



**UNODC**

United Nations Office on Drugs and Crime

# FEMALE VICTIMS OF TRAFFICKING FOR SEXUAL EXPLOITATION AS DEFENDANTS

A CASE LAW ANALYSIS



# Contents

- Acknowledgements..... 4**
- Executive summary ..... 5**
- I. Introduction ..... 8**
  - A. Methodology and summary of data on cases .....8
- II. Identification, forms of victimisation, relationships and roles ..... 11**
  - A. The identification and recognition of victims of trafficking, violence and exploitation by criminal justice actors ..... 11
    - 1. Diverse identification practices by courts and criminal justice actors..... 14
    - 2. Recognizing forms of prior and contemporaneous victimization and exploitation..... 17
    - 3. Impact of the failure to identify victimization ..... 23
  - B. Roles of the victim-defendant in the human trafficking enterprise..... 25
    - 1. Victim-defendants in subordinate roles, proximate to the exploitation ..... 25
    - 2. Victim-defendants as the means of perpetration and a shield from prosecution ..... 28
    - 3. Victim-defendants in a leading role..... 30
  - C. Victim-defendants’ relationships with traffickers and their motives..... 31
    - 1. Pimping/prostitution relationships ..... 33
    - 2. Familial relationship with traffickers..... 42
    - 3. Victim-defendants acting alone ..... 47
- III. The “means” element in cases involving female victim-defendants ..... 48**
  - A. Threats, use of force and coercion ..... 48
  - B. Coercive control..... 50
    - 1. Isolation and monitoring ..... 53
    - 2. Limiting access to money..... 54
    - 3. Jealous accusations and regulating sexual activity ..... 54
    - 4. Threatening children ..... 55
    - 5. Summing up on coercive control ..... 55
  - C. Abuse of a position of vulnerability..... 56
    - 1. Vulnerability factors ..... 57
    - 2. Abuse of a position of vulnerability ..... 61
  - D. Changes in *modus operandi* ..... 66
- IV. Application of non-punishment principle..... 66**
  - A. International standards on non-punishment ..... 68
    - 1. Recognizing victims for the purpose of preventing detention, prosecution and punishment..... 70
    - 2. National legislative approaches to non-punishment ..... 73
  - B. Availability of the defence of non-punishment to victim-defendants and the “means” element 75
    - 1. Duress and necessity ..... 76
    - 2. Compulsion ..... 78
      - a. Threat and use of force and coercion ..... 80
      - b. Coercive control ..... 81
    - 3. Direct consequence of the situation as a trafficked person ..... 80
    - 4. Consent and voluntariness ..... 86
  - C. Omissions in considering prior victimization and disregard of the non-punishment provision ... 88
  - D. Burden of proof and temporal requirements ..... 88
    - 1. Burden of proof..... 89
    - 2. Temporal requirements ..... 90
  - E. Exploitation of criminal activities as “purpose” and statutory exclusions ..... 90

1. <i>Exploitation of criminal activities</i> .....	90
2. <i>Statutory and case law exclusions</i> .....	90
<b>V. Sentencing</b> .....	<b>94</b>
A. Variations in considering prior or concurrent trafficking victimisation .....	95
B. Aggravating circumstances .....	98
1. <i>Prior experience as a trafficking victim</i> .....	98
2. <i>Abuse of a position of vulnerability</i> .....	98
C. Mitigating circumstances .....	99
1. <i>Prior experience as a trafficking victim</i> .....	99
2. <i>Age</i> .....	100
3. <i>Parental and other familial obligations</i> .....	100
<b>VI. Judicial treatment of gender in victim-defendant perpetration</b> .....	<b>101</b>
1. <i>Recognizing the gendered nature of the crime of trafficking</i> .....	101
2. <i>Gender in family and intimate partner relationships</i> .....	102
3. <i>Gender-discrimination and judicial bias</i> .....	104
4. <i>Sexual and reproductive rights</i> .....	105
<b>VII. Conclusion</b> .....	<b>108</b>
<b>VIII. Recommendations</b> .....	<b>109</b>
<b>Annex I - List of cases</b> .....	<b>112</b>
<b>Annex II – Selected case summaries</b> .....	<b>114</b>
<b>Annex III – Power and Control Wheel</b> .....	<b>119</b>
<b>Annex IV – Cycle of violence</b> .....	<b>121</b>
<b>Annex V - List of publications</b> .....	<b>122</b>

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## Executive summary

Ever since UNODC started collecting statistical data on trafficking in persons 15 years ago, women and girls have consistently represented the majority of reported victims of human trafficking. Furthermore, UNODC reports have also shown that women feature highly among those prosecuted and convicted for offences relating to trafficking of persons, especially when compared with other areas of crime. Although most countries report overall female offending rates below 15 per cent of the total for all crimes, approximately 30 percent of trafficking in persons prosecutions and convictions involve female offenders.

In addition to these statistical data trends, UNODC's community of practice has often highlighted the complexity of adjudicating and investigating cases that involve female victims of trafficking as alleged perpetrators.

This study examines these trends and complexities. It analyses case law on trafficking in persons for sexual exploitation involving female defendants, who had been or were contemporaneously being exploited as trafficking victims. Fifty-three cases were analysed from 16 different jurisdictions, with a focus on the European region. These cases were, for the most part, collected using the UNODC Trafficking in Persons Knowledge Portal. The analysis employed a thematic and qualitative textual analysis of the judicial decisions, enriched with bibliographical references and expert input. Draft findings of this analysis were discussed with experts in two meetings.

The main finding of this study is that traffickers use victims to shield themselves from prosecution. In many of the cases examined, traffickers used victims to commit acts proximate to the exploitation itself. This included, for example, recruitment of new victims, maintaining control over victims, collection of the proceeds from the exploitation, and the advertising of services. While these are, generally speaking, low-ranking roles within criminal hierarchies, they expose victims to greater risk of detection by law enforcement authorities. Using victims in this way is one means by which traffickers evade criminal liability and enjoy impunity.

Notably, the study also found that, in many cases, victim-defendants continue to be sexually exploited by the trafficker while simultaneously carrying out acts related to the trafficking process. Indeed, a significant conclusion of this study is that there is often a nexus between human trafficking and gender-based violence. In around 25% of the cases examined, victims who had been prosecuted for trafficking offences had suffered one or multiple forms of gender-based violence, either before or while being trafficked. These acts of violence included childhood sexual assault and sexual slavery, domestic and intimate partner violence, and forced and child marriage.

Relatedly, a further and key finding was that female victim-defendants in the case law examined were commonly intimate partners, wives, sisters, daughters, nieces, or mothers of their traffickers. The cases involving trafficking within the context of family relationships and prior gender-based violence, particularly involving children, revealed scenarios in which the violence was normalised to the extent that the women were unaware of their status as victims and/or the criminal nature of their acts. Nonetheless, and despite the nature of these

relationships to the trafficker in the case law examined, very few courts addressed this important dimension. In fact, the intimate partnership or family relation with the victim-defendants was often used by the traffickers as a defense strategy to evade liability for trafficking offences, with cases presented as merely familial disagreements.

An examination of victims' roles in offending also revealed a different set of motives from those typically attributed to traffickers. These included: seeking alleviation from their own exploitation, securing the trafficker's affection, and having no choice but to obey the trafficker's orders. Economic gain was a motive in a few cases, including attempts to escape extreme poverty that rendered them susceptible to trafficking, or in cases closely tied to economic survival and family care-giving obligations, especially for single mothers. Only in very few cases did victims engage in trafficking as a means of moving up within the hierarchy of criminal organizations.

The case law analysis also highlighted that certain "means" in the definition of trafficking in persons remain contentious in national judicial practice. This is an important observation, given the relationship between the trafficker and the victim-defendants raises important issues with respect to the "means" used to commit the underlying trafficking crime with which the victim-defendant was initially trafficked. It is also relevant to the potential application of the principle of non-punishment to victim-defendants.

In particular, the case law analysis revealed diverse interpretation and application of the means of "coercion" and "abuse of position of vulnerability". In relation to "coercion", there appear to be similarities with the concept of "coercive control" as it is understood in domestic and intimate partner violence litigation. While some decisions restrict "coercion" to the threat or use of force, others recognise that it encompasses more subtle forms of conduct similar to those captured by "coercive control". Such conduct extends beyond physical abuse and covers, for example, sexual coercion and tactics to intimidate, degrade, isolate and control victims.

In relation to the means of "abuse of a position of vulnerability", courts across jurisdictions recognised the often extreme vulnerability of victim-defendants based on their sex, age, poverty level, migration status, prior victimisation, disability and child and family obligations, among other factors.

Another finding of the case law analysis concerned the principle of non-punishment. Victim-defendants face many difficulties in benefiting from this principle for crimes they were compelled to commit, or that were a direct consequence of the trafficking situation. Courts appear to apply varying and, at times, stringent standards associated with the criminal law defences of "duress" and "necessity". Other difficulties included burden of proof and temporality requirements, as well as the impact of early plea agreements. Explicit statutory exceptions (for instance, those limiting the principle to less serious offences) constituted a further barrier, as did non-recognition of "forced criminality" as a "purpose" or form of exploitation within national anti-trafficking legislation. Failure to properly apply non-punishment provisions sometimes resulted in the double-victimisation of victim-defendants.

From the case law examined, a few cases contained no discussion of the non-punishment principle at all, while in others the victim-defendant was not recognised as a victim by the

court, or the court simply rejected application of the non-punishment provision. All such cases resulted in the prosecution, conviction and punishment of victims of trafficking for their engagement in crimes, which they were either compelled to commit or committed in the course of being trafficked.

This study also found that courts used divergent approaches when considering the relevance of victim-defendants' prior trafficking experience to sentencing. Trafficking experiences were seen as both an aggravating and mitigating circumstance by judges. There were instances where the sentencing decision was stricter because the victim "should have known", and others where due consideration was given to victimisation in mitigating the penalty.

The identified case law also showed instances of appropriation of "family terminology and roles" by trafficking groups, distinct use of voodoo rituals and women as "madames" to recruit new victims and escape liability.

Adopting a gender lens in the examination of the selected case law further revealed that gender dimensions are most often not taken into consideration in much of the judicial reasoning. Out of the 16 jurisdictions from which case-law was reviewed, only one made reference to human trafficking as a form of gender-based violence and framed its decision-making within the context of the international women's rights frameworks, namely the Convention on the Elimination of All Forms of Violence against Women (CEDAW) and Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Pará).

