TRAFFICKING IN HUMAN BEINGS IN CONFLICT OR POST-CONFLICT SITUATIONS. A REFLECTION ON STRATEGIES

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1. The nexus between armed conflicts and trafficking in human beings: introductory remarks

In conflict areas, trafficking in persons for the purpose of sexual slavery, forced labour, recruitment of children into armed groups and the abduction of women and girls for forced marriages are dramatically widespread [1].

Conflict related trafficking in persons for the purpose of sexual slavery and exploitation is included by the United Nations in the definition of Conflict Related Sexual Violence (CRSV) together with rape, sexual slavery, forced pregnancy, enforced sterilization, forced abortion, forced prostitution, forced marriage or any other form of sexual violence. This notion refers to crimes perpetrated against women, men, girls or boys, whether they occur in a conflict or post-conflict situation, directly or indirectly linked to the conflict itself [2].

The perpetrators belong to state or non-state armed groups, including those regarded as terrorist groups by the United Nations. The victims, in most cases, are actual or presumed members of a political, ethnic or religious minority who are persecuted in a climate of impunity, usually associated with the collapse of the State.

Such abuses, which is directed against the civilian population, completely upsets the community to which the victims belong, irreparably compromising their social aggregation, since this often results in their stigmatization, rejection by the community itself, rather than solidarity. And even where the community they belong to does not reject them, the victims of Conflict Related Sexual Violence feel affected by a stigma that leads them to no longer perceive themselves as worthy members of the community they belong to, generating a sense of alienation that is not without serious consequences.

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[1] See UNITED NATIONS, *Trafficking in persons in conflict situations: the world must strengthen prevention and accountability,* 29 July 2022.

[2] See UNITED NATIONS, *Conflict Related Sexual Violence*, Report of the United Nations Secretary-General, S/2022/272, 29 March 2022, 4.

A weapon of war, therefore, able to destroy the enemy and always used, since the dawn of time [3]. And it must be observed that, despite the formalization, as a response to the atrocities of the crimes of the World War II, of the rules on the fundamental rights of the human person and the relative gradual humanization of the rules on the limits to war violence, which should have constituted a bulwark against such aberrant crimes, nothing has changed in the conflicts that took place after this war.

In Liberia, Uganda, Rwanda, Sierra Leone, former Yugoslavia, parties to an armed conflict have committed such crimes in the context of genocide, ethnic cleansing, war crimes and crimes against humanity [4]. Groups and militaries have used these crimes as a war tactic to displace and disrupt communities.

It should also be highlighted that Conflict Related Sexual Violence continues to be used as a war tactic, a means of torture and a terrorist tactic in various countries, such as Afghanistan, Iraq, Libya, Yemen, Mali, Myanmar, Nigeria, the Democratic Republic of the Congo, Sudan, South Sudan, Syria. This has led to very serious violations of human rights.

In Afghanistan, women and girls are sold or forced into marriage and reduced and kept in slavery by Taliban forces. In Myanmar, the acts of sexual slavery against the Rohingya, vulnerable to trafficking and

[3] It is necessary to remember that the International Military Tribunal at Nuremberg did not proceed with the repression of the crimes of sexual violence perpetrated in the countries occupied by Nazi Germany, despite the possibility of appealing to a provision of the Hague Convention of 1907 (the provision that protects the honor and family rights), and to the provisions of the Nuremberg Statute which include among crimes against humanity reduction into slavery, as well as other inhuman acts. Likewise, the Tokyo Tribunal did not proceed to repress the massively practiced sexual slavery by the Japanese military in the occupied territories against "comfort women". In this regard, see H. O-GON KWON, *Forgotten Victims, Forgotten Defendants*, in Y. TANAKA, T. MCCORMACK, G. SIMPSON (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Leiden, 2011.

[4] A fundamental contribution to the qualification and suppression of acts of sexual violence such as war crimes, crimes against humanity and genocide has been made by the International Criminal Tribunals set up *ad hoc* by the United Nations Security Council – International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) – as well as by the mixed ones created with agreements between the United Nations and some States involved in international and/or internal conflicts (the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Chamber in Bosnia) and the International Criminal Court (ICC).

exploitation, are to be highlighted. In Libya and Yemen, armed groups and transnational traffickers continue to perpetrate rape and sexual slavery with impunity amid a deepening humanitarian crisis.

In the Central African Republic, women and girls have been subjected to violence and, in some cases, kidnapped and detained by armed groups. Such acts of violence and exploitation have also occurred in the context of kidnappings and trafficking in persons, including by terrorist groups.

In Iraq, systematic violence against women and forced pregnancies have been used as instruments to implement plans for ethnic cleansing. Da'esh has used the bodies of Yazidi women, kidnapped, as sex slaves to reward the fighters, trafficked on the global sex market, as war booty to be used also as a source of financing.

Crimes committed against the Yazidi, Turkmen, Christian and Shabak communities were defined by the Independent International Commission of Inquiry on the Syrian Arab Republic as "with deliberate genocidal intent" [5]. Da'esh has perpetrated the enslavement, deportation and forced transfer of populations, imprisonment, torture, kidnapping of women and children, exploitation, abuse, rape, sexual violence. Boko Haram in Nigeria has similarly sold hundreds of kidnapped girls in villages and schools. In South Sudan, women and girls were subjected to mass abductions, sexual slavery, forced marriages and pregnancies [6].

As for the conflict in Ukraine, since 17 May 2022 a team of 42 investigators, forensic experts and support staff has been conducting the investigation of crimes falling under the jurisdiction of the International

[5] See UNITED NATIONS, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, 11 March 2021, para 100, where it is noted that: "For nearly a decade, the Government of the Syrian Arab Republic then all parties have resorted to arbitrary detention, torture and ill-treatment, including through sexual violence, and to involuntary or enforced disappearance to intimidate and punish perceived political opponents and dissenting civilians and their families. Such violations were meted out with sectarian overtones in some cases, and in the case of ISIL, with deliberate genocidal intent. Groups designated as terrorist by the United Nations and some armed groups used unlawful detention to enforce draconian restrictions on daily life".

[6] For an overview regarding all the situations above mentioned, see UNITED NATIONS, *Conflict Related Sexual Violence*, Report of the United Nations Secretary-General (*supra* note 2).

Criminal Court [7] and provides support to the Ukrainian national authorities [8].

Trafficking and serious exploitation are therefore systematically linked to all recent conflicts. These constitute a multiplier of all those factors of vulnerability relating in particular to women and girls victims of various forms of violence. Vulnerability can depend on multiple factors that interact with gender, such as nationality, ethnic or geographical origin, social status. During a conflict, these factors of vulnerability are accentuated and further contextual factors contribute to creating a situation of risk. The conflict involves a subversion of the institutions due to the total or substantial collapse, or the unavailability of the judicial system, favoring impunity.

Many people are led by fear of attacks and bombings to choose to flee, facing the journey without any information and in otherwise unacceptable conditions of insecurity. At risk of trafficking are both internally displaced

[7] In this regard, it should be recalled that the Office of the Prosecutor of the International Criminal Court must determine whether a situation meets the requirements established by the Rome Statute to support an investigation by the Office. The preliminary examination of a situation by the Office can be initiated on the basis of: information received from individuals or groups, States, intergovernmental or non-governmental organizations; a request from a State Party or the United Nations Security Council; of a declaration filed by a State which accepts the exercise of jurisdiction by the Court pursuant to Article 12, para 3, of the Statute. Once a situation has been identified in this way, in order to establish whether there are reasonable grounds to proceed with an investigation, the Prosecutor must evaluate, pursuant to Article 53, para 1, *a*)-*c*): the jurisdiction (temporal, territorial or personal and material); admissibility (complementarity and gravity); the interests of justice.

[8] Ukraine is not a State party to the Rome Statute, but has twice exercised its prerogatives to accept the jurisdiction of the Court (pursuant to Article 12, para 3) on the alleged crimes, envisaged by the Rome Statute, perpetrated on its territory. The first declaration submitted by the Government of Ukraine accepted the jurisdiction of the ICC in relation to alleged crimes committed on the territory of Ukraine from 21 November 2013 to 22 February 2014. The second declaration extended this period indefinitely, in order to include the alleged crimes committed throughout the territory of Ukraine, from 20 February 2014 onwards. On 28 February 2022, the ICC Prosecutor announced that he would seek permission to open an investigation into the situation in Ukraine, based on the Office's previous conclusions from its preliminary examination, and including any new alleged crimes under the jurisdiction of the Court. On 2 March 2022, the Prosecutor's Office announced that it had proceeded to open an investigation into the situation in Ukraine on the basis of the referrals received. The scope of the situation includes any past and present allegations of war crimes, crimes against humanity or genocide committed in any part of the territory of Ukraine by any person from 21 November 2013 onwards.

persons who leave their villages or towns to move to other areas of the same country, and refugees, who lose their protection systems consisting of family and social ties.

