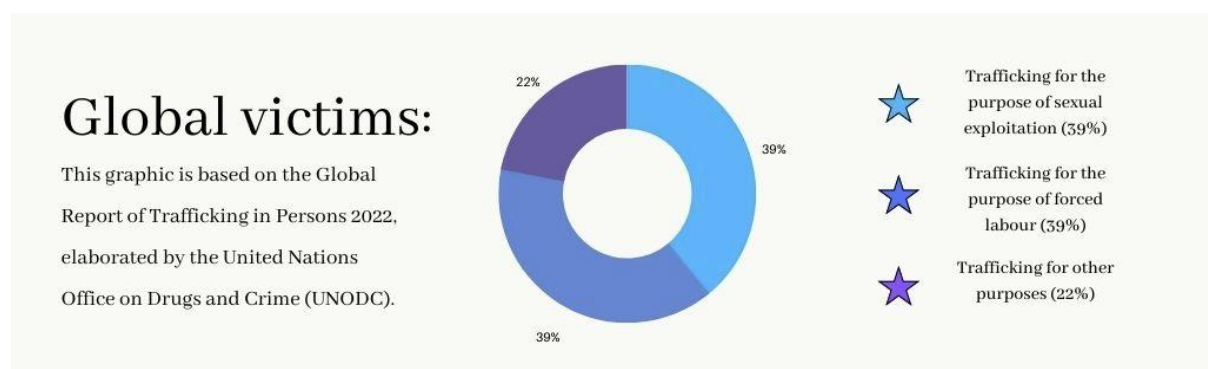
There are many different fundamental causes of trafficking, and they often vary from one country to another. The UNODC Handbook on Combating Trafficking in Persons (2007) explains that “in their search for a better life elsewhere, disadvantaged people often fall into the hands of criminals who take advantage of their situation and exploit them.” As we can see, this analysis shows once again why it’s so important to elaborate preventive and protective measures for human trafficking, instead of only focusing on its criminalization.

B) Global data on human trafficking

An essential trouble within the investigation of human trafficking is the absence of unified data that would provide a global and clear picture of the issue. There are, in fact, critical contrasts between the number of trafficking cases reported or identified, and estimates of the actual impact and numbers of this crime. It is subsequently vital to note that information on human trafficking should be handled with caution. They are a fundamental tool for measuring trafficking and understanding its magnitude, but they do not provide an accurate picture (Fundación Mutua Madrileña & Proyecto Esperanza, 2022). According to the United Nations, the number of trafficked persons is estimated at 2.5 million. However, it is estimated that for every identified victim, there are 20 more unidentified.

Graphic 1

The percentage that corresponds to each modality of exploitation, according to UNODC (2022).



4

⁴ United Nations Office on Drugs and Crime (2022): *Global Report on Trafficking in Persons 2022*.

As indicated in the report drafted by the Spanish Ombudsman in 2012, "the lack of data on the true dimension of human trafficking seriously compromises the adoption of measures to combat it, especially with regard to its transnational dimension, and hinders the realistic evaluation of the impact of any intervention plan" (p. 2).

C) The characteristics of the crime and its challenges

First of all, the crime of human trafficking is dynamic and adaptable, it constantly changes with the intention to outsmart the efforts of law enforcement agencies, which face difficult obstacles in their efforts to prevent and control this crime (UNODC, 2007). Human trafficking networks have historically been adaptable, and this adaptability has made them remarkably resilient in the face of ever-changing socioeconomic and political conditions (Paolella, 2020, pp. 247-250).

The crime is often international in nature, it's committed across certain borders and jurisdictions, which means that, instead of referring to it as a "criminal act", it would be more accurate to refer to it as a "criminal process". This makes it even more complicated for the law enforcement agencies, because it requires them to conduct investigations across international borders and to rely on evidence obtained abroad. In addition to that, human trafficking is a clandestine activity, it remains mostly hidden and that's the main reason why data published by official agencies does not reflect the true dimension of the problem (Fundación Mutua Madrileña & Proyecto Esperanza, 2022).