Indeed, despite multiple references to sexual violence and forced and clandestine abortion in the jurisprudence, this study found that victims' sexual and reproductive rights went almost wholly unaddressed in the cases examined. Only one case mentioned the violation of the victims' right to sexual self-determination. None of the cases included references to initiating any proceedings related to the victims' reproductive rights. While the possibility that other charges were brought separately cannot be excluded, this absence is indicative of the lack of a gender-based perspective in most, if not all, criminal justice systems. This deficit is all the more serious in the context of crimes --including trafficking in persons-- that disproportionately affect women.

Finally, it should be noted that this study is not intended to be a comprehensive examination of judicial practice. In addition, given the diversity of legal systems analysed and the lack of representativeness of the case law sample, it does not draw comparisons between States.

# I. Introduction

In recent years, data collected by UNODC has consistently indicated the over-representation of women and girls both as victims and perpetrators of trafficking for sexual exploitation. In particular, UNODC's Global Reports on Trafficking in Persons ("GLOTIP Report" hereinafter) demonstrate that the percentage of females involved in trafficking offences, compared to other areas of crime,<sup>1</sup> has been high. While there is some variation across the stages of the criminal justice process, from investigation (in 2016, 69% male and 31% female), prosecution (in 2016, 65% male and 35% female), to conviction (in 2016, 62% male and 38% female),<sup>2</sup> these percentages are consistently above 30%.

On this background, this report contains the key findings of qualitative research on case law concerning female victim-defendants of trafficking for the purpose of sexual exploitation. Based on examination of judicial decisions, it provides insight into the specific roles of victim-defendants in trafficking enterprises and their relationships with the principal traffickers. It also highlights ways in which victims of trafficking become criminal defendants, including their motives for participation in criminal activity. In addition, the report analyses the application of the elements of the crime of human trafficking for the purpose of sexual exploitation in this context, the application of the non-punishment principle, and sentencing practices. It draws primarily on case law, contextualised by relevant literature and international standards.

It should be stressed that the findings of this report are not representative of global practice, due both to its limited geographical scope and the number of cases examined. They do, however, provide important insight into the phenomenon of female victim-defendants of trafficking for the purpose of sexual exploitation. The report identifies significant challenges for criminal justice actors in ensuring the right to protection for victims of human trafficking.

## A. Methodology and summary of data on cases

This study examined criminal justice case law on trafficking in persons for sexual exploitation, focusing on cases involving female defendants who had been or were contemporaneously being exploited as trafficking victims. Cases were selected where this was either explicitly or implicitly indicated in the decision. In other words, the study included cases in which there were reasonable indications that the defendant was, previously or concurrently, a victim of trafficking, even if this was not explicitly identified in the decision. A few cases were included where the female victim-defendant had not been charged with

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<sup>1</sup> For example, the GLOTIP 2012 report indicates that "[a]lthough the majority of trafficking offenders are men, the participation of women is higher for this crime than for most other crimes. Most countries report overall female offending rates below 15 per cent of the total for all crimes, with an average of some 12 per cent; while 30 per cent of trafficking in persons prosecutions and convictions are of women offenders. Statistical analyses show that the involvement of women in trafficking is more frequent in the trafficking of girls. Qualitative studies suggest that women involved in human trafficking are normally found in low-ranking positions of the trafficking networks and carry out duties that are more exposed to the risk of detection and prosecution than those of male traffickers". UNODC, *Global Report on Trafficking in Persons (GLOTIP) 2012*, p. 29.

<sup>2</sup> UNODC, *Global Report on Trafficking in Persons (GLOTIP) 2018*, p. 35.

trafficking (or had been prosecuted in separate proceedings), but their involvement in trafficking was apparent from the case facts. Such cases were included as they provided useful information concerning the dynamics of female victims accused as traffickers.<sup>3</sup> The study included one case in which the victims were trafficked for personal sexual servitude;<sup>4</sup> all other cases included involved commercial sexual exploitation.

Much of the jurisprudence was identified in the UNODC Knowledge Portal on Trafficking in Persons,<sup>5</sup> powered by SHERLOC, which hosts more than 1,500 judicial decisions from 114 jurisdictions around the world.<sup>6</sup> In addition, UNODC reached out to its community of practice and collected decisions from various publications, experts in the field and longstanding counterparts. Most of the cases examined are currently available in the UNODC Knowledge Portal on Trafficking in Persons.<sup>7</sup>

This study includes qualitative analysis of 53 cases from 16 jurisdictions, spanning the period from 2006 to 2020.<sup>8</sup> More cases were identified and examined, but were not included in this study. Difficulties in accessing case law in some jurisdictions, combined with the inherent limits of the topic and scope of this study, led to uneven geographic representation across the examined cases. A rich body of jurisprudence was identified in the American region, particularly Argentina and the United States, together with a substantial number of cases from Europe. Though the original focus of the study was on European countries,<sup>9</sup> its scope was expanded to other regions during the course of work.

Two further points regarding the cases selected should be noted. First, some cases examined comprise multiple decisions (i.e. first instance, appeal decisions and/or sentencing). Second, the dates of the decisions identified are significant, given changes in legislation and judicial practice over time.

Analysis of the selected cases was guided by the following questions:

1. Were the female-defendants previously victimised and were there indicators of this? If so, what were these indicators?
2. What was the role of the female victim-defendant in committing the “acts” and “means” element of the offence?
3. What was the role and status of female-defendants in the criminal hierarchy?
4. What was the relationship between the female victim-defendants and other co-defendants and accessories to the crime?
5. How are female victim-defendants sentenced and how does previous victimisation affect sentencing? What aggravating or mitigating circumstances are considered?
6. Are female victim-defendants acquitted?

<sup>3</sup> See, e.g., Italy, *IC*, Catania, 2019.

<sup>4</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016.

<sup>5</sup> <https://sherloc.unodc.org/cld/en/v3/htms/index.html>.

<sup>6</sup> The cases were identified manually within the search parameters using the keywords “gender” and “female defendant”.

<sup>7</sup> Annex I contains the case-law list with hyperlinks for direct access to the cases.

<sup>8</sup> Argentina, Australia, Belgium, Bosnia and Herzegovina, Canada, Colombia, Costa Rica, Italy, Germany, the Netherlands, the Philippines, Serbia, South Africa, United Kingdom, the United States and the European Court of Human Rights.

<sup>9</sup> In agreement with the donor.

7. How is the principle of non-punishment of victims of trafficking addressed when dealing with potential female victims that were charged as defendants?
8. Are female victims involved in other areas of crime?

The research aimed to identify consistent patterns or trends across the examined cases. To do so, it employed a thematic and qualitative textual analysis of the judicial decisions, examining judicial interpretation of the facts, the reasoning employed, the language used and any omissions. Relevant trafficking laws were examined as necessary, where referred to in the cases. As such, the issues addressed in this study remain limited to those that arose out of these decisions, as opposed to issues raised by the phenomena more broadly. Themes identified and covered included: recognition of prior and contemporary forms of gender-based violence victimization, roles in the trafficking enterprise, relationships with the trafficker(s), application of the non-punishment principle, sentencing, and specific cultural norms.

While the study revealed contrasting approaches across the different jurisdictions, the analysis did not aim to draw comparisons between States. This is due to the diversity of legal systems included, as well as the lack of representativeness of the case law sample. The cases are drawn from both common law<sup>10</sup> and civil law<sup>11</sup> jurisdictions, as well as one mixed system jurisdiction.<sup>12</sup>

For cases in Argentina, South Africa, Australia, Bosnia and Herzegovina, the Netherlands and the Philippines, the trafficking was largely transnational and within the same region. In the U.S. and Canada, cases involved primarily domestic trafficking. In Italy, Belgium, the U.K., Colombia and Germany, the cases were transnational and involved trafficking across multiple regions.

With the exception of the cases pertaining to migrant smuggling and human trafficking between Nigeria and Europe, and an Australian case involving criminal organizations working there and in Thailand, most of the “criminal enterprises” in question tended to be small in scale. They principally involved family members and the trafficking of a small number of victims.

This report uses the term “victim-defendant” to describe individual victims of trafficking who face criminal prosecution for their engagement in acts of perpetration of human trafficking. This term aims to underscore the defendants’ victim status, which is otherwise obscured in many of the judgements. Without calling into question the judicial determinations in the examined cases, the term “defendant,”<sup>13</sup> rather than “offender”, is used. Consistent use of the term “victim-defendant” also avoids other derogatory terms found in the relevant literature and case law, which were “created and perpetuated by the traffickers who exploit victim-offenders”.<sup>14</sup>

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<sup>10</sup> U.S., U.K., Canada, Australia, and South Africa.

<sup>11</sup> Italy, Belgium, Germany, the Netherlands, Argentina, Colombia, Bosnia and Herzegovina and Serbia.

<sup>12</sup> The Philippines.

<sup>13</sup> Notwithstanding the fact that in a few decisions, such as those on sentencing, the victim-defendant had been convicted.

<sup>14</sup> Shared Hope International, *Responding to Sex Trafficking: Victim-Offender Intersectionality*, 2020, p. iii. Shared Hope International, a civil society organisation, also uses the term “victim-offender intersectionality”.

## II. Identification, forms of victimisation, relationships and roles

Since the adoption of the Trafficking in Persons Protocol, many countries around the world have taken measures to improve identification of victims of trafficking. Nonetheless, and despite these positive steps, identifying victim-defendants remains challenging. This is evident from the case law examined.

This section examines issues relating to identification of female defendants of trafficking for sexual exploitation. This includes identification by courts, as well as other actors in the criminal justice system. It highlights the potential negative consequences that follow failures to identify defendants as victims, including the possibility of further human rights violations and re-traumatisation.

### A. The identification and recognition of victims of trafficking, violence and exploitation by criminal justice actors

Growing international recognition of the involvement of victims of trafficking in criminal offending is, to some degree, likely reflective of increasing awareness around trafficking.<sup>15</sup> Nonetheless, the case examined for this study revealed multiple instances of authorities, including courts, failing to detect and recognise the underlying victimization of female defendants.

As a result of failures in identification, “trafficking victims are often wrongly arrested, charged, prosecuted and convicted for crimes and other unlawful acts committed in their status as victims of trafficking”.<sup>16</sup> Indeed, all of the cases in this study involve the prosecution of a victim of trafficking. In several cases the victim-defendant was also convicted. As observed by the OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings: “[t]he vulnerable situation of the trafficked person becomes worse where the State fails to identify such a person as a victim of trafficking, as a consequence of which they may be denied their right to safety and assistance as a trafficked person and instead be treated as an ordinary criminal suspect.”<sup>17</sup> Identification of victims of trafficking among perpetrators is also essential to ensure the potential application of the non-punishment principle. It is also a precondition to granting victims access to the forms of assistance and protection necessary to escape exploitative situations and rebuild their lives.