It is precisely the conflicts and resulting humanitarian crises that expose minors to trafficking and other forms of exploitation. In such contexts, girls are victims of violence and sexual exploitation. During humanitarian crises, girls and boys who have lost their families are frequently forced to offer sexual services in order to survive. And again, many young women are induced to marry in order to obtain shelter, passage or protection [9].

These evidences require an in-depth reflection on the requirements necessary to qualify such crimes as crimes against humanity [10] under jurisdiction of the International Criminal Court [11].

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[9] See UNITED NATIONS, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, 3 May 2016, A/ HRC/32/41, paras 18-22.

[10] To learn more about the topic, see M. CHERIF BASSIOUNI, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge, 2014; M. DELMAS-MARTY, I. FOUCHARD, E. FRONZA, L. NEYRET, *Le crime contre l'humanité,* Paris, 2018.

[11] About the International Criminal Court, which constitutes the first real supranational world jurisdiction, see M. CHERIF BASSIOUNI, *The Statute of the International Criminal Court. A Documentary History*, New York, 1999; A. CASSESE, P. GAETA, J.R.W.D. JONES, *The Rome Statute of the International Criminal Court. A Commentary*, Oxford, 2002; O. TRIFFTERER, K. AMBOS, (eds), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford, 2016. And see also M. DELMAS-MARTY, *The ICC as a Work in Progress for a World in Process*, in M. M. DEGUZMAN, D. M. AMANN, (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas,* Oxford*,* 2018, 257 ff. It should be noted that international criminal justice derives its essence from the universalism of human values assumed as objects of protection. With regard to the purposes of protection, international criminal justice is responsible for sanctioning the most serious violations at an international level: human rights rise to juridical assets subject to criminal protection. About international criminal justice, see: A. CASSESE, M. DELMAS-MARTY, (eds), *Crimes internationaux et juridictions internationales*, Paris, 2002; A. CASSESE, M. CHIAVARIO, G. DE FRANCESCO (eds), *Problemi attuali della giustizia penale internazionale*, Torino, 2005; S. ZAPPALÀ, *La giustizia penale internazionale*, Bologna, 2005; A. CASSESE, *Lineamenti di diritto internazionale penale*, Bologna, 2005; M. DELMAS-MARTY, E. FRONZA, E. LAMBERT ABDELGAWAD, (eds), *Les sources du droit international pénal*, Paris, 2005; G. FIANDACA, *Gli obiettivi della giustizia penale internazionale: tra punizione e riconciliazione*, in F. PALAZZO, R. BARTOLI, (eds), *La mediazione penale nel diritto italiano e internazionale*, Firenze, 2011, 97 ff; G. WERLE, F. JESSBERGER, *Principles of International Criminal Law*, Oxford, 2014; R. WENIN, G. FORNASARI, E. FRONZA (eds), *La persecuzione dei crimini internazionali. Una riflessione sui diversi meccanismi di risposta*, Trento, 2015; E. AMATI, M. COSTI, E. FRONZA, P. LOBBA, E. MACULAN, A. VALLINI, *Introduzione al diritto penale internazionale*,

But that's not enough. Trafficking, included in the definition of Conflict Related Sexual Violence, should be considered as such even when it is perpetrated not by groups involved in the conflict, but by criminal groups that take advantage of the collapse of institutions and the consequent widespread impunity, and also of the vulnerabilities of people seeking to flee conflict zones. Organized crime profits from conflict or post-conflict situations and turns the exploitation of vulnerabilities created or exacerbated by them into a business. Criminal organizations turn their sights towards the poorest social groups, to exploit people in the sex industry, forced prostitution, slavery and servitude. These criminal groups have an increasingly transnational connotation.

Starting then from this second point of view, the reflection is aimed at the instruments that constitute the regulatory response at a supranational level and in Italian criminal system to these aberrant crimes, to verify whether this is adequate for the purposes of allow for effective law enforcement and protection of the victims.

Of fundamental importance are the correlations between trafficking in persons and international protection, in the sense of identification, in the migratory history of persons who have experienced trafficking or are at risk of experiencing it, of the requirements for applying international protection. The central point is the recognition of the experience of trafficking, in its multiple manifestations, as a reason for persecution, namely the possibility of applying the 1951 Geneva Convention for according the Status of Refugees to trafficked persons.

Torino, 2016; M. CHERIF BASSIOUNI, *Human Rights and International Criminal Justice in the Twenty-First Century*, in M. M. DEGUZMAN, D. M. AMANN, (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas*, (*supra*), 3 ff; F. LATTANZI, *Dal trattato di Versailles allo Statuto di Roma*, in *Dir. pen. cont.-Riv Trim*., 2018, 4, 305 ff. For an overview regarding international criminal justice and function of punishment, see L. CORNACCHIA, *Funzione della pena nello Statuto della Corte Penale Internazionale,* Milano, 2009; ID., *Funzione della pena nel diritto penale internazionale*, in *Dig. disc. pen.*, X *Aggiornamento*, Milano, 2018, 232 ff.

2. *Trafficking in human beings in the context of a conflict as a crime against humanity*

Even before developing the analysis concerning the issue of trafficking in human beings perpetrated in the context of a conflict and in particular the requirements that must exist to qualify it as a crime against humanity, under the competence of the International Criminal Court, it is necessary to remind that crimes against humanity constitute particularly despicable and abject crimes, as they harm the right to life, freedom, dignity and even more because they harm humanity as a value consubstantial to every person [12].

In particular, it is crime against humanity one of the acts contemplated in Article 7 ICC St, punishable only if committed in implementation or execution of the political plan of a State or of an organization, in the context of a widespread or systematic attack against civilian populations, and with knowledge of the attack [13]. So these are not sporadic or isolated events [14], but events that are part of a government policy, or of an extended or systematic practice [15] of atrocities against the civilian population,

[12] On topic, it is necessary to remind what was stated by the ICTY, *Erdemović* case, IT-96-22-T, *Trial Judgment*, 29 November 1996, para 28: "Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity".

[13] The different meaning attributed to the term "attack" in the context of crimes against humanity versus war crimes is clearly highlighted by the ICTY in the *Kunarać et al.* case: "The term "attack" in the context of a crime against humanity carries a slightly different meaning than in the laws of war. In the context of a crime against humanity, "attack" is not limited to the conduct of hostilities. It may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention. However, both terms are based on a similar assumption, namely that war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target" (ICTY, *Kunarać et al.*, IT-96-23-T & IT-96-23/1-T, *Trial Judgment*, 22 February 2001, para 416).

[14] See G. WERLE, F. JESSBERGER, *Principles of International Criminal Law*, (*supra* note 11), 334.

[15] As the ICC effectively stated in the *Katanga and Ngudjolo Chui* case*,* ICC-01/04-01/07-717, *Decision on the confirmation of charges*, 30 September 2008; the expression "widespread or systematic" in Article 7, para 1, of the Statute excludes random or isolated acts of violence. Furthermore, the adjective "widespread"

leaded, tolerated, accepted [16] by a government, or by a *de facto* authority or organization [17].

It is therefore necessary that the single act constitutes a link in a chain of crimes of the same type or is part of the succession of acts through which these crimes have been perpetrated (extended attack), or that it is carried out in implementation or in execution of a political project [18], or a plan

connotes the large-scale nature of the attack and the number of targeted persons, whereas the adjective "systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence (para 394).

[16] See G. WERLE, F. JESSBERGER, *Principles of International Criminal Law*, (*supra* note 11), 345. On this point, it should be noted that, in the *Samoei Ruto, Kiprono Kosgej e Arap Sang* case, ICC-01/09-01/11-373, *Decision on the confirmation of charges*, 23 January 2012, the ICC specified that: "The implementation of a policy can consist of a deliberate failure to take action, which is consciously aimed at encouraging such attack" (para 210).

[17] The ICC has specified that the "organisation" must have "sufficient resources, means and capacity" to carry out the acts referred to in Article 7, para 2, a), of the Statute. The Court affirmed that an attack against a civilian population may be perpetrated by a group or organization which can be also a private entity (ICC, *Katanga,* ICC-01/04-01/07-3436, *Judgment pursuant to article 74 of the Statute*, TC, 7 March 2014, para 1119). On this point, see also, ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, *Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya*, 31 March 2010, para 90, where it is stated that: "the associative element, and its inherently aggravating effects, could eventually be satisfied by 'purely' private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by 'territorial' entities or by private groups, given the latter's acquired capacity to infringe basic human rights". The Court stated that the determination regarding the qualification of a given group as an 'organisation', pursuant to the Statute, must be made on a case-by-case basis, considering a series of elements, among which: "(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the above-mentioned criteria. It is important to clarify that, while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled" (para 93). See also ICC, *Samoei Ruto, Kiprono Kosgej and Arap Sang*, (*supra* note 16), para 185.