This lack of data can be explained by two main factors: on the one hand, legislation is often lacking, inadequate or not implemented, making the prosecution of traffickers very difficult and often impossible. On the other hand, trafficking convictions are often based on witness and/or victim testimony, which is hard to obtain as trafficking victims are either deported as illegal migrants or, if identified as trafficking persons, are often too frightened to testify (Laczko & Gramegna, 2003).

Another problem that we can address is that very often, there is a partial, limited and stereotyped vision of human trafficking that prevents us from recognizing many of the situations that don't fit into that stereotype, which remain hidden and undetected.

The misinterpretation of HT means that many cases of trafficking are not recognized as such. Even more concerning, the representation of victims creates a hierarchy, resulting in many non-ideal, but real victims being denied services and rights, to the extent where they are prosecuted. In fact, only half of those who need assistance actually receive it (Gregoriou, 2018).

The problem of this stereotyping is that certain victims are either offered less support, or denied any altogether. One requirement is for the victim to have done nothing that can be considered as having contributed to their being trafficked. Those who fail to qualify as victims are not just denied support and sympathy, they are often criminalized.

As it has been shown, in today's trafficking discourse, only those who meet a very specific criteria are identified as victims. They must be young women, preferably exploited in the sex industry and transferred without permission.

Last but not least, the greatest difficulty lies in the misapplication of legislation related to human trafficking, due to conceptual confusion with other crimes such as smuggling of migrants or slavery, for example. The similarities and differences between human trafficking and these other crimes has already been explained in previous chapters.

In conclusion, in this chapter we have analyzed the factors that contribute to human trafficking, the global data available regarding this crime and the reason why it doesn't accurately reflect the reality, and the challenges that this crime entails due to its unusual characteristics. Now that we have a better understanding of human trafficking and its complexity, in the next chapter I'm going to comment on the approaches that have been proposed by different authors in order to combat this crime effectively.

XI. DIFFERENT APPROACHES TO HUMAN TRAFFICKING

I'm going to dedicate this chapter to explain the most significant approaches I have investigated in relation to human trafficking.

First of all, CASADEI (Perez Alonso et al., 2020) argues that what underlies trafficking is the lack of alternatives to “consent” the oppression. He proposes to start with migrants and refugees who often become victims of trafficking because their hopes to obtain another chance are denied. Hope is what leads migrants to cross seas and borders, and that's why the other side, which is their destination, should guarantee their fundamental rights, “so that the choice is not, for many people of different ages, between being trafficked and exploited, or being left to die at sea.” (pp. 622-623).

Another perspective is given by SIEGER (2011) in the Encyclopedia of Global Justice. She argues that instead of focusing on the offer, we should consider the other side, the demand. It is important to rise consumer conscientiousness and for them to reject cheap goods, made available at low cost at the expense of exploitative labor. This same point of view is also supported by MAIHOLD and SERTVIJA ROCA (Usillos et al., 2011), who emphasize that one part of the population is taking advantage of services that the other part of the population can offer.

The different protocols and laws on HT tend to focus their fight against this crime on the three “P”: Persecution, Protection and Prevention. But what about the demand for services from human trafficking? This is one of the central problems that is not sufficiently addressed, there should be certain measures to discourage the purchase of human services.

I will introduce the last approach with a quote of MARTINEZ DE VEDIA, which summarizes the main point: *“treating trafficking as strictly a crime perpetuates the fallacy that prosecution and imprisonment alone will bring justice and prevent further harm.”* (Chisholm-Straker & Chon, 2021, p. 13).

With that being said, I need to mention professor VAN DIJK (2011), who elaborates on this last approach that I completely agree with. He explains that instead of putting the interest of the states in the center of attention, the focus should be on the interests of people.

These last years, combating HT has been on the agenda of many states and international organizations. However, an important mistake in the dominant legal responses to this crime is that they focus only on prosecution and criminal law. As a result, the interests of victims are considered to be a secondary concern, and they are only mentioned in discretionary or non-mandatory provisions in documents such as the Palermo Protocol, for example.

In order to make efforts against human trafficking, we must look beyond criminal law, because a complex crime like this requires action in various fields: labor law, migration law... this is called an integrated approach. To develop such an approach, the main focus should be the severe violation of a person's human rights and because of this, I consider that putting the victim at the center is fundamental when determining policies against this crime.