<sup>15</sup> OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, 2013, para 1.

<sup>16</sup> Special Rapporteur on trafficking in persons, especially women and children, *The importance of implementing the non-punishment provision: the obligation to protect victims*, 2020, para 6.

<sup>17</sup> OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, 2013, p. 10.

International standards and norms concerning crime prevention and criminal justice stress the importance of victim-centred criminal justice responses.<sup>18</sup> Relevant instruments call not only for measures to guarantee victims' rights to dignity, privacy, protection, support, assistance and effective remedies, but also the stress the importance of specific provisions concerning victim-defendants. This includes recommendations to

- Take account of the history of victimization of many women offenders in judicial decision making at the pre-trial and sentencing stage.<sup>19</sup>
- Ensure that legal defences advanced by women who have been victims of violence (such as claims of self-defence in cases of battered woman syndrome) are taken into account in investigations, prosecutions and sentences against them.<sup>20</sup>
- Refrain from penalizing victims who have been trafficked for having entered the country illegally or for having been involved in unlawful activities that they were forced or compelled to carry out.<sup>21</sup>

Regional instruments in Europe and Latin America call for protection of victims of crime in subsequent proceedings. The Brasilia Regulations Regarding Access to Justice for Vulnerable People call for:

The adoption of measures aimed at mitigating the negative effects of the crime (primary victimisation) shall be encouraged.

In addition, efforts shall be made to ensure that the damage suffered by the victim of the crime is not worsened as a result of their contact with the justice system (secondary victimisation).

Efforts shall be made to guarantee, throughout all the phases of the criminal proceedings, the protection of the physical and psychological integrity of the victims, especially in favour of those who are at the highest risk of intimidation, reprisal or reiterated or repeated victimisation (the same person being a victim of more than one crime over a certain period of time). It may also be necessary to grant specific protection to victims who are going to give evidence in the trial. Special attention shall be paid to cases of family violence, as well as to cases where the person accused of having committed the crime is set free.<sup>22</sup>

While explicitly recognising the EU policy framework for combating violence against women and Directive 2011/36/EU on preventing and combating trafficking in human beings and

<sup>18</sup> See UNODC, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (2016).

<sup>19</sup> United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), A/Res/65/229, annex, Rules 57-62.

<sup>20</sup> United Nations updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/Res/65/228, annex, para. 15(k).

<sup>21</sup> United Nations updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/Res/65/228, annex, para. 18(k).

<sup>22</sup> Section 2(5)(12), *100 Brasilia Regulations Regarding Access to Justice for Vulnerable People*.

protecting its victims, the preamble of Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime, similarly provides that:

Victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.<sup>23</sup>

The Preamble of the Directive specifically contemplates its application to victims of gender-based violence and trafficking victims:

Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence.<sup>24</sup>

With respect to violence committed in intimate partner or family relationships, the Directive observes that:

Such violence could cover physical, sexual, psychological or economic violence and could result in physical, mental or emotional harm or economic loss. Violence in close relationships is a serious and often hidden social problem which could cause systematic psychological and physical trauma with severe consequences because the offender is a person whom the victim should be able to trust. Victims of violence in close relationships may therefore be in need of special protection measures. Women are affected disproportionately by this type of violence and the situation can be worse if the woman is dependent on the offender economically, socially or as regards her right to residence.<sup>25</sup>

As observed by an Argentinian court in the *Dulcinea* case, subjecting victim-defendants to detention, prosecution and conviction subjects them to re-traumatisation:

In its eagerness to go after traffickers, it is possible that the administration of justice ends up criminalizing those who are engaged in prohibited conduct, but who are in reality victims of human trafficking, constituting the weakest links, who find themselves in a situation of extreme social vulnerability, to prosecutions of victim-offenders as revictimization and a form of "institutionalized violence".<sup>26</sup>

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<sup>23</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Recitals 6, 7 and 9.

<sup>24</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Recital 17; see also Recital 57, applying a "strong presumption" related to the need for specially protection and support services for "[v]ictims of human trafficking . . . violence in close relationships, sexual violence or exploitation [and] gender-based violence".

<sup>25</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Recital 18.

<sup>26</sup> *Dulcinea*, Causa nro. 91017032, p. 58.

A criminal conviction can also have lasting effects on victim-defendants' lives, including limitations on employment and educational opportunities, as well as freedom of movement. This is further addressed below.

## 1. Diverse identification practices by courts and criminal justice actors

Identification of potential victims of trafficking among suspected perpetrators has important implications for the range of services they receive, as well as application of in- and out-of-court protection measures aimed at securing their safety, effective participation in legal proceedings and access to justice. Consequently, "proactive steps should be taken throughout the criminal justice process to identify evidence that an individual suspected of or charged with trafficking has experienced, or is currently experiencing, trafficking victimization".<sup>27</sup> The study found significant variation across jurisdictions with respect to the identification of victim-defendants throughout the criminal justice process. Notably, interactions with national referral mechanisms or specialist trafficking services appeared to have a positive impact on the identification of victims.

### a. Law enforcement/police identification

Several cases revealed law enforcement/police failures to identify victims of trafficking while conducting raids, even in cases in which they were directly contacted by a victim for assistance.<sup>28</sup> The Canadian *Majdalani* case, where the victim was only correctly identified by an anti-trafficking expert within the police force (despite the victim's earlier calls to, and conversations with, other police officers) demonstrates the importance of specially trained anti-trafficking units.

In some cases, police failures to identify victims appeared to be a result of corruption. For example, in the *San Felippo* case from Argentina, there were indicia of police protecting the traffickers.<sup>29</sup> In the *Justino Horacio Abel y Otra* case, also from Argentina, the Cassation Court made reference to police complicity in the crim. The Court observed that a former police investigator, who had checked victims' identities and health booklets, had testified that no sexual exploitation had been witnessed. It recalled the testimony of one victim (after the defence lawyer had withdrawn from the room) that the victims were forced to provide sexual services to police officers, paid for by the owners and conducted in a specific hotel.<sup>30</sup> Other cases from Argentina also referred to police complicity. A police officer was convicted along with the traffickers in the *Dulcinea* case and,<sup>31</sup> in the *Bar California* case, the Court noted pay-offs to the police and their access to sexual services.<sup>32</sup>

Reluctance by a male officer to arrest the principal trafficker was also noted in the South African case of *State vs. Veeran Palan and Edwina Norris*, though a female officer also involved

<sup>27</sup> Shared Hope International, *Responding to Sex Trafficking: Victim-Offender Intersectionality*, 2020, p. iv.

<sup>28</sup> Canada, *R. v. Majdalani*, 2017 ONCJ 145, 2017.

<sup>29</sup> Argentina, *Sanfelippo*, Causa No. 15-554, 2014, p. 8.

<sup>30</sup> Argentina, *Justino Horacio Abel y otra*, Causa No. FGR 81000828/2012//CFC1, 2017, pp. 24, 25.

<sup>31</sup> Argentina, *Dulcinea*, Causa nro. 91017032, 2014.

<sup>32</sup> Argentina, *Bar California*, 40066/2013, p. 20.

in the investigation carried out the arrest.<sup>33</sup> In a Dutch case, the victim-defendant was arrested with the principal perpetrators and placed in pre-trial detention for two days, before identification as a victim through her statements and those of the other victims.<sup>34</sup>

More positive practices were evident in some of the jurisprudence from Argentina, particularly the presence and participation of staff from the State Office of Assistance and Rescue for Victims of Human Trafficking at raids. These staff conducted on-site and follow-up interviews with victims and submitted filings and provided expert testimony at court hearings. This testimony concerned aspects of the phenomenon of human trafficking and its effect on victims, as well as the situation pertaining to specific victims in a given case.<sup>35</sup> Notably, these staff were licensed psychologists and social workers.

A few cases in the U.S. and Canada also referenced the presence of specially trained law enforcement units during raids, in addition to their in-court expert testimony.<sup>36</sup> Reference was not made in these cases to the provision of specialised assistance for victims.

### **b. Prosecution (investigation) identification**

Several cases referred to withdrawal of charges by prosecutors based on evidence of perpetrator victimisation.<sup>37</sup>

Other decisions disclosed poor investigatory practices and failures to gather adequate evidence of victimisation of defendants. This may include evidence of the threat or use of force or coercion employed to engage the victim-defendant in acts pertaining to their offending. In turn, this can result in the misidentification of victims as offenders. For example, in the *People vs. Ruth Dela Rosa y Likinon, aka "Sally"* case from the Philippines, the prosecution presented limited evidence that was restricted to the victims' testimony and a forensic examination for the purpose of establishing that sexual intercourse took place.<sup>38</sup> In the South African *Mabuza and Chauke* case, the Court observed the poor quality of the investigation into the crimes, noting that relevant premises were never searched and that the accused was arrested and his firearm confiscated only much later.<sup>39</sup>

<sup>33</sup> South Africa, *State vs. Veeran Palan and Edwina Norris*, Case No: RCD 13/14, 2014, p. 9.

<sup>34</sup> Netherlands, First Instance Court of The Hague, 09/754126-08, 2010, p. 3.

<sup>35</sup> Argentina: *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, pp. 52, 53; *Dulcinea*, Causa nro. 91017032, pp. 49, 50; *Ledesma*, Sentencia No. 457, pp. 18, 19; *Soria*, FMP 32005377/2008/TO1, 2017, p. 25; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>36</sup> U.S., *People v. Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published), p. 5; Canada, *R. v. Robitaille*, [2017] O.J. No. 5954.

<sup>37</sup> Argentina: *Blanco José Constantin y otros*, Expte. No. 72000674, 2014, p. 8. Notably, the Prosecution requested a suspension of the process after a review of the case, as it found her to be a victim at the same time as a perpetrator. *Soria*, FMP 32005377/2008/TO1, 2017, p. 35; Netherlands, First Instance Court of The Hague, 09/754126-08, 2010, p. 3; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>38</sup> Philippines, *People vs. Ruth Dela Rosa y Likinon, aka "Sally,"* Criminal Cases Nos 13-9820 and 13-9821, 2013.

<sup>39</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016, p. 36.