[18] About the so-called *policy element*, see G. WERLE, F. JESSBERGER, *Principles of International Criminal Law*, (*supra* note 11), 340 ff; see also, M. CHERIF BASSIOUNI, *Crimes against Humanity: Historical Evolution and Contemporary Application*, (*supra* note 10), 364. In the *Katanga* case, (*supra* note 17), the ICC stated that since the policy element is relatively rare to materialize in a pre-established design or plan, in most cases its existence will have to be inferred by discernment of circumstances such as repeated actions occurring according to a same sequence, or the existence of preparations or collective mobilizations orchestrated and coordinated by that State or organization (see para 1109). In this regard, see,

prepared or induced by a state authority, or by a *de facto* authority, or by a political organization (systematic attack) [19].

Any form of harassment against the civilian population may be included [20]. Victims can be civilians [21] or people who do not take part in the conflict or former combatants, who have laid down their arms [22].

In particular, as far as here of interest, *enslavement*, to be understood as the exercise of any or all of the powers attaching to the right of

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also, ICC, *Bemba Gombo*, ICC-01/05-01/08-424, *Decision on the confirmation of charges*, 15 June 2009, para 81, where it is stated that: "The policy need not be formalised. Indeed, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion". It should be remembered that the *ad hoc* Tribunals had decided to deduce their existence from circumstances such as: the general historical circumstances and the overall political background in which the criminal acts take place; the establishment and implementation of autonomous political structures at any level of authority in a given territory; media propaganda; the establishment and implementation of autonomous military structures; the mobilization of armed forces; temporally and geographically repeated and coordinated military offensives; links between the military hierarchy and the political structure and its political programme; the adoption of discriminatory measures against a certain 'ethnicity'; the scale of the acts of violence perpetrated – in particular, murders, rapes, arbitrary imprisonment, expulsions, destruction of non-military property, in particular sacral sites; (see ICTY, *Blaškić,* IT-95-14-T, *Trial Judgment*, 3 March 2000, para 204).

[19] With regard to the nexus assessment, as specified by the judges of the ICC, the characteristics, the aims, the nature or consequences of the act must be considered; see ICC, *Bemba Gombo*, (*supra* note 18), para 86; see also ICTR, *Semanza*, ICTR-97-20-T, *Trial Judgment*, 15 May 2003, para 326.

[20] See G. WERLE, F. JESSBERGER, *Principles of International Criminal Law*, (*supra* note 11), 337 ff; see also ICTY, *Kunarać et al.*, IT-96-23 & IT-96-23/1-A, *Appeals Judgment*, 12 June 2002: "the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population", (para 86).

[21] Article 7 of the Statute specifies that the acts included therein, to constitute crimes against humanity, must be directed against "any civilian population". Therefore, they can be either civilians of the same nationality as the perpetrator of the crime, or stateless citizens or citizens of a different nationality. What is relevant, according to the case law of the ICC, is that the civilian population is the main target of the attack (ICC, *Bemba Gombo*, (*supra* note 18), para 76). See also ICC, *Katanga and Ngudjolo Chui*, (*supra* note 15), para 399, where it is specified that: "the term "civil population" within the meaning of Article 7 of the Statute affords rights and protections to "any civilian population" regardless of their nationality, ethnicity or other distinguishing feature".

[22] The ICC in the *Bemba Gombo* case, (*supra* note 18), specified that: "the term "civilians" or "civilian population" is not defined in the Statute. However, according to the well-established principle of international humanitarian law, "[t]he civilian population (...) comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants" (para 78). The presence within a civilian population of members of armed resistance groups, or former combatants, who have laid down their arms, as such, does not alter its civilian nature; see also ICTY, *Mrkšić et al.*, IT-95-13/1-T, *Trial Judgment*, 27 September 2007, para 442.

ownership over a person (such as by purchasing, selling, lending or bartering such a person or persons [23]), expressly includes the exercise of such power in the course of trafficking in persons, in particular women and children, for the purpose of sexual exploitation (Article 7 para 2, *(c)*).

The definition of enslavement was elaborated by the case low relating to the crimes perpetrated during the Second World War, in particular by the International Military Tribunal at Nuremberg, in the cases *Milch* [24] and *Pohl et al.* [25], then perfected by the ICTY in the case of *Kunarać et al.* and crystallized in the Statute of the International Criminal Court.

In this regard, it should be noted that with the *Kunarać* judgment, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) indicated a set of elements that contribute to the definition of this crime. The judges established that the indices of enslavement include the elements of ownership and control (of movement or the physical environment; psychological control; measures taken to prevent or impede the victim's escape; the use or threat of the use of force; subjection to cruel treatment and abuse; control of sexuality); human trafficking should also be included among the relevant factors. Other indices of enslavement consist of the forced imposition of work or professional services or the exploitation of the victim [26].

The consent or free will of the victim is absent, due to the use of violence, threat, deception, abuse of his condition of vulnerability, of being in a condition of detention or captivity.

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[23] See *Elements of Crimes*, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002*, in International Criminal Court, 2013, 4.

[24] International Military Tribunal at Nuremberg, *Milch Erhard*, 17 April 1947, in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law n.10*, Washington DC, US Government Printing Office, 1950, II, 773 ff.

[25] International Military Tribunal at Nuremberg, *Pohl et al*., 3 November 1947, in *Trials of War Criminals Before the Nuernberg Military Tribunals*, (*supra* note 24), V, 958 ff.

[26] See ICTY, *Kunarać et al.*, IT-96-23-T & IT-96-23/1-T, *Trial Judgment*, (*supra* note 13), paras 515-543. An insightful analysis in M. CHERIF BASSIOUNI, *Crimes against Humanity: Historical Evolution and Contemporary Application*, (*supra* note 10), 379 ff.

In this regard, what the Court stated in the *Pohl* case is to be noted: "Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill treatment, overlook the starvation, beatings and other barbarous acts, but the admitted fact of slavery – compulsory, uncompensated labour – would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery" [27].

In this context of conflict, it is also necessary to refer to crimes such as sexual slavery, enforced prostitution, rape, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity, which are included in the Article 7 para 1, *(g*), ICC St.

In particular, as regards *sexual slavery*, the *Elements of Crimes* specify that the perpetrator exercised any or all the powers attaching to the right of ownership over one or more persons, obliging them to perform an act or acts of a sexual nature; the conduct was committed as part of a widespread or systematic attack directed against a civilian population and the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack.

As regards *enforced prostitution*, the *Elements of Crimes* specify that the perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent. The perpetrator obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature. The conduct was also committed as part of a widespread or systematic attack against a civilian population and the

[27] International Military Tribunal at Nuremberg, *Pohl et al*., (*supra* note 25), 970.

author knew that the conduct was part or intended to be part of a widespread or systematic attack against a civilian population [28].

As regards *rape* as a crime against humanity, it should be noted that it was first defined in international criminal law by the ICTR in the *Akayesu* case [29]. The Court states that like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person; like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity [30].

Of particular importance is the question of the lack of consensus as a possible element in the definition of these crimes. In the *Akayesu* case, the ICTR stated that coercive circumstances need not be evidenced by a show of physical force: "threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion", and the Court states that "coercion may be inherent in certain circumstances, such as armed conflict or the military presence of *Interahamwe* (Hutu extremist militias) among refugee Tutsi women [31].

This interpretation was then taken up and supplemented by the ICTY, in the *Kunarać* case, where the appellants' blatant assertion that «nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted» was deemed «wrong on the law and absurd on the facts» [32].

With regard to the role of force in the definition of rape, the Appeals Chamber notes that «force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape» [33]. This

[28] See *Elements of Crimes*, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002*, (*supra* note 23), 6.

[29] The Tribunal defines rape "as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive", (ICTR, *Akayesu*, ICTR-96-4-T, *Judgment*, 2 September 1998, para 688).

[30] ICTR, *Akayesu*, (*supra* note 29), para 597.

[31] ICTR, *Akayesu*, (*supra* note 29), para 688.

[32] ICTY, *Kunarać et al.*, IT-96-23- & IT-96-23/1-A, *Appeals Chamber Judgment*, (*supra* note 20), para 128.

[33] ICTY, *Kunarać et al.*, IT-96-23- & IT-96-23/1-A, *Appeals Chamber Judgment*,

interpretation was then confirmed by the ICC in the case *of Katanga and Ngudjolo Chui* [34]; the Judges said that a coercive environment does not require physical force: threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as an armed conflict or a military presence [35].

2.1. *The knowledge of the attack as part of a widespread or systematic attack directed against any civilian population*

The Crimes against humanity must be committed «with knowledge of the attack», as set out in Article 7 ICC St: the subjective element required for such crimes must include the agent's knowledge that his criminal act is part of a widespread or systematic attack directed against civilian population. However, the element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the element indicates that this mental element is satisfied if the perpetrator intended to further such an attack [36].