There is a growing awareness among states that a criminal law response to human trafficking is not sufficient. However, that awareness is not enough if no real priority is given to implementing measures regarding the protection and assistance of victims. This reflects the focus on states' prosecutorial and punitive strategies to protect the state's safety, while victim protection and assistance are proposed in a non-binding way, or not at all.

In order to sustain and justify my position with some practical examples, I have analyzed the The 2022 Trafficking in Persons Report, elaborated by the Department of State of the USA, which ranks countries based on their efforts to prosecute traffickers, protect victims and prevent HT, and they can be classified into three categories: Tier 1, Tier 2 and Tier 3.

I have chosen three countries classified in Tier 1: Argentina, Namibia and the USA, because the measures that they each apply demonstrate serious and sustained efforts for the elimination of human trafficking and I consider that they can be contemplated as an example of the victim-centered and human rights based approach that I support.

A) Argentina:

In terms of protection, The National Directorate of Migration reported training 700 public officials on the identification of trafficking victims amongst migrant populations. Foreign victims have the same access to care as Argentine citizens do, but sometimes they are not aware of the services that they are offered. The government promotes victim participation in trials through an assistance framework in which victims have access to psychological and legal support while preparing to testify. In terms of prevention, the government implements awareness campaigns and workshops accessible to the general public, while also informing of the nationwide 1-4-5 trafficking hotline through bus stations and other public venues.

B) Namibia:

Eight government-run shelters have been established in this country to care for victims, and three NGOs have also been given funding to provide psychosocial services, medical care, and other basic necessities for the victims. Foreign victims can access these facilities and services as domestic victims do.

What caught my attention about Namibia's case study is that all 25 victims identified during the reporting period voluntarily assisted law enforcement with investigations. This is because in this country, authorities do not condition access to victim services on cooperation with law enforcement, all victims are worthy of legal aid, transportation and witness protection. In addition, the government assigned victim advocates to testifying victims, and allowed them to testify in rooms separate from the courtroom when such rooms were available.

C) United States of America:

The government funded a national hotline and referral service, as well as victim assistance organizations that provided trafficking-specific services such as mental health and medical care, substance use treatment, housing and shelter, translation and interpretation services, legal services, employment training and job placement services, transportation assistance and financial assistance.

Nevertheless, the most outstanding measures, in my opinion, are U visas and T visas, which were both created in order to help victims of particular crimes to gain a visa status (U.S. Department of Homeland Security, s.f.). These visas were developed, on the one hand, because the government realized that HT victims without legal status might be reluctant to help in the investigation or prosecution of this type of criminal activity, and on the other hand, to strengthen relations between law enforcement and immigrant communities.

The T visa requirement is that the applicant must have been trafficked into the United States, which means that the victim is only present in the country due to trafficking. This is different from the U visa, in which the individual could have simply visited the US and was then a victim of human trafficking. Another specificity of the U visa is that individuals who apply for this one are required to cooperate with law enforcement to a greater extent, they will be expected to assist in the investigation of the criminal activity they were negatively affected by, which is a much less common requirement in T visas.

XII. JURISPRUDENCE: CASE OF RANTSEV V. CYPRUS AND RUSSIA

As we have seen in the previous chapter, the responsibility of victim protection and assistance relies on the States in the first place. Nevertheless, States have the obligation to implement and enforce the laws regarding human trafficking, because merely criminalizing the offense is not enough. In this chapter, these obligations are going to be further elaborated upon by explaining the RANTSEV case (2010), an important case from the ECHR.

This case concerns ms. Rantseva, a 21 year old woman who had been trafficked from Russia to Cyprus in 2001. She had entered Cyprus on an “artist” visa (synonym for working as a prostitute) and began to work in a cabaret. She had disagreements with the manager of the cabaret and his brother, and after three days she left the apartment and disappeared.

Some days later, the woman was captured by the manager and his brother at a discotheque and taken to the police station, but the authorities disregarded the case and handed the victim back to her traffickers. They took her to a 5th floor apartment and placed her in a room while the owner slept in the living room, blocking her only exit. At around 7 a.m., when the cabaret owner and the employee to which the apartment belonged to woke up, they found police officers gathered around the woman’s dead body on the street. The woman died under “unclear circumstances” having fallen from a window of that apartment in Cyprus.