### c. Judicial identification

The examined cases provided several examples of judicial identification of defendants as victims of human trafficking,<sup>40</sup> as well as cases in which numerous indicia were present, but no identification was made.<sup>41</sup>

In the U.S. case of *People v. Cross*, despite clear recognition by the magistrate of the victimisation of the female victim-defendant, the prosecution continued to pursue the charges against her. The appeals court ultimately overturned the victim-defendant's conviction in light of the magistrate's factual findings. The prosecution had ignored these findings and re-filed the charges twice, for a total of three prosecutions. The magistrate at first instance made a series of observations, including the following comments:

I am going to make that absolutely clear here, if nobody else does. That she is a victim of human trafficking, in my opinion, worse -- [10] times worse than this victim that testified. That's a factual finding that I am going to make, that I am clear in my mind that this evidence demonstrates. She is an absolute victim.<sup>42</sup>

The magistrate stated to the prosecutor:

You seem to be minimizing their relationship as a violent human trafficking situation or duressful situation or coercive situation because all the other cases are the same. They prostitute. They beat her once in a while here and there and she gives money to him every time she returns. That's what we have in this record. She had given money to him, she gets beaten and she's been with him for [one] year and he has beat her in the past. I don't know what else you need.<sup>43</sup>

The magistrate also stated of the victim-defendant:

She is in a [10] times or more different situation, harsher situation than this victim. . . We're going to potentially send someone away for life in prison on a [section] 209 when she is that entrenched as a victim of human trafficking because she walked up some stairs at the direction of a male. I mean, doesn't that give you pause, I mean, as a human being? . . . I can't do it and I am not going to do it. [¶] So she is discharged on every count except count 4 for the reasons stated.<sup>44</sup>

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<sup>40</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016; U.S., *People v Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published), pp. 5, 6.

<sup>41</sup> See, e.g., U.S., *U.S. v. Brown / Hollis*, US District Court, Eastern District of Michigan, 2:05-cr-80101-AJT-DAS Doc # 39, 2005; Germany, District Court Duisburg, 33 Kls 17/18, 2019.

<sup>42</sup> U.S., *People v Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published), p. 5.

<sup>43</sup> U.S., *People v Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published), p. 6.

<sup>44</sup> U.S., *People v Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published), p. 6.

Around the time the trial ended, the legislature enacted a law offering human trafficking victims an affirmative defence to certain crimes they were coerced into committing, which became effective on January 1, 2017.<sup>45</sup> However, as the statute<sup>46</sup> explicitly excluded application to charges of serious or violent crimes, including human trafficking, the defense would have been unavailable for the victim-defendant in this case.

The Belgian case of *T.* also involved identification of the defendant as a victim by the Court, resulting in her acquittal. The Court was aided in its determination by the existence of a French judgement involving the same criminal network and victims, which had found the victim-defendant to be a victim in a time period following the charges in the Belgian case.<sup>47</sup>

In some cases, evidence of prior victimisation were disregarded by courts, or otherwise given no weight for the purposes of conviction and sentencing. For example, in the Canadian case of *R. v. Majdalani*, the decision made references to the fact that the victim-defendant turned over the money she made from prostitution<sup>48</sup> to her male co-defendant Majdalani.<sup>49</sup> It also made reference to the fact that the victim-defendant had told the victim that she had been a victim of human trafficking.<sup>50</sup> Nonetheless, there is no indication in the decision that due account was taken of the possible contemporaneous or prior victimisation of the victim-defendant by Majdalani or another trafficker. Such an approach departs from UNODC guidelines, which recommend that justice sector professionals take measures to identify, protect and support victims of trafficking at an early stage and avoid prosecuting them for offences committed as a consequence of their exploitation by traffickers.<sup>51</sup>

## 2. Recognizing forms of prior and contemporaneous victimization and exploitation

Criminal justice actors should be trained to recognise the interconnected nature of diverse forms of violence and exploitation and understand victims' experiences. This would better facilitate referral of victims to appropriate service and support providers. The European Institute for Gender Equality (EIGE) notes that:

[w]omen victims of trafficking for sexual exploitation experience similar patterns of exertion of control and violence as victims of other forms of violence against women. They experience abuse through threats and psychological control, sexual and physical violence, economic violence, deprivation of freedom, inter alia.<sup>52</sup>

<sup>45</sup> U.S., *People v Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published), fn.3.

<sup>46</sup> AB 1761 (2016).

<sup>47</sup> Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018.

<sup>48</sup> This report attempts to reflect the policy choices and terminology of the particular national context concerning prostitution as it relates to the judicial decision in question. References to sex work or prostitution in the context of trafficking in persons in this report do not represent in any way UNODC's position.

<sup>49</sup> Canada, *R. v. Majdalani*, 2017 ONCJ 145, 2017, para 41.

<sup>50</sup> Canada, *R. v. Majdalani*, 2017 ONCJ 145, 2017, para 93.

<sup>51</sup> UNODC, Toolkit on Gender-responsive Non-Custodial Measures (2020), p. 67.

<sup>52</sup> EIGE, *Gender-specific measures in anti-trafficking actions*, 2018, p. 14.

The EIGE recommends that victims of human trafficking for the purpose of sexual exploitation be considered as victims of violence against women.<sup>53</sup> Contemporaneous and past forms of violence and exploitation reflect both the continuum of gender-based violence as forms of violence, such as domestic violence and human trafficking, overlap and mutually reinforce each other. Understanding the spectrum of violence sheds important light on the phenomenon of victim/offenders, given the potential impact of earlier trauma in victims' engagement with the criminal justice system.

Prior forms of violence, such as domestic violence and sexual abuse, can be considered as factors that may cause trafficking. They may condition victims to accept abusive treatment by perpetrators and normalise gender-based violence. While the cycles<sup>54</sup> and continuum of violence against women has been recognised in jurisprudence on domestic and intimate partner violence at the national and international level, it was conspicuously absent in most of the examined cases (with some important exceptions).<sup>55</sup>

Of particular note is the fact that not all countries have legislation in line with international standards on violence against women and domestic violence. This deficit impedes effective prosecution and victim protection. Given that violence against women constitutes a form of gender discrimination,<sup>56</sup> systematic failure to ensure legal protection and remedies has been found to violate prohibitions on discrimination.<sup>57</sup>

The examined decisions noted victim-defendants' past victimisation in the forms of:

- human trafficking and exploitation of prostitution
- domestic violence
- sexual violence, including:
  - rape,
  - sexual assault,
  - child sexual assault,
  - sexual slavery, and
- forced and early marriage.

Important questions remain regarding the appropriateness and extent to which past forms of victimisation can be considered in trafficking cases involving victim-defendants, given the focus on ensuring access to justice to the current victim in the case. In the case law

<sup>53</sup> EIGE, *Gender-specific measures in anti-trafficking actions*, 2018, p. 16.

<sup>54</sup> See Annex III on the cycle of violence.

<sup>55</sup> U.S., *People v. G.M.*, New York City Criminal Court, 2011 NY Slip Op 21176, 2011, p. 2; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>56</sup> Article 3 of the Istanbul Convention defines violence against women as a:

violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

See also, CEDAW, General Recommendation No. 19, para 6.

<sup>57</sup> The European Court of Human Rights (ECtHR) has found that ineffective government response to gender-based violence constitutes discrimination and a failure to ensure equal protection of the law. *Opuz v. Turkey*, Application No. 33401/02 2009, para 200; *Balsan v. Romania*, Application No. 49645/09, 2017, para 88.

reviewed, the courts recognised past forms of victimisation and exploitation in three stages of the proceedings:

- when assessing the abuse of a position of vulnerability (APOV) for the means element of the crime;
- in the application of the non-punishment clause, where existing under national law; and,
- as a mitigating or aggravating circumstance for the purpose of sentencing.<sup>58</sup>

Each of these examples are examined in greater detail in the sections below.

### **a. Human trafficking and sexual exploitation**

All of the cases in this study involved victim-defendants who were prior and/or contemporaneous victims of human trafficking and sexual exploitation.<sup>59</sup> Approximately nine of the cases examined involved victim-defendants who had experienced past (rather than contemporaneous) trafficking victimisation; three victims had been sexually exploited until just prior to the facts underpinning the charges.<sup>60</sup> The decisions in six of the cases examined explicitly referred to the victim-defendant's past childhood sexual exploitation.

Human trafficking and the exploitation of prostitution are considered as forms of violence against women.<sup>61</sup> Experience as a victim of human trafficking can have the effect of normalizing commercial sexual exploitation, such that victim-defendants do not recognise that they are victims, or perceive the harm caused by their own engagement in acts of trafficking. This is especially true if the victim-defendant experienced sexual exploitation either during childhood, or as a survival strategy to meet basic needs or gain "a perceived sense of security or protection from other forms of harm".<sup>62</sup> As described by Shared Hope International:

The impact of past trafficking victimization can create the same susceptibility to coercion and control as concurrent victimization, especially when the trafficking

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<sup>58</sup> Rule 57 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) states: "Gender-specific options for ... sentencing alternatives shall be developed within Member States' legal systems, taking account of the history of victimization of many women offenders. . . ."

<sup>59</sup> See, Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, *Crime, Law and Social Change* 72, 53, 2019, p. 60, a study finding 50.8% of female victim-defendants convicted for sexual exploitation in the Netherlands had worked as a prostitute, and 28.3% still worked as prostitutes at the time of the offence—a total of almost 80%; see also, Alexandra Louise Anderson Baxter, *When the line between victimization and criminalization blurs: The victim-offender overlap observed in female offenders in cases of trafficking in persons for sexual exploitation in Australia*, *Journal of Human Trafficking*, 2019, p. 2, finding victim-defendants with long-standing involvement in the commercial sex industry.

<sup>60</sup> The exact timing of the apparent end of the victim-defendants' sexual exploitation, if it had ended, is not always clear from the factual recitations in the decisions.

<sup>61</sup> See, Article 6, Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW).

<sup>62</sup> Shared Hope International, *Responding to Sex Trafficking: Victim-Offender Intersectionality*, 2020, p. 23.

occurred as a minor. Individuals who were trafficked as children may be at increased vulnerability for becoming a victim-offender later in life for a variety of reasons.<sup>63</sup>

The victim-defendant's experience of violence and control from a previous or current trafficker may not only increase her susceptibility to control by a later trafficker, but can also affect her "perceived or actual degree of choice in engaging in trafficking conduct".<sup>64</sup> This phenomenon was observed, for example, in the Canadian case of *R. v. Robitaille*, where a psychological evaluation revealed that the child victim-defendant was unable to empathize with victims due to past trauma. In that case the victim-defendant's prior history of childhood sexual abuse interfered with her judgement.<sup>65</sup>

### **b. Domestic and intimate partner violence as past and contemporaneous victimisation**

Domestic and intimate partner violence intersects with human trafficking in a number of ways. Perhaps most directly, trafficking of family members and intimate partners can constitute a form of domestic violence. Domestic and intimate partner violence is also recognised as a factor increasing victims' vulnerability to human trafficking. Among other impacts, it increases economic vulnerability, isolation and the risk of forced displacement from the home.<sup>66</sup> Six of the cases examined explicitly referred to past domestic violence. Of these cases, four also included concurrent domestic violence. Three further cases involved concurrent domestic violence.