The subjective element typical of crimes against humanity is not limited to the intent required for the single underlying crime (murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other serious forms of deprivation of personal liberty in violation of fundamental norms of international law, torture, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or other forms of sexual violence of similar gravity, political, racial, national,

(*supra* note 20), para 129. The Judges also stated that genuine consent of the victim is excluded especially if the victim is subjected to acts of violence or psychological pressure or if he is in a situation of coercion, detention or threatened with retaliation, also with respect to another person (paras 130 -133).

[34] ICC, *Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, *Decision on the confirmation of charges*, (*supra* note 15), paras 437- 439.

[35] ICC, *Katanga and Ngudjolo Chui*, (*supra* note 15), para 440.

[36] See M. CHERIF BASSIOUNI, *Crimes against Humanity: Historical Evolution and Contemporary Application*, (*supra* note 10), 365.

ethnic, cultural, religious or gender-based persecution and other inhumane acts), but invests the crime against humanity as a whole. The disvalue of these crimes far outweighs the underlying crime.

This further element, which represents a distinctive profile of crimes against humanity compared to war crimes, is substantiated in the awareness of the broader context within which crimes against humanity fit, that is, the awareness that they are part of a policy or systematic practice of atrocities or abuses perpetrated extensively and on a large scale.

According to the jurisprudence of the International Criminal Court, the agent's knowledge, of the existence of the attack against the civilian population is sufficient, as well as the awareness that his acts were part of it [37]. Awareness of all the characteristics of the attack is not required, in detail [38]. Therefore knowledge of the attack and the perpetrator's awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused's position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred [39].

2.2. *The conditions for exercising the jurisdiction of the International Criminal Court*

It is clear that the jurisdiction of the International Criminal Court neither replaces nor overlaps that of national jurisdictions: the Rome

[37] See ICC, *Katanga and Ngudjolo Chui*, (*supra* note 15), para 401, and also ICC, *Al Bashir*, ICC-02/05-01/09-3, *Decision on the Prosecution's Application for a Warrant of Arrest*, 4 March 2009, para 87.

[38] ICC, *Katanga and Ngudjolo Chui*, (*supra* note 15), para 401; ICC, *Al Bashir*, (*supra* note 37), para 87. It may be noted that the *ad hoc* Tribunals have understood this phrase to mean that the perpetrator knew that there was an attack on a civilian population, and that his or her acts were a part of that attack; see: ICTY, *Kunarać et al.,* IT-96-23-T & IT-96-23/1-T, *Trial Judgment*, (*supra* note 13), para 434; ICTY, *Kordić e Čerkez*, IT-95-14/2-A, *Appeals Judgment* 17 December 2004, para 99; ICTY, *Blaškić*, IT-95-14-A, *Appeals Judgment*, 29 July 2004, para 124; ICTR, *Semanza*, ICTR-97-20-T, *Trial Judgment*, (*supra* note 19), para 332.

[39] See ICC, *Katanga and Ngudjolo Chui*, (*supra* note 15), para 402.

Statute indeed accepts the principle of *complementarity* [40], according to which the Court can intervene only when the competent States do not want (*unwilling*) or cannot (*unable*) actually carry out the investigation or prosecution [41].

A State demonstrates *unwillingness* when the national authorities have conducted the proceedings in order to shield the person concerned from criminal responsibility for international crimes within the jurisdiction of the Court (genocide, crimes against humanity, war crimes and aggression, Article 5 ICC St); where there has been an unjustified delay in the proceedings, irreconcilable with the aim of bringing the person concerned to justice; or where the proceedings have not been carried out independently or impartially or have been conducted in such a way as to render them irreconcilable with the aim of bringing the person concerned to justice (Article 17, 2, ICC St).

As for the *inability*, Article 17, 3, ICC St provides that this is the case if, because of the total or substantial collapse or unavailability of the internal judicial system, or because it does not have adequate legislation,

[40] A useful reconstruction in: B.S. BROWN, *Primacy or Complementarity. Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, in *Yale Journal of International* Law, 1998, 23, 383 ff., and in particular 423 ff.; J. T. HOLMES, *The Principle of Complementary*, in R. S. LEE, *The International Criminal Court. The Making of the Rome Statute*, London-Boston, 1999, 41 ff.; ID., *Complementarity: National Courts vs. the ICC*, in A. CASSESE, P. GAETA, J.R.W.D. JONES, *The Rome Statute of the International Criminal Court. A Commentary*, (*supra* note 11), 667 ff.; M.M. EL ZEIDY, *The Principle of Complementarity in International Criminal Law. Origin, Development and Practice*, 2008, Leiden-Boston; J.K. KLEFFNER, *Complementarity in the Rome Statute and National Criminal Juridictions*, Oxford, 2008; J. STIGEN, *The Relationship between the International Criminal Court and National Jurisdictions. The Principle of Complementarity,* Leiden, 2008.

[41] The complementarity of the International Criminal Court with national criminal jurisdictions is established in para 10 of the Preamble and Article 1 of the Statute, and is fully regulated in Articles 15, 17, 18 and 19 ICC St.; the Court shall not have jurisdiction in a case where investigations or criminal proceedings are being conducted by a State having jurisdiction over it, or the State authorities have duly investigated the case and have decided not to prosecute the person concerned, unless the State is unwilling or unable genuinely to investigate or prosecute the case (Article 17, 1, (a) and (b) ICC St); the Court also has no jurisdiction over persons who, by reason of the same facts, have already been tried – provided that the trial was independent or impartial (Article 17, 1, (c) and Article 20, 3, ICC St) – and where the case is not of sufficient gravity to justify further action by the Court (Article 17, 1, (d) ICC St).

a State is unable to arrest the accused or to obtain his surrender by the authorities or organs that have him in custody, and to obtain the necessary evidence and testimonies, or to conduct the criminal proceedings [42]. This provision refers to situations in which the State is still in a phase of crisis as a result of a conflict.

The Court has an appreciable margin of maneuver with regard to the criteria to be used, due to the breadth that characterizes the indices in question. An intervention by the Court, pursuant to art. 17, 2, (a) ICC St, is conceivable in the case of a mock trial, designed to conceal the responsibilities of the accused, while the *unjustified delay*, irreconcilable with the aim of bringing the interested party to justice, pursuant to Article 17, 2, (b) ICC St, seems difficult to determine.

The system of complementarity of the International Criminal Court, as a whole, stipulates that the jurisdiction of the Court is subject to the criminal courts of individual States, unless they genuinely want or cannot carry out the investigation or prosecution, and the case is of sufficient gravity to justify the Court's intervention (Art. 17, 1, (d) ICC St) [43].

Of course, the rule of complementarity contemplated by the Rome Statute, applied to the supreme political and military bodies of a State, may seem questionable. It is perfectly logical and consistent that very serious international crimes, of which the political and military leaders of a State are accused, should be tried by an international criminal court. Holding trials before the courts of the States where the crimes were perpetrated, or

[42] In these cases, both a review of the national law in force and an assessment of how the internal provision can actually be applied to that specific case, proving to be or not adequate to the Statute, are carried out. On this point, see the *Al Senussi* case, ICC-01/11-01/11- 466, *Decision on the admissibility of the case against Abdullah Al-Senussi,* PTC, 11 October 2013; v. also the case of *Saif Al-Islam Gaddafi*, ICC-01/11-01/11-344, *Decision on the admissibility of the case against Saif Al-Islam Gaddafi*, PTC, 31 May 2013.

[43] Complementarity shall take place whatever the method of activation of the Court's jurisdiction. This can be activated by a State Party (Articles 13 (*a*) and 14 ICC St), or by the Prosecutor at the Court, who has initiated an investigation *proprio motu*, after having obtained from the Pre-Trial Chamber the authorization to start the investigation (Articles 13 (*c*) and 15 ICC St), or by the United Nations Security Council which reports to the Prosecutor a situation where it appears that one or more *crimes* – falling within the jurisdiction of the Court – have been perpetrated (Article 13 (*b*) ICC St).

where the victims and their families live, could provoke resentment and tension and it could be difficult for judges to maintain impartiality. Notably, where the crimes are of a serious and systematic nature (such as crimes against humanity), and where these crimes were perpetrated by central authorities or with their (tacit or explicit) consent, it may be difficult for a national court to prosecute the alleged creators or authors, in the absence of an intervening change of government. An international criminal court appears by its nature to be better suited to rule on the commission of serious and systematic crimes perpetrated by political or military leaders.