Some months later, her father (Mr. Rantsev) contacted the authorities of both countries to initiate an additional investigation of his daughter’s death. Not satisfied with the results, he brought the case to the ECHR in 2004. Mr Rantsev alleged violations of the following articles of the European Convention on Human Rights and Fundamental Freedoms (1950):

- Article 2: the right to life.
- Article 3: prohibition of torture.
- Article 4: prohibition of slavery and forced labor.
- Article 5: right to liberty and security.

He claimed that the Republic of Cyprus insufficiently investigated the death of his daughter, that the police inadequately protected her while she was still alive, and that the government failed to take necessary steps to bring to justice those responsible for her death.

According to the Court, “states have an obligation to take operational measures to protect victims or potential victims of trafficking in the circumstances where the state authorities knew or should have known that an identified person had been or was at real and immediate risk of being trafficked or exploited.”

From Russia’s part, the state had obligations to take measures to protect the woman from being trafficked. The Court found that Russia had an obligation to investigate the possibility of the involvement of Russian individuals or networks in the trafficking of the woman to Cyprus and the means of such recruitment. Thereby, this failure to investigate recruitment amounted to a violation from Russia’s part.

In conclusion, the Court declared both states guilty of not fulfilling their obligations. This proves that having a legal provision that prohibits human trafficking is not sufficient and states need to have an appropriate legislative and administrative framework to combat this crime and guarantee the protection and assistance of its victims.

This case is a perfect demonstration of the different aspects of HT that have been mentioned throughout all these chapters, for example: the factors that contribute to human trafficking, consent and vulnerability, the elements of this crime (the act was recruitment, the means were abuse of power or a position of vulnerability, and the purpose was sexual exploitation). I consider that it reflects many important aspects of the crime and it also supports my point of view regarding the accurate approach that should be taken in these cases. This case proves that the role of the States is not limited to having some legal provisions regarding human trafficking if they are going to turn a blind eye when this phenomenon happens.

Finally, another reason why I chose this case is because the father of Rantseva raised awareness regarding similar cases where young women were being exploited, while also fighting to obtain justice for the death of his daughter.

XIII. CONCLUSION

With each and every issue of trafficking already stated, I must conclude the work with some final conclusions from my personal point of view. Given that human trafficking is the third most lucrative business for organized crime, as we have said, it is alarming that the progress made regarding this crime is much less than in other crimes.

We have also commented that most of the causes lie in globalization and the economic imbalance it has generated between the most developed and the least developed countries. On the one hand, progress in transportation has allowed traffickers to transport people more easily and on the other hand, technological advances have allowed traffickers to find new ways to capture people outside of their country of origin.

These modern means have helped criminals to find new ways to catch people into their trap and exploit them for different purposes. For this reason, I believe that the solution to this is not to punish or prosecute criminals more strictly, as they will continue to find ways to get away with it. We must focus on the other side of this phenomenon: the victim.

This means that an effective and adequate measure against human trafficking would not be, for example, increasing the years of sentence corresponding to this crime, or putting more costly economic sanctions on criminals, since this approach only focuses on persecution and punishment, and as long as they keep finding ways to commit this constantly evolving crime, they won't care about the consequences if they assume that they won't get caught.

Instead of that, an effective measure could be one focused on preventing this crime or putting the victims in a safer situation. For this to be possible, it is necessary to continue investigating the needs of each group of victims, which would provide a better understanding of what victims need in order to become less vulnerable to traffickers.

In conclusion, as we can see, human trafficking is a crime that affects devastating numbers of people all around the world every year, and there are many others who fall into the dark figures of this crime, because their situation is neither identified nor visible. What is clear is that although progress has been made in human trafficking, perhaps progress has been made in focusing on the wrong side of the crime.

In spite of this, we can identify appropriate measures in certain countries like the ones I have mentioned previously (Argentina, Namibia and the United States of America). This shows that a victim-centric and human based approach is possible, it's not an abstract idea but an approach that is already being developed and put into practice by some countries. Nevertheless, there is still a long way to go and it will require the involvement and cooperation of many more countries.

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