In cases of domestic and intimate partner trafficking, the elements of physical, sexual and economic abuse are often already present when the sexual exploitation begins.<sup>67</sup> In cases involving trafficking within the family, familial power dynamics are often used as a means of control. In such cases, the perpetrator may sexually exploit the victim to, inter alia, make money for the family or the relationship,<sup>68</sup> support an addiction,<sup>69</sup> or as another means of controlling, abusing and exploiting the victim. It should be noted that, in the context of prostitution rings, the pimp/trafficker's treatment of victims living in the same residence should also be considered as domestic violence.

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<sup>63</sup> Shared Hope International, *Responding to Sex Trafficking: Victim-Offender Intersectionality*, 2020, p. 23.

<sup>64</sup> Shared Hope International, *Responding to Sex Trafficking: Victim-Offender Intersectionality*, 2020, p. 24.

<sup>65</sup> Canada: *R. v. Robitaille*, [2017] O.J. No. 5954, paras 34, 35; see also, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018, referring to the trauma caused by the child sexual abuse of the victims.

<sup>66</sup> U.S. State Department, *Trafficking in Persons Report*, 2009, citing a London study that found 70% of victims of trafficking had experienced domestic violence before being exploited.

<sup>67</sup> Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018, referring to the family trafficking enterprise involving a husband, wife and their children as violence within the family, and a specific finding of economic, physical, psychological and sexual domestic violence between the son (principal trafficker) and one of his victims, the mother of his child.

<sup>68</sup> U.S., *U.S. v. Bell*, 2013 WL 12086759, 2013; Netherlands, Cassation Court of Amsterdam, 23-000272-14, 2017; Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>69</sup> U.S., *People v. G.M.*, New York City Criminal Court, 2011 NY Slip Op 21176, 2011; Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

Effectively identifying the intersections between domestic and intimate partner violence and human trafficking requires capacity building across the criminal justice sector. This will better ensure comprehensive crime prevention and criminal justice responses to cases of violence against women, including the provision of protection and other essential services to victims and survivors.<sup>70</sup> National legislation should also be brought in line with international standards and criminalize all forms of violence against women. Importantly, criminal offences must not be limited to physical assaults resulting in visible injuries.

In the examined cases, some courts recognised domestic violence as a factor leading to a finding of abuse of a position of vulnerability as the “means” element of the crime. It was also relevant to application of non-punishment provisions. For example, in the *Dulcinea* case from Argentina, the Court described the violence the victim-defendant experienced by her father as one of seven children, in a poor household with a low level of education. She was forced into marriage at 18 with a 44-year-old man who beat her. She was a victim of domestic violence in two subsequent relationships and was injured by a bullet in one of them.<sup>71</sup> Child abuse and exposure to domestic violence and prostitution were also recognised as vulnerability factors in the context of the “means” element of trafficking in cases in Canada and the U.S.<sup>72</sup>

Courts also recognised intimate partner violence as an element of the relationship between the victim-defendant and the trafficker in several cases. This included abuse of a romantic relationship as the “means” used by the trafficker to exploit victims and to obtain their participation in acts of trafficking.<sup>73</sup> Some of the examined cases involved domestic and intimate partner violence that took the form of trafficking. Most of these cases involved victims developing intimate partner relationships with their traffickers, including for the purpose of alleviating their exploitation. In others, the trafficking emerged with other forms of violence only after the relationship started or the couple was married.<sup>74</sup>

Domestic violence was also considered as a mitigating factor in sentencing. For example, in the *Lay Foon Khoo* sentencing decision in Australia, the judge observed that the victim-

<sup>70</sup> The sometimes contentious dilemma between the use of the terms “survivor” or “victim” has been widely discussed in the literature on gender-based violence. The dichotomy does not conceptually address the multifaceted nature of victimization, as it neglects the variety of coping and survival strategies employed in response to coercion, and fails to capture the continuum between agency and victimization. For more see Liz Kelly, Sheila Burton, Linda Regan, *Beyond victim and survivor: Sexual violence, identity, feminist theory and practice*, 1996 and UNODC, Education for Justice, Module 6 Defining the Concept of Trafficking in Persons at <https://www.unodc.org/e4j/en/tip-and-som/module-6/key-issues/crime-of-trafficking-in-persons.html>.

<sup>71</sup> Argentina: *Dulcinea*, Causa No. 91017032, 2014, pp. 47-48.

<sup>72</sup> Canada: *R. v. Robitaille*, [2017] O.J. No. 5954, paras 68-83; U.S., *U.S. v. Bell*, 2013 WL 12086759, 2013. Abuse of a position of vulnerability is not included as a “means” in the definition of human trafficking in national/federal anti-trafficking legislation in the U.S. It is considered in the anti-trafficking legislation in some states.

<sup>73</sup> Costa Rica, Resolución Nº 00930 – 2002, p. 3, referring to the “circle of violence” in their “conflictual” relationship; Argentina: *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018; *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017, p. 31; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa nº 2.559, nº, CFP 7677/2014/TO1, 2018; Serbia, K-133/11, High Court in Novi Sad, 2012, noting relationships between both victim-defendants and male traffickers.

<sup>74</sup> See, U.S.: *People v. G.M.*, New York City Criminal Court, 2011 NY Slip Op 21176, 2011; *M.G. v. Florida*, 260 So.3d 1094, 2018.

defendant had been beaten at home as a child, bullied in school due to her mother's sex work, and that her prior and current marriages had been violent.<sup>75</sup>

The multiple intersections between intimate partner and family violence and human trafficking is explored throughout this report in greater detail.

### **c. Sexual violence as past and current victimisation**

Courts noted victim-defendants' past experience with sexual assault and sexual exploitation both as children and adults. Six of the cases observed victim-defendants having been victims of child sexual exploitation; at least four others referred to child sexual assault.<sup>76</sup> Childhood sexual abuse, in particular, can result in conditioning to being sexualised from an early age, as well as "learned survival through exploitation".<sup>77</sup> It can also cause a child to leave home without the economic means to obtain alternative, safe housing. Trauma from child abuse can affect neurological brain development and, as a consequence, decision-making capacity. In at least one case, the court seemed to recognise, albeit only implicitly, the cycle of violence that resulted in adult and youth offenders re-perpetuating the abuse they experienced as children.<sup>78</sup>

Courts have recognised various forms of sexual violence and sexual exploitation as factors creating vulnerability. They were taken into account by Argentine cases when applying the country's non-punishment provision and acquitting victim-defendants. Cases from several jurisdictions have recognised incidents of rape and child sexual abuse as factors relevant either to assessing the means element of abuse of a position of vulnerability, or as mitigating circumstances.<sup>79</sup> For instance, these forms of victimisation were accepted as mitigating circumstances during sentencing in decisions from South Africa, Canada and Australia.<sup>80</sup>

Several cases referred to prior incidents of rape and childhood sexual assault in the recitation of the facts, but did not take them into account during determination of the legal issues. These factual scenarios detailed the ways in which sexual violence contributed to the victims' susceptibility to trafficking, such as their willingness to accept risky opportunities due to their resultant homelessness or the social stigma of rape.<sup>81</sup> One case referred to a

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<sup>75</sup> Australia, *Lay Foon Khoo*, Document Number M20171128\_1017000571\_WADC\_PERTH\_PART\_0003, 2017, pp. 19, 20.

<sup>76</sup> See, e.g., Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018, para 131; U.S.: *U.S. v. Bell*, 2013 WL 12086759, 2013; *People v. Aarica S.*, 223 Cal. App. 4th 1480, 2014, p. 1484; Canada: *R. v. Robitaille*, [2017] O.J. No. 5954, paras 68-83.

<sup>77</sup> Shared Hope International, *Responding to Sex Trafficking: Victim-Offender Intersectionality*, 2020, p. 26.

<sup>78</sup> Canada, *R. v. Robitaille*, [2017] O.J. No. 5954, p. 35, 36.

<sup>79</sup> See, e.g., U.S., *U.S. v. Bell*, 2013 WL 12086759, 2013; Canada: *R. v. Robitaille*, [2017] O.J. No. 5954, paras 68-83; Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>80</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016; Canada: *R. v. Robitaille*, [2017] O.J. No. 5954, p. 35, 36; Australia: *Lay Foon Khoo*, Document Number M20171128\_1017000571\_WADC\_PERTH\_PART\_0003, 2017; *Watcharaporn Nantahkuhm*, SSC No. 149, 2012.

<sup>81</sup> Germany, District Court Duisburg, 33 Kls 17/18, 2019, pp. 15, 18, 19; U.S., *U.S. v. Bell*, 2013 WL 12086759, 2013.

victim's experience of captivity for the purpose of sexual slavery in Libya while in transit from Nigeria to Europe.<sup>82</sup>

Within the trafficking context, sexual violence is often used to condition victims to sexual abuse or to "break" them.<sup>83</sup> For example, in the case of *C. M. S. y Otros* from Argentina, the trafficker forced the victims to have sex with indigent men to "try them out".<sup>84</sup> In some of the cases, sexual violence continued throughout the trafficking experience as a continuing form of abuse and punishment, and as a tool of control.<sup>85</sup>

#### d. Forced/early marriage

Forced and early marriage were recognised as a vulnerability factor and thus a risk-factor for being trafficked in some cases. In one Belgian case, the forced marriage of the victim-defendant occurred concurrently with the sexual exploitation. In that case, one of the principal traffickers, who was the victim-defendant's perceived intimate partner, forced her to marry his nephew.<sup>86</sup> Forced and early marriage was, however, observed primarily as past victimisation in the cases examined. In one case, a Nigerian victim had no fixed residence upon facing forced marriage by her uncle, resulting in her accepting an offer to travel to Europe.<sup>87</sup> The forced marriage of the victim-defendant in a case from Argentina was also found to contribute to her vulnerability.<sup>88</sup> Several cases also involved victim-defendants whom the courts noted had been married as minors.<sup>89</sup> In these and other cases, although such prior forms of victimisation or exploitation were referenced in the text of the decision they did not impact on determination of the relevant legal issues.

Of additional note here is the UNODC Issue Paper on "Interlinkages between Trafficking in Persons and Marriage", which analyses in detail links between forced and child marriage and trafficking in persons and explains the relationship between vulnerability and victimization.<sup>90</sup>

### 3. Impact of the failure to identify victimization

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<sup>82</sup> Belgium, First instance court of Bruges, B637.L6.961-X7-DF, 2017, p. 46.