The criterion of *gravity* – referred to in paras 4 and 5 of the Preamble in addition to the Articles 1, 5, 17 (1) (d), 53 (1) (c) ICC St – is considered in order to identify situations worthy of treatment among those falling within the jurisdiction of the Court, and also to focus the investigation and prosecution by the Court on the perpetrators of the most serious international crimes [44] – as far as is of interest here, leaders and members of armed groups or militias, traffickers and members of criminal gangs, who are responsible for crimes such as enslavement, including in the course of trafficking in persons, forced labour and sexual violence.

If the initiative is taken by a State Party or by the Prosecutor, the Court can exercise its jurisdiction only if its jurisdiction has been accepted by the

[44] It should be noted that the Statute of the Court, while expressly providing that the *most serious crimes* fall within the competence of the Court itself, does not establish that the investigations and the prosecution must focus exclusively on the *most serious perpetrators*; see ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04-169, *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"*, 13 July 2006, para 79, where it is stated that "[…] the Preamble to the Rome Statute mentions "most serious crimes" but not "most serious perpetrators". The Preamble to the Statute in paragraphs five and six respectively states "perpetrators" and "those responsible for international crimes". The reference in paragraph five of the Preamble to "perpetrators" is not prefixed by the delineation "most serious" or "most responsible". Such language does not appear elsewhere in the Statute in relation to the category of perpetrators. Had the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they could have done so expressly". It should be recalled that, on the other hand, the Statute of the International Military Tribunal at Nuremberg, in Article 1, established that the Tribunal had jurisdiction to judge and punish "major war criminals".

State in whose territory the crime was perpetrated, or by the State of nationality of the accused; the State which becomes a party to the Statute accepts, by virtue of this act, the jurisdiction of the Court on international crimes pursuant to Article 5 ICC St (Article 12 ICC St).

These conditions shall not be required where the initiative is taken by the United Nations Security Council, which has the power to decide, with binding effects for States, any action necessary for the maintenance of international peace and security, which also includes the adoption of measures aimed at repressing serious and systematic violations of human rights perpetrated during conflicts. In particular, the Security Council may, by means of a resolution binding on all UN Member States, legitimize the exercise of the jurisdiction of the International Criminal Court even in the territory of States not party to the Rome Statute.

2.3. *The effective ability to produce justice*

The analysis carried out cannot exempt from highlighting a profile whose importance has gradually emerged. This is, in particular, a question concerning international criminal justice, which, unlike state legal systems, which have at their disposal the monopoly of force and solid institutional apparatuses, often appears limited by the absence or at least by the lack of the conditions of the *law enforcement*.

Its effectiveness is revealed when the International Criminal Court actually manages to exercise its function of deputy towards States that are unwilling or unable to carry out investigations or prosecution. The effective submission to international criminal justice, however, is subject to real relationships of force, that force which is not the exclusive prerogative of the institution of justice, but which is the prerogative of the States, and which can even prove to be the prerogative of the perpetrators of the most serious crimes against humanity.

If the general prevention function is feeble, as, up to now, in international criminal law, the essence of the *criminal* is substantiated in its effective capacity to generate justice.

The contribution of international criminal justice to general prevention is genetically limited, circumscribed to the reaffirmation of values and factual truths; it is devoid of deterrence, it is fulfilled in the position of precepts and in the ability to guarantee a just retribution.

The preventive function of punishment of a small number of subjects (mostly in the apical position) appears a critical aspect. Think of the experience of the post-World War II international criminal trials, and the dramatic evidence that war crimes, crimes against humanity and mass atrocities have not decreased at all compared to the past.

Having said that, however, it cannot be denied that a limit to deterrent effectiveness, linked to the specific way in which the International Criminal Court operates, derives from the fact that, in the absence of effective cooperation between States, it does not have the power to act so that the threat of concrete penalties in an effective punishment of the guilty. An objective of deterrence is therefore obfuscated, since its attainment depends on a series of factors which escape the direct power of control of the Court.

The perspective of retribution, although understood in a broad sense, which includes the symbolic stigmatization of the specific gravity that characterizes crimes against humanity, is thus highlighted. This clarification is particularly significant in that the remuneration paradigm, which has now lost its dominant role in the past, sums it up in the context of international crime, particularly with regard to the expectations of victims, in particular trafficking in persons for the purpose of sexual slavery and exploitation related to conflicts, as well as other forms of Conflict Related Sexual Violence.

Such crimes pose needs to which the form of criminal justice represents a necessary (although not sufficient) response, not as a vindictive reaction, but as an affirmation, even symbolic, of the permanent value and vigor of a *nomos* indispensable for human life and coexistence, a coexistence that bans practices of oppression, cruelty, denial of the other.

3. *Organized crime and trafficking in persons in conflict or post-conflict situations*

Organized crime profits from conflict or post-conflict situations and exploits the vulnerabilities created or exacerbated by them. Criminal organizations are targeting people who are extremely vulnerable to exploit them: people affected by armed conflicts and fleeing conflicts run a great risk of being trafficked.

Trafficking in human beings in areas affected by armed conflict and post-conflict situations can be aimed at different forms of exploitation, including the exploitation of prostitution or other forms of sexual exploitation, forced marriages, forced labour, slavery, servitude or the removal of organs [45].

The risk of trafficking in persons is also linked to the high number of refugees, and the number of people *displaced* as a result of wars and conflicts and of those who in this context are at risk or victims of trafficking is considerable: the need to fleeing war and persecution can easily be exploited by traffickers who find a fertile environment to promise safe migratory routes, employment, education.

The implementation of such illicit conduct requires a complex articulation that develops over time, set up by organized groups of subjects, often characterized by a transnational dimension. Indeed, it must be emphasized in this regard that the articulation of the criminal activity, the segmentation of the relative phases into non-limited territorial areas but often included in different countries, are the main factors of the presence of criminal groups, of different numerical consistency, personal composition and structural organization. And although individual actors also provide targeted services locally, criminal groups are not least predominant. The more structured ones have a consistent dimension in terms of affiliates, transnational links and organize the various phases of

[45] See UNITED NATIONS, *Trafficking in persons in conflict situations: the world must strengthen prevention and accountability,* (*supra* note 1).

the traffic, through collaboration with other associations, even smaller, for particular purposes [46].

The increasingly transnational and delocalized connotation leads to increased difficulties in the assessment, in particular, of the place and time in which the criminal organization was formed, and of its ontological consistency, due to the complications consubstantial to the location at the level transnational of the components, organizational structures, activities and illicit interests [47].

Hence the need, both of the legal systems of individual States and of the international community, to equip themselves with the instruments of law enforcement capable of coping with the structural features and the transnational operating methods often adopted by them [48] and to define at the metanational level standards for the incrimination of criminal organizations. It is therefore the regulated matter, with its distinctive features, that requires metanational intervention, as the intervention and law enforcement instruments available to individual States are inadequate.

The fundamental reference for an adequate action to combat criminal phenomena characterized by a marked transnationality is the United Nations Convention against Transnational Organized Crime [49], not only

[46] See V. MILITELLO, *I traffici illeciti nel Mediterraneo e le organizzazioni criminali transnazionali*, in M. CATENACCI, V.N. D'ASCOLA, R. RAMPIONI (eds), *Studi in onore di Antonio Fiorella,* I, Roma, 2021, 294.

[47] See V. MILITELLO, *I traffici illeciti nel Mediterraneo e le organizzazioni criminali transnazionali*, (*supra* note 46), 294 ff, that notes that in foreign territories, the collection, even by judicial cooperation, of evidence for the purposes of their investigation and subsequent trials often proves to be particularly difficult.

[48] For an effective framework of international guidelines on the matter, see V. MILITELLO, L. PAOLI, J. ARNOLD (eds), *Il crimine organizzato come fenomeno transnazionale*, Milano – Freiburg, 2000; see also, M.C. BASSIOUNI (eds), *La cooperazione internazionale per la prevenzione e la repressione della criminalità organizzata e del terrorismo*, Milano, 2005, and N. BOISTER, *An Introduction to Transnational Criminal Law*, Oxford, 2018.

[49] The Convention and the Supplementing Protocols on Trafficking in Persons and Smuggling of Migrants were adopted by the United Nations General Assembly on 15 November 2000 and opened for signature by Member States at the Palermo Conference from 12 to 15 December 2000; together with a third protocol on firearms, were ratified by Italy with law 16 March 2006, n. 146. With particular reference to the latter, see A. DI MARTINO, *Criminalità organizzata, reato transnazionale, diritto penale nazionale: l'attuazione in Italia della cd. Convenzione di Palermo*, in *Dir. pen. proc*., 2007, 16 ff. For a comprehensive analysis of the United Nations Convention against Transnational Organized Crime, see V. MILITELLO, *Le strategie*

because it sets the worldwide reference framework for the consideration of criminal organizations that operate beyond the borders of a single State, but also because it fully understands the connection between organized forms of crime and illicit trafficking (such as trafficking in human beings).

The Palermo Convention has considered forms of crime linked to the coexistence of changing aggregations of subjects in relation to the type of criminal interests pursued, as well as to the mobility of the social or ethnic groups of reference.

It is interesting to observe, in this regard, how the breadth of this formulation can be traced back to a precise choice of the conventional legislator, since it is destined to adapt to legal systems, such as those of the common law, in which the distinction between the mere involvement of persons in a single crime and the specific dangerousness of an organization whose program includes an indeterminate plurality of crimes.

From this breadth of definition, however, there follows a departure from the objective pursued by the Convention of highlighting the absolute peculiarity of the phenomenon of organized crime, whose specific dangerousness derives, in particular, from the greater criminal efficiency that can be achieved through the predisposition of an organizational structure aimed at committing crimes. Well, this dangerousness would have been more fully grasped by including in the formulation a requirement linked to the element of the organization, such as the existence of a division of tasks between at least three subjects aimed at committing a plurality of crimes [50]. Such an operational structure reveals a

di contrasto della criminalità organizzata transnazionale tra esigenze di politica criminale e tutela dei diritti umani, in C. PARANO, A. CENTONZE (eds), *L'attività di contrasto alla criminalità organizzata. Lo stato dell'arte*, Milano, 2005, 243 ff; G. GRASSO, *Le risposte penali globali: la Convenzione ONU contro il crimine organizzato transnazionale, in Criminalità transnazionale fra esperienze europee e risposte penali globali,* Milano, 2005, 389 ff; D. MCCLEAN, *Transnational Organized Crime. A Commentary on the UN Convention and its Protocols*, Oxford, 2007; G. MICHELINI, G. POLIMENI, *Il fenomeno del crimine transnazionale e la Convenzione delle Nazioni Unite contro il crimine organizzato transnazionale*, in E. ROSI (eds), *Criminalità organizzata transnazionale e sistema penale italiano*, Milano, 2007, 3 ff.

[50] See V. MILITELLO, *Partecipazione all'organizzazione criminale e* stardards *internazionali d'incriminazione. La proposta del Progetto comune europeo di contrasto alla criminalità organizzata*, in *Riv. it. dir. proc. pen*., 2003, 1/2, 190.

rationalization of the criminal work that broadens the scope of the activities carried out by the group, thus motivating the autonomous punishability of participation in the criminal organization.

The different and more nuanced option adopted by the Convention in this regard is probably due to the influence that the tradition of Anglo-Saxon legal systems has had in it, in which the figure of the conspiracy [51] includes both forms of mere agreement aimed at committing a crime, and the commission of one or more crimes by an organized group. This ambivalence is fully reflected in the definition of the conduct incriminated by the Convention as participation in an organized criminal group.

4. *The fight against trafficking in persons in supranational legislation*

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* [52] constitutes a fundamental instrument to combat trafficking in all its forms, which has given a modern and broader definition of the phenomenon of trafficking [53].

[51] It should be remembered that conspiracy, originally understood as an agreement between two or more persons for the purpose of committing an unlawful act or a lawful act by unlawful means, derives its general discipline from the *Criminal Law Act 1977*, as amended by *Criminal Attemps Act 1981*. Conspiracy concerns the subject's agreement with another person so that a course of conduct is followed which, if the agreement were carried out according to their intentions, would either necessarily include or involve the commission of an offense, or would achieve this aim were it not for the existence of facts which render the commission of the offence impossible. The subsequent transposition of the institution into US law led to the equating of the penalty contemplated for the conspirator to that of the crime committed, the cumulation of the same with the penalty prescribed for the purpose crimes if committed and the automatic extension of the liability for such last facts to all actors (so-called *Pinkerton* rule). For a complete overview of the subject, see M. PAPA, *Conspirancy*, in *Dig. disc. pen.*, III, Torino, 1989, 94 ff; ID., *La* conspirancy *nel diritto penale statunitense*, Firenze, 1989; E. GRANDE, *Accordo criminoso e* conspirancy. *Tipicità e stretta legalità nell'analisi comparata*, Padova, 1993.

[52] See D. MCCLEAN, *Transnational Organized Crime. A Commentary on the UN Convention and its Protocols*, (*supra* note 49), 309 ff, and also A.T. GALLAGHER, *The International Law of Human Trafficking*, Cambridge, 2010, p. 68.

[53] See S.H. DECKER, *Human Trafficking. Contexts and connections to conventional crime,* in *Journal of Crime and Justice*, 2015, 3, 291 ff; A.T. GALLAGHER, *The International Law of Human Trafficking*, (*supra* note 52).

The Protocol contemplates a definition of trafficking in persons which constitutes an important anchor for the harmonization of the national incriminations of the corresponding conduct.

The Protocol's definition of trafficking is essentially based on three elements, namely the relevant types of conduct, the methods used and the purposes. In particular, the expression *Trafficking in persons* shall mean 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)).

In this regard, it should be highlighted in particular that the consent of a victim of trafficking to the specific type of exploitation shall be irrelevant where any of the means mentioned above have been used (Article 3, (b)), and that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered as trafficking in persons even if this does not involve the use of any of those means (Article 3, (c)): coercion is therefore not element necessary for a child to be considered as a victim of trafficking [54].

The resulting incrimination is adequately articulated, and nevertheless in subsequent supranational interventions a further specification of the established standard is found: in particular, in the EU Framework Decision 2002/629/ JHA *on combating trafficking in human beings* [55], which

[54] *Child* shall mean any person under eighteen years of age.

[55] *Council Framework Decision 2002/629/JHA* of 19 July 2002. It should be remembered that precisely with regard to trafficking in persons, the European Union has introduced the possibility of setting binding criminal standards for the Member States: the *Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children* was adopted a few months before the broad programmatic commitment in the *Action Plan to combat organized crime* and the same provision adopted in the Amsterdam version of the EU Treaty, which regards trafficking in human beings as one of the areas of

likewise takes up the definition of the crime contained in the Palermo Protocol, also includes the sanctioning levels for unlawful conduct (Article 3), while in *Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims* contains a definition of trafficking largely based on that of the Palermo Protocol and there are only two additions regarding the modalities of typical conduct [56].

However, the Palermo Protocol outlines the basis for structuring the front of interventions to combat trafficking in persons – paying particular attention to women and children – in the main guidelines of prevention, repression and protection of victims, in full respect of their human rights, as well as cooperation between States Parties, in order to achieve these objectives.

The Protocol on Trafficking in Persons requires each State Party to ensure that its legal system includes appropriate measures to provide victims of trafficking with protection of privacy and personal identity, information and assistance on relevant court and administrative proceedings, as well as measures relating to physical, psychological and social recovery (including, appropriate housing, counselling and information, in particular as regards their legal rights, medical, psychological and material assistance, employment, educational and training opportunities). It is also necessary to ensure the physical safety of

crime in which the Member States should take joint action (Article 29). The specific penal relevance of trafficking will then be confirmed with Framework Decision 2002/629/JHA.

[56] Article 2 of Directive 2011/36/EU defines trafficking as "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". In order to define trafficking in human beings, in the light of its coercive or fraudulent modalities and of the purpose of exploitation, Article 2 includes, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging (to be understood as a form of forced labour or service, as defined in the 1930 ILO Convention No 29 concerning Forced or Compulsory Labour), slavery or practices similar to slavery, servitude, exploitation of criminal activities – such as pick-pocketing, shop-lifting, drug trafficking –, removal of organs, illegal adoption or forced marriage (*Whereas* (11); Article 2 para 3).

victims of trafficking, as well as the adoption of appropriate measures which permit them to remain on the territory (temporarily or permanently), preventing them from being trafficked again. It is important to note in this regard that the granting of legal status should not be based on testimony against traffickers.

The principle that assistance and support measures for victims are not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial, is also affirmed in Directive 2011/36/EU (Article 11, para 3), which contemplates greater protection of the rights of the victims themselves, who should not be prosecuted or punished for criminal activities, such as the use of false documents or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. This protection, which aims to safeguard the human rights of victims, to prevent further victimization and to encourage them to act as witnesses in criminal proceedings against the perpetrators, is not generalized, but modulated on the basis of their individual needs and requirements, taking into account specific needs arising in particular from any state of pregnancy, health status, any disabilities, mental or psychological disorders, or from being subjected to serious forms of psychological, physical or sexual violence.

It should also be recalled that Directive 2004/81/EC of 29 April 2004 provides a period in which to reflect on their position for third-country nationals who are victims of trafficking in human beings to allow them to recover, escape the influence of the perpetrators of the offences and consciously decide whether or not they want to cooperate with the police authorities and with the prosecution and judicial authorities (*Whereas* 11; Article 6, para 1) and that during the reflection period it shall not be possible to enforce any expulsion order against them (Article 6, para 2).