<sup>83</sup> See, e.g., U.S.: *U.S. v. Brown / Hollis*, 2:05-cr-80101-AJT-DAS Doc # 39, E.D.Michigan, 2015, where the trafficker raped the 14-year-old victim prior to her sexual exploitation; *People v. Deshay*, California Court of Appeals, Case No. C062691, 2011, in which a couple engaged in sex with a 16-year-old prior to sexually exploiting her; *U.S. v. Villaneuva*, 746 Fed.Appx. 840, 2018, p. 841, noting that two male pimps gave the victim drugs and had sex with her to "show her who [was] in charge"; Italy, *JE*, Case Number 1081/2019, penetrating the victim with a banana prior to sexually exploiting her; Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 30.

<sup>84</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 30.

<sup>85</sup> U.S., *People v. G.M.*, 2011 NY Slip Op 21176, 2011, p. 2; Belgium, Correctional facility Antwerp, 2015, p. 6; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>86</sup> Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018.

<sup>87</sup> See, Germany, District Court Duisburg, 33 KLS 17/18, 2019, pp. 18, 19.

<sup>88</sup> Argentina, *Dulcinea*, Causa nro. 91017032, 2014, pp. 47-48, observing that she had been forced into marriage at 18 years old with a 44-year-old man who beat her.

<sup>89</sup> See, e.g., *Ledesma*, Sentencia No. 457, p. 16.

<sup>90</sup> UNODC, *Issue Paper: Interlinkages between Trafficking in Persons and Marriage*, 2020.

One of the principal effects of the failure to identify the concurrent or prior victimization of a female defendant is their lack of access to justice. They may be prosecuted and punished for crimes that they were coerced or compelled to commit. Moreover, lack of understanding of the traumatic impacts of multiple and overlapping forms of victimisation impacts criminal justice actors at all levels. In particular, it impedes recognition of the connection between victimisation and the victim-defendant's criminal actions.

Failures to identify concurrent or prior victimization can also lead to denial of much needed assistance and protection and frustrate victim-defendants' ability to escape the influence of their traffickers. Victims of trafficking have rights to such assistance and protection measures, as well as to effective participation in criminal proceedings. Importantly, recognition by courts of the rights and needs of victims of human trafficking is essential to the implementation of a victim-centred approach. Such an approach is, in turn, integral to the effective recognition of victim-defendants as victims.

Violations of the victims' rights to privacy were evident in cases in which the courts identified the female defendants as victims. Their full names had already been published in the texts of the judicial decisions, often at multiple stages of the proceedings.<sup>91</sup> In the *Sanfelippo* case from Argentina, the Cassation Court observed that the lower court's use of the names the victims used when they were sexually exploited as a violation of their human dignity and as a form of institutionalized violence.<sup>92</sup>

Failures to identify victim-defendants as victims may lead to situations where their convictions frustrate attempts to recover from trafficking. For example, in the U.S. case of *M.G. v. Florida*, a victim of trafficking appealed the refusal of a trial court to expunge kidnapping charges from her criminal record, in circumstances where the kidnapping was coerced by the trafficker and she was not actually convicted of kidnapping. Her felony record impeded her enrolment in culinary school, which was part of her reintegration plan. Both the trial and appeals courts found that the Florida Human Trafficking Victim Expunction Statute explicitly excluded the crime of kidnapping and removed judicial discretion in the matter.<sup>93</sup> In the case of *People v. G.M.*, in light of the prosecutor's discretionary grant to expunge all convictions, the court did so even though the New York statute covered only prostitution-related crimes. Prosecutorial and judicial discretion were exercised in light of the severe forms of violence and exploitation suffered by the victim-defendant.<sup>94</sup>

Cases involving foreign nationals may also entail implications for the principle of *non-*

<sup>91</sup> See, e.g., Costa Rica, Resolución N° 00930 – 2002; Argentina: *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 26; *Sanfelippo*, Causa No. 15-554, 2014, pp. 12-13. It is worth noting that in several of the decisions the full names of victims, including minor victims, were also referenced. See, Costa Rica, Resolución N° 00930 – 2002; Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 26, in which the Cassation Court uses initials and finds a violation of the victims' privacy rights under the national anti-trafficking law; Argentina, *Sanfelippo*, Causa No. 15-554, 2014, pp. 12-13.

<sup>92</sup> Argentina, *Sanfelippo*, Causa No. 15-554, 2014, pp. 12-13.

<sup>93</sup> U.S., *M.G. v. Florida*, 260 So.3d 1094, 2018, pp. 1096, 1097, 1099. Both courts rejected her argument that the result of the decision contravened legislative intent.

<sup>94</sup> U.S., *People v. G.M.*, New York City Criminal Court, 2011 NY Slip Op 21176, 2011, pp. 5, 6, fn.7.

*refoulement*, especially where victim-defendants are at risk of removal from the state.<sup>95</sup> Removal may deny victim-defendants access to evidence and witnesses, as well as to support and protection measures.

## B. Roles of the victim-defendant in the human trafficking enterprise

The roles that victim-defendants played during their participation in trafficking enterprises covered the full spectrum of engagement, ranging from minor, subordinate roles to a position as the principal trafficker.<sup>96</sup> Where they had intermediate roles, this blurred the lines between “victim” and “trafficker” and guilt and innocence, complicating criminal justice responses. Most critically, the differences in their roles often corresponded to their relationship to the traffickers and to the context in which the trafficking took place.

### 1. Victim-defendants in subordinate roles, proximate to the exploitation

The large majority of female victim-defendants in the examined cases played subordinate roles to those of the principal traffickers. These roles included, *inter alia*: recruiting other victims, training victims in prostitution, working the bar and monitoring the time spent with clients in a brothel, collecting the proceeds from their prostitution, monitoring victims, imposing punishments including fines and forms of physical violence, posting ads for victims' sexual services, transporting victims to meet with clients and getting them ready for “dates”.<sup>97</sup> In most cases, the victim-defendant continued to engage in prostitution for the benefit of the trafficker while simultaneously engaging in acts of perpetration.<sup>98</sup>

Female victim-defendants frequently played a gendered role, characterized by their close contact with (other) victims and their proximity to the exploitation. Victim-defendants were

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<sup>95</sup> The Philippines, *People v. Janet Java Onida*, Crim Case No-Q-08-151971, 2013; South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016.

<sup>96</sup> Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, *Crime, Law and Social Change* 72, 53, 2019, p. 56, finding women playing both supporting and prominent roles in trafficking for sexual exploitation.

<sup>97</sup> See, Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, *Crime, Law and Social Change* 72, 53, 2019, p. 57, 67, finding female victim-defendants in the roles of housing victims, exploiting, taking away and keeping travel documents, “bookkeeping and earnings, transport to the country of destination, monitoring victims in the brothels where they are working, and the forgery of passports”. See also, Alexandra Louise Anderson Baxter, *When the line between victimization and criminalization blurs: The victim-offender overlap observed in female offenders in cases of trafficking in persons for sexual exploitation in Australia*, *Journal of Human Trafficking*, 2019, p. 2, finding female victim-defendants in Australia to be involved in recruitment and management of brothels, or “madames”. See also, UNODC, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*, CTOC/COP/WG.4/2020, para 8, finding victim-defendants engage by “helping to recruit new victims or by performing supervisory functions over other victims”.

<sup>98</sup> See, e.g., Argentina: *Sanfelippo*, Causa No. 15-554, 2014, pp. 18, 30; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018; Germany, District Court Duisburg, 33 KLS 17/18, 2019; Serbia, K-133/11, High Court in Novi Sad, 2012, pp. 4, 5; Costa Rica, Resolución N° 00930 – 2002, pp. 1, 3; Belgium: *E.G.*, Parquet system number 18G1175, 2018; *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018; First instance court Liège, 19th Chamber, 2016.

of the same sex as the other victims, frequently came from the same countries of origin or localities of the victims, and thus often served as a bridge to recruitment for the principal traffickers.<sup>99</sup> Traffickers can use women “to select and recruit other women to get them to work as a prostitute. The assumption here is that a female recruiter can more easily gain trust than a male recruiter, simply because she is a woman”.<sup>100</sup> The geographic, familial and friendship connections between victim-defendants and subsequently recruited victims was apparent in numerous cases.<sup>101</sup> For example, in several cases victim-defendants were engaged in recruiting or transporting victims from their respective countries;<sup>102</sup> in the *Cáceres* case, the victim-defendant recruited girls from her hometown.<sup>103</sup> It is clear that victim-defendants serve as a critical link to other vulnerable individuals susceptible to being trafficked for the purpose of sexual exploitation, including those closest to them.<sup>104</sup>

Indeed, familial relationships were exploited by victim-defendants to recruit victims in a number of cases.<sup>105</sup> In several of these cases, however, courts generally declined to find the “act” of recruitment in the context of the familial nexus. In these cases, the courts based the trafficking charges on other “acts”. Furthermore, a few cases involved recruitment by victims, often minors, of their friends, namely other minor victims, which were not always recognised by courts as acts of perpetration.<sup>106</sup>

In the light of their past or current engagement in prostitution, the victim-defendants also remained close to the exploitation and were often simultaneously exploited. Victim-defendants often work not only “as a recruiter, but also as a kind of guardian for the victims

<sup>99</sup> Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, Crime, Law and Social Change 72, 53, 2019, p. 64, a study conducted in the Netherlands finding in the majority of cases the perpetrator and the victims originate from the same region.

<sup>100</sup> Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, Crime, Law and Social Change 72, 53, 2019, p. 57.

<sup>101</sup> See, Alexandra Louise Anderson Baxter, *When the line between victimization and criminalization blurs: The victim-offender overlap observed in female offenders in cases of trafficking in persons for sexual exploitation in Australia*, Journal of Human Trafficking, 2019, p. 3, finding most of the convicted female victim-defendants in Australia to be of “the same cultural and language backgrounds of their victims,” namely from South East Asia.

<sup>102</sup> Australia: *D.S.*, Court of Appeals, Victoria, [2005] VSCA 99, para 7; *Lay Foon Khoo*, Document Number M20171128\_1017000571\_WADC\_PERTH\_PART\_0003, 2017, p. 6; *Watcharaporn Nantakuhm*, SSC No. 149, 2012; Argentina: *Dulcinea*, Causa nro. 91017032, 2014; *Justino Horacio Abel y otra*, Causa No. FGR 81000828/2012//CFC1, 2017, pp. 3, 27, 28; *Ledesma*, Sentencia No. 457, p. 13; *Sanfelippo*, Causa No. 15-554, 2014, p. 29; *Soria*, FMP 32005377/2008/TO1, 2017, p. 37; Costa Rica, Resolución N° 00930 – 2002, pp. 1, 3. Belgium, First instance court Liège, 19th Chamber, 2016. This was also a feature of all of the cases involving Nigerian trafficking networks.

<sup>103</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, pp. 39-41, noting that the victim-defendant and the victims came from the same social circles.

<sup>104</sup> UNODC has identified a link between the act of “recruitment” and the means “abuse of a position of vulnerability”. UNODC, *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 4.

<sup>105</sup> See, e.g., Argentina: *Bar California*, 40066/2013, p. 28, 29, 71; *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa n° FCB 53200033/2012/TO1/CFC1, 2017, p. 4, abuse of a situation of vulnerability constituted the means of the crime; *Dulcinea*, Causa nro. 91017032, 2014; Colombia: *Roldán Giraldo*, Case No. 66-01-60-00035-2006-01458; South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016; Belgium, First instance court of Bruges, B637.L6.961-X7-DF, 2017, p. 27; Philippines, *People vs. Ruth Dela Rosa y Likinon, aka “Sally,”* Criminal Cases Nos 13-9820 and 13-9821, 2013, pp. 18-19.

<sup>106</sup> Bosnia and Herzegovina, Court of BiH, K-71/05, 2006; Canada: *R. v. Robitaille*, [2017] O.J. No. 5954. In the *U.S. v. Bell* case, one victim recruited her sister. *U.S. v. Bell*, 2013 WL 12086759, 2013.

when they are put to work".<sup>107</sup> In many of the examined cases, female victim-defendants who were currently or formerly in the sex industry trained female victims, collected monies earned, prepared for and transported victims to work, monitored them and collected their earnings. In a case from Serbia, the victim-defendant travelled with the victims to Italy and monitored them and collected their earnings on behalf of the male accused, while also being sexually exploited.<sup>108</sup> In the Italian *JE* case, the judge specifically noted the "greater responsibility assumed by the woman both in the relationship with the two young women [the victims] and with their relatives remaining in Nigeria".<sup>109</sup> The wife in the *JE* case engaged in prostitution with one of the victims until she got pregnant. The second victim was trafficked to take her place.

In a case from the U.S., an anti-trafficking task force member testified in one case regarding the role of what is referred to in the pimping-prostitution context as a "bottom" namely:

a prostitute who works under the control of a pimp or trafficker by recruiting other prostitutes, collecting proceeds from prostitutes, supervising prostitutes, and punishing prostitutes. He added a "Wifey" is another prostitute who works under the same pimp. He stated pimps expect prostitutes to recruit other "Wifeys" to work for the pimp.<sup>110</sup>

The term "bottom" was also defined with slight variations in the cases *U.S. v. Britton* and *M.G. v. State of Florida*. In the *Britton* case, the court described the term as "prostitutes in charge of a pimp's other prostitutes, responsible for the recruitment, training, collection of earnings, forwarding the earnings to the pimp and oversight of other prostitutes".

The gendered language used to designate the role of victim-defendants in the U.S. case law examined in the context of exploitation of prostitution is significant (discussed in greater detail below). The clarity on the part of multiple experts regarding the fact that the victim-defendants work "under the control of a pimp or trafficker," who is most frequently male, should also be noted.

This close engagement by victim-defendants with the victims at the point/venue of exploitation contributes to the difficulties often faced by law enforcement in distinguishing victims from perpetrators, particularly when raids are conducted. This was explicit in a few of the examined cases. In the *Ledesma* case from Argentina, the Court emphasised the fact that during the raid the victim-defendant grouped herself with the other victims and it was the police who placed her alongside the principal perpetrator as a suspect.<sup>111</sup> The difficulty in identifying victims was also implicit in the case of *U.S. v. Bell*, in which the police originally arrested the most vulnerable of three victims and only later arrested another victim-defendant who had engaged in acts of perpetration.<sup>112</sup> In the Belgian *T.* case, the victim-

<sup>107</sup> Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, *Crime, Law and Social Change* 72, 53, 2019, p. 57.

<sup>108</sup> Serbia, K-133/11, High Court in Novi Sad, 2012, pp. 4, 5. See also, Belgium, First instance court Liège, 19th Chamber, 2016.

<sup>109</sup> Italy, *JE*, Case Number 1081/2019, p. 47.

<sup>110</sup> U.S., *People v. Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published), p. 5.

<sup>111</sup> Argentina, *Ledesma*, Sentencia No. 457, pp. 21, 25.

<sup>112</sup> U.S., *U.S. v. Bell*, 2013 WL 12086759, 2013, p. 10.

defendant was the only defendant prosecuted, while the principal traffickers were not apprehended. It was the court that identified her victim status.<sup>113</sup> The victim-defendants were also arrested and detained with the perpetrators in two Dutch and Argentinian cases. They were subsequently released.<sup>114</sup>

## 2. Victim-defendants as the means of perpetration and a shield from prosecution

The OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings has emphasised the “deliberate strategy of the traffickers to expose victims to the risk of criminalization and to manipulate and exploit them for criminal activities”.<sup>115</sup> The UN Special Rapporteur on trafficking in persons, especially women in children, similarly observes that:

[i]t is to be appreciated that the more traffickers can rely on a State’s criminal justice system to arrest, charge, prosecute and convict trafficking victims for their trafficking-related offences, whether criminal, civil or administrative, the better are the conditions for traffickers to profit and thrive, unencumbered in their criminality and undetected by the authorities.<sup>116</sup>

Several of the examined decisions characterised traffickers’ use of victim-defendants as an explicit strategy to carry out human trafficking and shelter themselves from prosecution. This was particularly the case for those engaged in trafficking in the sex industry. The often lower-level engagement of victim-defendants, and their proximity to the exploitation, in this context meant that “they [were] also more exposed to detection by investigative authorities”.<sup>117</sup> Relevantly, in the case of *People v. Deshay*, the Court observed generally that:

[t]he typical hierarchy in juvenile prostitution involves a pimp at the top, a stable of prostitutes called “wifeys,” and a “bottom” woman or trusted prostitute, *who insulates the pimp from law enforcement*. The “bottom” will collect the money, do the recruiting, get the motel rooms and drive the girls to dates *so that the pimp will not be around and in danger of being arrested*.<sup>118</sup> (Emphasis added).

In *People v. Deshay*, the female victim-defendant required the minor victim to communicate to Deshay, who was her husband and the principal trafficker, through her and that if they

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<sup>113</sup> T., Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018.

<sup>114</sup> Netherlands: First Instance Court of The Hague, 09/754126-08, 2010, p. 3; Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>115</sup> OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, 2013, p. 9.

<sup>116</sup> UN Special Rapporteur on trafficking in persons, especially women in children, *The importance of implementing the non-punishment provision: the obligation to protect victims*, 2020, para 4.

<sup>117</sup> Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, *Crime, Law and Social Change* 72, 53, 2019, p. 57.

<sup>118</sup> U.S., *People v. Deshay*, California Court of Appeals, Case No. C062691, 2011, p. 2.

got caught not to mention him.<sup>119</sup>

In the Canadian case of *R. v. Majdalani*, the victim-defendant took great pains to shield the trafficker, her boyfriend, from criminal responsibility.<sup>120</sup> In her statement to the police, the victim-defendant assumed all of the blame in an attempt to distance Majdalani from the allegations. She stated: “[g]ive me the charges. I picked up that ho, if that’s what you are trying to say. I am the one who exploits people, okay”. She also stated: “I did it. I picked up the girl like I told you, I put her in the room. It was under my name. It was me, me, me, me, me, me”. When asked about Majdalani's involvement, she replied “Nothing to do with him”.<sup>121</sup>

In the Belgian *T.* case, the Court observed that victims, during multiple interactions with police, consistently reiterated that they had come to Belgium on their own from Romania and worked in prostitution of their own accord. Their later statements in the course of the investigation revealed a different scenario, involving sexual exploitation and the sale of at least one of the victims to the traffickers by her “lover boy”.<sup>122</sup> As noted above, the victim-defendant—whose circumstances were mostly indistinguishable from that of the other victims, and whose participation involved monitoring the victims with whom she lived and was exploited with—was the only defendant charged in the case.<sup>123</sup>

In the *Blanco José Constantin y otros* case from Argentina, the Court described the victim-defendant as the “means” by which the perpetrators controlled the prostitution business in question. More specifically, it found that Blanco (the principal trafficker) used his romantic relationship with the victim-defendant to control the other women.<sup>124</sup> In the case of *People v. G.M.*, the victim-defendant’s affidavit indicated that her husband/trafficker forced her to commit the crimes, resulting in six misdemeanour convictions for prostitution, criminal trespass and drug possession. The husband did this in order to avoid criminal liability. As recounted by the Court, he:

forced her to engage in these illegal activities, including prostitution, upon threat of physical harm or actual violence if she did not comply. She was also forced to purchase crack cocaine for her husband because D.S. feared getting arrested himself.

<sup>119</sup> U.S., *People v. Deshay*, California Court of Appeals, Case No. C062691, 2011, p. 2.

<sup>120</sup> Canada, *R. v. Majdalani*, 2017 ONCJ 145, 2017.

<sup>121</sup> Canada, *R. v. Majdalani*, 2017 ONCJ 145, 2017, para 45.

<sup>122</sup> The term “lover boy” has been used to describe perpetrators whose modus operandi involves seducing vulnerable young girls and persuading them to be prostituted. According to the literature, they target: vulnerable and socially isolated adolescents who often come from dysfunctional families. Using their charm, they try to establish a relationship based on dependency, which thrives on the emotional support that the girl or woman was missing in her relationships with others. Once the pimp establishes a certain level of control over the girl/woman, he begins to encourage prostitution. Prostitutes often state that their relationships with their pimps are based on love, and have difficulty recognising that the pimps are dominating or exploiting them. For more see: *Trafficking in Human Beings: Seventh Report of the Dutch National Rapporteur*, 2010, p. 35, noting that the Ministry of Justice introduced the term “pimp boy” and Carlos Morselli and Isa Savoie-Gargiso, *Coercion, Control, and Cooperation in a Prostitution Ring*, *Annals of the American Academy of Political and Social Science*, vol. 653, 2014, p. 249.

<sup>123</sup> *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, p. 12.

<sup>124</sup> Argentina: *Blanco José Constantin y otros*, Expte. No. 72000674, 2014, pp. 9, 10.