In order to counteract such far-reaching phenomena, whose extent and future implications remain unpredictable, prevention is of fundamental importance, in order to avoid the intolerable scandal of the incessant loss of human lives, acts of coercion, exploitation, of ill-treatment or other

human rights violations suffered by victims at the hands of traffickers. And at the supranational level, a holistic approach to the aberrant phenomenon of trafficking in human beings has now established itself, oriented not only towards repression, but also towards preventing the phenomenon, as well as towards the rights of victims. In particular, in a fundamental passage in the path of formalization of supranational obligations of protection in the matter, such as Directive 2011/36/EU, the precise choice in favor of such an approach is expressly indicated, with the aim of a more rigorous prevention, prosecution and protection of victims' rights (*Whereas* 7).

5. *Trafficking in human beings and the problematic distinction with the smuggling of migrants*

Trafficking in human beings is often linked to smuggling of migrants [57]; the latter is defined by the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* as, the procuring, for the purpose of obtaining, directly or indirectly, a financial or other material benefit, the illegal entry of a person into a State Party of which that person is not a national or a permanent resident (Article 3, *(a)*) [58].

The difference between the two phenomena is linked to the distinction adopted internationally in their legal formalization: trafficking in human beings always entails a position of subordination of one individual to another, who exploits him in the most diverse but always degrading forms with respect to the intangible core of human freedom and dignity [59]; the

[57] For an effective framework, see V. MILITELLO, *La tratta di esseri umani: la politica criminale multilivello e la problematica distinzione con il traffico di migranti,* in *Riv. it. dir. proc. pen.,* 2018, 1, 86 ff.

[58] To learn more about the topic, see D. MCCLEAN, *Transnational Organized Crime. A Commentary on the UN Convention and its Protocols*, (*supra* note 49), 375 ff.

[59] See V. MILITELLO, *La tratta di esseri umani: la politica criminale multilivello e la problematica distinzione con il traffico di migranti*, (*supra* note 57), 91, for which the reference to the dignity of the person in the matter of trafficking in human beings refers to a particular approach to intervention in the matter, attentive to the human rights of the victims and aimed at ensuring them the maximum possible protection. See also J. PLANITZER, *Trafficking in Human Beings and Human Rights. The Role of the Council of Europe Convention on Action against Trafficking in Human Beings*,

smuggling of migrants, on the other hand, is structured as aimed at protecting the State's interest in the integrity of the borders and in the control of migratory flows [60].

Well, in trafficking there is recourse to coercion, deception or abuse of the condition of vulnerability [61], physical or mental inferiority or need of the victims, to the promise or giving of money or other benefits to the person who has authority over them and the transfer of victims takes place for the purpose of subsequent exploitation, while in illegal immigration, there is an agreement between those who manage the smuggling of migrants and the migrants themselves.

Nevertheless, it cannot be denied that, like trafficking, the smuggling of migrants often takes place in dangerous and degraded conditions, with serious human rights abuses and illegal migrants who resort to traffickers – voluntarily hired – can also become victims of trafficking. In fact, the mix between trafficking and smuggling is increasingly evident: the journey, with the debt contracted to leave and the reasons that led to it, the ways in which documents for leaving the country of origin are obtained (often through debts and corruption) and the vulnerability of migrants, especially women and girls, are all factors that create contexts conducive to trafficking, serious exploitation – to be carried out once the phase of

Vienna, 2014, 21 ff and 89 ff; C. RIJKEN, *A Human Rights Based Approach to Trafficking in Human Beings*, in *Security and Human Rights*, 2009, 212 ff.

[60] See, about the topic, V. MILITELLO, A. SPENA, *Introduzione. "La cruna dell'ago": il migrante fra mobilità e controllo*, in ID., ID. (eds), *Il traffico di migranti. Diritti, tutele, criminalizzazione*, Torino, 2015, 4 ff. See also M. DONINI, *Il cittadino extracomunitario da oggetto materiale a tipo d'autore nel controllo penale dell'immigrazione*, in *QG*, 2009, 119 ff.

[61] Namely, pursuant to Article 2, para 2 Directive 2011/36/EU "a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved". It should be remembered that the concept of *abuse of vulnerability* is also contained in the UN Protocol on Trafficking in persons. It constitute a vitiating element of the consent given by the subject, as a result of an active persuasive behavior on the part of the trafficker-recruiter. In the *Traveaux Préparatoires*, the interpretative criterion for the notion of "position of vulnerability" suggested is placed in reference "to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved" (see United Nations, Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, New York, 2006, 347).

moving the persons into the new context is over – and the violation of human rights.

6. *The reflection of the distinction between trafficking in persons and smuggling of migrants in the Italian legal system*

Trafficking in persons and smuggling of migrants also have a distinct legal relevance in the Italian legal system, according to the guideline outlined by the Palermo Convention and its Protocols, made evident by the incrimination of the respective illicit conduct: the incrimination of trafficking in human beings stands out as a figure for the protection of individual personality (Italian Criminal Code, Article 601), while the smuggling of migrants is considered as aiding and abetting illegal immigration and is regulated *extra codicem* in Article 12 of the Legislative Decree 25.7.1998, No. 286 on *Consolidated Act of Provisions concerning immigration and the condition of third country nationals* [62].

Trafficking in persons is structured in broad terms, considering it to include all unlawful activities, from the recruitment of persons, to the illegal transfer, transportation and reception, carried out for the purpose of exploiting the victim, to be implemented as soon as its move into the new context has been completed.

The first case foreseen by Italian Criminal Code, Article 601 requires, as a prerequisite, that the victim is already in the condition of slavery or servitude. On the other hand, the second case foreseen envisaged by Article 601 presupposes the *status libertatis* of the victim. The crime is aimed at prosecuting the phenomena of trafficking in persons aimed at exercising over them powers of use and disposition pertaining to the right of property – prostitution, begging, organ removal are in fact nothing more than particular powers corresponding to property – and which reveals in

[62] About the topic, see V. MILITELLO, *La tratta di esseri umani: la politica criminale multilivello e la problematica distinzione con il traffico di migranti,* (*supra* note 57), 102 ff; M. PELISSERO, *Il controllo penale del traffico di migranti: il migrante come oggetto e come vittima*, in V. MILITELLO, A. SPENA (eds), *Il traffico di migranti. Diritti, tutele, criminalizzazione,* (*supra* note 60), 109 ff. And also you may see P. SCEVI, *Nuove schiavitù e diritto penale*, Milano, 2014.

the subjection of a person, which was previously free, to another's domain, or in the state of complete dependence and submission. The punishable conduct consists in the induction, through deception, or in the coercion, through violence, threat, abuse of authority or taking advantage of a situation of vulnerability, physical or psychological inferiority or a situation of necessity, or through the promise or giving of sums of money or other advantages to the person who has authority over it, to enter or stay in or leave the territory of the State or to move within it. The creation of situations impeding the exercise of the whole of fundamental freedoms of the person, of his life autonomy, is aimed at inducing or forcing him to work, sexual services or begging, or to carry out illegal activities which involve the exploitation or to undergo organ harvesting.

The aiding and abetting illegal immigration refers to various illicit activities, mainly managed by criminal organizations, including transnational ones, aimed to the transport and subsequent illegal entry of clandestine immigrants into Italian territory, on the basis of their request, and therefore consensually. The center of gravity of the offence is placed on the transportation and on the relative ability of traffickers to evade controls on entry into the territory of the State.

In this regard, it is necessary to highlight that the Italian Constitutional Court [63] emphasized that the whole range of the criminal hypotheses described by the Article 12 of the Legislative Decree 25 July 1998, No. 286 on *Consolidated Act of Provisions concerning immigration and the condition of third country nationals* has as its common object of protection the orderly management of migratory flows, namely an interest which constitutes an "instrumental" legal asset, through whose safeguarding the legislator implements an advanced form of protection of the complex of "final" public goods, of indubitable constitutional importance, susceptible to being compromised by uncontrolled immigration phenomena, such as, in particular, the balance of the labor market, the (limited) resources of the social security system, public order and security.

[63] Italian Constitutional Court, decision 8 February 2022, No. 63.

The incriminating rule on which the fight against illegal immigration is based, observes the Court, differentiates the punitive treatment of two distinct kinds of conducts: on the one hand, the aid to illegal entry into the territory of the State carried out in favor of individual foreigners, for altruistic purposes in the broadest sense; and on the other, the activity carried out for profit by organized criminal groups against a more or less large number of migrants destined to be transported illegally into the territory of the State. With regard to "individual" or "altruistic" aiding and abetting, the Court stresses that the foreigner whose illegal entry is facilitated appears as a subject in substance "beneficiary" of the illegal conduct, his interests remaining in any case unrelated to the focus of the protection provided by the rule all focused on the legal good of the orderly management of migration flows. On the other hand, as regards the aggravated cases foreseen envisaged by the Article 12 (3; 3-*bis*; 3-*ter*), the foreigner undoubtedly becomes the holder of the other juridical assets protected from time to time, constituting first of all the victim of the criminal conduct: now exposed to danger for the own life or safety, now to inhuman and degrading treatment, now to the risk of being prostituted or exploited in work activities, and in anyway – in the ordinary case in which the conduct is carried out for the purpose of profit – forced to pay large sums of money in exchange for help to cross the borders.

This perspective makes it clear that the issue raises delicate questions and is much more complex than how it has been conceived and addressed up to now.

In this regard, it should be noted how it is easy to see in reality aspects of the migration phenomenon in which the borderline between the two situations becomes increasingly nebulous. It is therefore essential to adopt an integrated strategy to more effectively face the distinct but often related components of trafficking in persons and smuggling of migrants, which are recognized as crimes which in some cases may share some characteristics and which often require complementary responses. As has been effectively observed, a consideration of the phenomena in question caring the protection of human dignity can contribute to a deeper

understanding of the osmotic nature of the dividing line between the two illicit activities, which does not deny their theoretical distinction, without however neglecting the frequent interweaving in practice [64].

7. *The special protection for victims of trafficking in persons in the Italian legal system*

Italy has legal instruments for the protection of victims of trafficking which represent a point of reference in Europe. In particular, the Article18 of the Legislative Decree 25 July1998, No. 286 and the Article 27 of the related Implementing Regulation (Presidential Decree No. 394 of 31 August 1999) provide for the issue of a residence permit in order to allow the foreigner to escape the violence and influence of the criminal organization and to participate in an assistance and integration programme. The proposal for the issue of the residence permit can be made not only by the Prosecutor of the Italian Republic, in cases in which a criminal proceeding has begun (judicial path), also by the social services of local authorities or by associations registered with a specific register (social path). The Superintendent (police), having assessed the seriousness and current nature of the danger, then proceeds to issue a residence permit for reasons of social protection. The concession is based on the assumption that the victim is in danger because of the attempt to escape situations of violence or serious exploitation and contributes to breaking the vicious circle of re-entry into trafficking, preventing the victim from being again in a situation of vulnerability.

The situation for illegal migrants involved in the crime of smuggling is quite different; nevertheless, it cannot be denied that for migrants transported illegally within the territory of the State, the journey can be so fraught with dangers – for their life or safety – or humiliations, or involve the risk of sexual or labor exploitation, that it would be unreal not to recognize them the quality of victims.

[64] V. MILITELLO, *La tratta di esseri umani: la politica criminale multilivello e la problematica distinzione con il traffico di migranti,* (*supra* note 57), 108.

In reality, the two criminal phenomena of trafficking in human beings and smuggling of migrants can intersect, so that a categorical and formalistic depiction of the relations between them risks being reductive and unable in grasping the multiple facets that can reveal themselves in the concrete case: the abstract sharpness of the distinction between the two phenomena, in the reality it is considerably decreased, so as to make it difficult to find the distinction.

However, persons who entered illegally can aspire to obtain a residence permit for reasons of social protection, but only when they are also victims of trafficking.

In this regard, moreover, it cannot be forgotten that the Protocol (Article 14 para1) saves the right of individuals to be granted refugee status pursuant to the 1951 Geneva Convention relating to the Status of Refugees where there is a "well-founded fear of being persecuted" , linked to at least one of the reasons contemplated by the Convention itself.

8. *The recognition of the experience of trafficking in its different manifestations as a reason for persecution and the possibility of applying the 1951 Geneva Convention for according the Status of Refugees to trafficked persons*

It is therefore necessary to look also at another aspect linked to the phenomenon of trafficking in human beings in areas affected by armed conflicts and post-conflict situations: the connection between trafficking in persons and international protection, in the sense of identification, in the migratory of the persons who have experienced trafficking or are at risk of experiencing it, of the requirements for applying international protection [65].

[65] The importance of a correct identification of possible victims of trafficking among the migrants and persons seeking international protection and of an effective referral system, including the reporting of presumed victims of trafficking to personnel qualified to assist and protect such vulnerable persons, is at the basis of the choice of a coordination between the international protection system and the one for the protection of victims of trafficking, established in Italy with the Article 10 of the Legislative Decree 4 March 2014, No. 24. The coordination between the two systems was achieved within the framework of the procedure for recognition of international protection, through the adoption of specific standard operating procedures aimed at facilitating the timely identification, among international

A crucial aspect of the whole issue is the legal basis of this connection, which is the application of Article 1 A. (2) of the 1951 Geneva Convention relating to the Status of Refugees to cases of persons who are victims of trafficking or at risk of trafficking: the Protocol UN on Trafficking in persons (Article 14 para 1), indeed, is without prejudice to the right of persons to be accorded refugee status pursuant to the Geneva Convention [66]. A fundamental requirement for according the status of refugee is the existence of a "well-founded fear of being persecuted", linked to at least one of the reasons contemplated by the Convention itself: race, religion, nationality, membership of a particular social group or political opinion. In this regard, it cannot be forgotten that the serious human rights violations inherent in the experience of trafficking in areas affected by armed conflicts and post-conflict situations, such as sexual slavery, forced prostitution, rape, forced labour, beatings, starvation, denial of medical care, constitute persecution.

In situations of armed conflict, where there is a deliberate policy of exploitation or hostility towards certain racial or ethnic groups, persecution may be perpetrated by trafficking in persons belonging to that group.

Some people may be targeted by traffickers in relation to their belonging to a specific religious community: even if the purpose of profit is the preeminent factor, religion is still the criterion for identifying victims of trafficking.

protection applicants, of the persons who have experienced or are at risk of experiencing trafficking, and the reporting, by the Territorial Commissions, to the bodies responsible for implementing the single program of emergence, assistance and social integration, pursuant to the Article18 of the Legislative Decree 25 July1998, No. 286. These procedures were defined in the Guidelines addressed to the Territorial Commissions on the identification of victims of trafficking among applicants for international protection and referral procedures, elaborated within the project carried out by UNHCR and the National Commission for the Right of Asylum, 2020.

[66] It is important to highlight in this regard that the Article 11 of Directive 2011/36/EU, dedicated to assistance and support measures for victims of trafficking in human beings, expressly provides (para 6) that the latter be provided with the necessary information on the possibility of accessing international protection.

Trafficking may be the method chosen to persecute persons belonging to a particular national group in a context in which there is an ongoing inter-ethnic conflict within a State and certain groups have reduced guarantees of protection.

Victims and potential victims of trafficking may be granted refugee status, even where they risk being persecuted for reasons linked to their belonging to a particular social group. For such purpose, it is necessary that they share a common characteristic, or that they are perceived as a group by society. The shared characteristic will often be innate, immutable or in any case foundational to their identity, conscience or exercise of human rights. Women are an example of a social group of people defined by innate and immutable characteristics and, due to their vulnerability in certain social contexts, they can become targets of traffickers.

People may be trafficked because of their real or perceived political views, which make them without effective state protection and therefore vulnerable.

A further fundamental aspect concerns the place of persecution. If the 1951 Convention definition of a refugee explicitly states that the applicant is "outside the country of his nationality" and is unable or unwilling to return to it owing to his "well-founded fear of being persecuted", this does not necessarily mean that he left because of such fear. The case of the need for protection arising outside the country of origin (*sur place*) is particularly applicable to situations of trafficking in human beings, since fear often arises only after departure, when the victim becomes the object of exploitation.

9. *Final remarks*

In the different contexts considered here, impunity for the trafficking of persons for the purpose of sexual slavery and conflict-related exploitation, as well as for other forms of Conflict Related Sexual Violence, is dramatically widespread and the time for justice remains painfully slow; while coherent and effective prosecution constitutes the fundamental form of deterrence.

The most serious crimes against humanity present needs for which criminal justice constitutes a necessary response, not as a vengeful reaction, but as an affirmation of the persistent validity of a *nomos* without which there can be no life and coexistence among human beings.

The suppression of trafficking of human beings in all its forms is nothing but the prerequisite for guaranteeing their fundamental rights, together with the dignity of the people who are its victims.

Furthermore, the repression of trafficking in persons for the purpose of sexual slavery and conflict-related exploitation, as well as other forms of Conflict Related Sexual Violence, is not only a need for truth for each of the victims, it is not only one of the possible forms of reparation for the evil suffered – by them and by the community to which they belong – but it also constitutes a requirement of the whole international community, since it constitutes an indispensable instrument for reconciliation and therefore for the restoration of internal and international peace.

Admittedly, the hidden nature of trafficking in human beings reverberates both on the widespread impunity of its perpetrators and on the invisibility of the victims, which has been induced, it should be noted, by the perpetrators themselves.

Only an overall perspective of the different forms in which trafficking in human beings takes place and of the related causes can inspire a truly effective contrast strategy.