If she refused to comply with any of his demands, he would threaten to kill her or harm her children in the Dominican Republic.<sup>125</sup>

The decision in the *R. v. D.S.* case from Australia called for greater attention to “the victim-offender issue in trafficking, and the role of victims as a gear in criminal organizations”.<sup>126</sup> The Court found that while she was a “minor cog” in the large transnational enterprise, the victim-defendant’s role was significant in the five cases for which she was convicted.<sup>127</sup>

### 3. Victim-defendants in a leading role

In a few cases, courts found that the victim-defendant played a central role in the trafficking enterprise. For example, in the Australian *D.S.* case, the Court found that, although the victim-defendant was a “minor cog” in the trafficking enterprise, she also served as a key intermediary between Thai and Australian transnational human trafficking organizations.<sup>128</sup> In a few cases, the female victim-defendant was the sole or principal trafficker in smaller trafficking enterprises involving few victims. In another Australian case, *Watcharaporn Nantahkuhm*, the Court found that the victim-defendant was the principal trafficker in a small-scale, unsophisticated trafficking enterprise in which she gained all the, albeit meagre, financial benefits.<sup>129</sup> Similarly, in the Australian case of *Lay Foon Khoo*, the victim-defendant employed the same *modus operandi* that she had undergone as a victim to traffic another Malaysian victim. This included use of substantial debt and confiscation of the victim’s passport to exert control.<sup>130</sup>

In the *Dezorzi* case from Argentina, the victim-defendant was accused of capturing and housing minor and adult victims for the purpose of sexual exploitation by abuse of a position of vulnerability. She and the victims lived in the same domicile where the sexual exploitation took place. She took 40% of the victims’ money earned with clients, using this money to pay rent and related expenses.<sup>131</sup> Despite her “lead” role, the Court found that the victim-defendant in the *Dezorzi* case was extremely vulnerable and engaged in prostitution for survival. As this case reveals, the self-organisation of consensual sex work for the purpose of protection could be construed as “trafficking.” Importantly, the Court in the *Dezorzi* case did not convict the victim-defendant.

One of the principal characteristics of Nigerian human trafficking networks is the possibility for victims to move up the hierarchy to become *madames*.<sup>132</sup> These are women who run the brothels and/or place victims on specific streets or posts that they control. In such instances, “victims can buy themselves out of their situation, plus the associated possibility to make a

<sup>125</sup> U.S., *People v. G.M.*, 2011 NY Slip Op 21176, 2011, p. 2.

<sup>126</sup> Australia, *R. v. D.S.*, County Court.

<sup>127</sup> Australia, *R. v. D.S.*, County Court, para 27.

<sup>128</sup> Australia, *R. v. D.S.*, Court of Appeals, Victoria, [2005] VSCA 99.

<sup>129</sup> Australia, *Watcharaporn Nantahkuhm*, SSC No. 149, 2012, p. 9.

<sup>130</sup> Australia, *Lay Foon Khoo*, Document Number M20171128\_1017000571\_WADC\_PERTH\_PART\_0003, 2017.

<sup>131</sup> Argentina, *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa n° FCB 53200033/2012/T01/CFC1, 2017, pp. 4, 11.

<sup>132</sup> See, e.g., Germany, District Court Duisburg, 33 KLS 17/18, 2019; Italy, *IC*, 2019; *Trafficking in Human Beings: Seventh Report of the Dutch National Rapporteur*, 2010, pp. 362.

career and ultimately become madams themselves. This ‘victim-becomes-perpetrator’ process ensures that the Nigerian human trafficking structure keeps replicating itself”.<sup>133</sup> This move from trafficking victim to entrepreneur is also complex. A few cases involved female victim-defendants charged as the principal trafficker,<sup>134</sup> while other cases refer to sex trafficking victims transforming themselves into *madames*, even as they continued to pay off their own debts.<sup>135</sup> Some victims trafficked newcomers, even as they remained exploited by the trafficker.<sup>136</sup> A few of the decisions made reference to the significance of the relationships between female victim-defendants and their male traffickers. The form of the relationship affected their participation in trafficking and whether or not the women assumed the lead trafficker role, a subservient role and/or operated with the male trafficker as a couple.<sup>137</sup>

Although the study encompassed cases in which victim-defendants apparently took a “leading” role in human trafficking enterprises, the facts in many of these cases revealed significant vulnerability. Victim-defendants often experienced concurrent and past victimisation which limited their choice as to whether or not to engage in trafficking.

## C. Victim-defendants’ relationships with traffickers and their motives

The relationship between victims and their traffickers is often the most significant determinant in whether or not they engage in trafficking. This demonstrates that “offending is embedded in social relationships”.<sup>138</sup> As observed by Shared Hope International:

A V/O’s [victim-offender’s] relationship with their trafficker is critical to understanding the level of loyalty, obligation or indebtedness a V/O may feel towards the trafficker. A V/O’s sense of loyalty, obligation or indebtedness may be particularly strong if the trafficker is a family member or the V/O had a personal relationship with the trafficker prior to their trafficking victimization. Similar to the harm experienced by victims of intimate partner violence or child abuse, a V/O may be more inclined to engage in conduct that rises to exploitation of others if they believe that doing so will please or strengthen their relationship with their trafficker.<sup>139</sup>

Yet, in most of the examined cases, courts tended to simply note the existence of the relationship between the victim-defendant and the co-accused without specifically

<sup>133</sup> *Trafficking in Human Beings: Seventh Report of the Dutch National Rapporteur*, 2010, pp. 362, 363.

<sup>134</sup> Germany, District Court Duisburg, 33 Kls 17/18, 2019; Belgium, *EG*, Parquet system number 18G1175, 2018; Italy, *IC*, 2019, referring to arranging the recruitment and transport of victims to various *madames* across Europe.

<sup>135</sup> Belgium, *EG*, Parquet system number 18G1175, 2018, p. 8; Italy, *IC*, 2019.

<sup>136</sup> Italy, *IC*, 2019; U.S., *U.S. v. Bell*, 761 F.3d 900, (8th Cir 2014).

<sup>137</sup> See, e.g., Germany, District Court Duisburg, 33 Kls 17/18, 2019 and Belgium, Correctional facility Antwerp, 2015, in which the female victim-defendants assumed the leading role with their male intimate partners assisting. *Trafficking in Human Beings: Seventh Report of the Dutch National Rapporteur*, 2010, p. 360. See also, Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, *Crime, Law and Social Change* 72, 53, 2019, p. 67, finding offending to be “embedded in social relationships, including intimate (romantic) relationships”.

<sup>138</sup> Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, *Crime, Law and Social Change* 72, 53, 2019, p. 67.

<sup>139</sup> Shared Hope International, *Responding to Sex Trafficking: Victim-Offender Intersectionality*, 2020, p. iv.

inquiring into the nature of that relationship. This practice functions as an implicit refusal to investigate the existence and character of private relationships. This is, arguably, reflective of the law’s traditional reticence to deal with matters (such as domestic violence) that occur in the private sphere. In this context, it should be noted that the European Court of Human Rights (ECtHR) recently found that an inadequate investigation into the “true nature” of the relationship between a trafficker and the victim violated the State’s positive obligations under the procedural aspect of Article 4 of the ECHR.<sup>140</sup>

The primary types of relationships identified in the cases included:

- pimping/prostitution;
- combined pimping/prostitution and intimate partner relationship; and
- familial relationship with the trafficker.

It is critical that the links between intimate partner and domestic violence and human trafficking are understood. This is a necessary part of effectively addressing victim-defendant offending in the context of trafficking for the purpose of sexual exploitation. In sex trafficking involving intimate partner violence, the forms of violence—physical, sexual, psychological and economic—may already be present in the relationship, with trafficking and exploitation constituting an additional form of abuse. In both intimate partner and familial trafficking, non-physical coercion and manipulation are used to create a mix of loyalty, fear and dependence on the trafficker, functioning as a form of entrapment and making it difficult for the victim to leave.<sup>141</sup> In familial trafficking, existing power dynamics within the family are used as a means of control.<sup>142</sup> Interestingly, it was evident in the cases examined that relationships in the pimping/prostitution context tend to mimic family structures. This is explored in more detail below.

The cycle of abuse is often present in both the trafficking and the domestic and intimate partner violence contexts. In the case of trafficking, traffickers form strong bonds with the victims initially, such as through false job promises or by posing as a loving partner or caretaker. This form of recruitment has been described as the “lover boy” system.<sup>143</sup> The tension-building phase is marked by the trafficker employing various forms of force, fraud or coercion to obtain control over the victim. In the exploitation phase, the victims are subjected to sexual exploitation and/or experiences, sometimes with severe consequences for any attempts to leave or for disobeying the trafficker. The exploitation takes on a cyclical

<sup>140</sup> ECtHR, *S.M. v. Croatia*, Application No. 60561/14, 2020, para 336, finding that the investigation “failed to follow some obvious lines of inquiry capable of elucidating the circumstances of the case and establishing the true nature of the relationship” between the victim and the trafficker.

<sup>141</sup> Evan Stark, *From Battered Woman Syndrome to Coercive Control*, Albany Law Review, Vol. 59, 1995, p. 975, observing in cases of domestic violence, “hostage-like levels of fear, isolation, entrapment, and retaliatory violence”. See also, Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>142</sup> National Human Trafficking Resource Center, *Intersections of domestic violence and human trafficking: Developing a lens for intimate Partner and familial trafficking*, available at: <https://humantraffickinghotline.org/resources/human-trafficking-intersections-domestic-violence>.

<sup>143</sup> Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, pp. 12, 13, 23.

nature and may include small indulgences and/or the reinforcement of false promises of a better future, like those employed for the purpose of recruitment.<sup>144</sup>

This cycle was described in the U.S. case of *People v. G.M.*, in which the victim-defendant returned to the Dominican Republic twice in response to the domestic violence she faced, including being trafficked for sexual exploitation by her husband. On the first occasion, her husband "begged" her to return, "promising to find her a good job and to help her with her immigration status".<sup>145</sup> On the second occasion, he forced her to return with threats to seriously harm a close friend of the family.

In the case of *M.G. v State of Florida*, the victim-defendant was trafficked by her "abusive and controlling boyfriend". The Court found that the trafficker:

convinced M.G. that she could make a lot of money working for him— a technique referred to as the "honeymoon" phase—where, as M.G. described it, Valdes sold her "a dream," which was really a nightmare consisting of violence, beatings, abuse, humiliation, and victimization.<sup>146</sup>

It is important to note that the relationship structure between the victim-defendant and the trafficker remained in several cases after the sexual exploitation of the victim, as the trafficker was a boyfriend or husband.<sup>147</sup>

Five broad motives for victim-defendants to engage in trafficking are evident in the case law examined:

- to alleviate their own levels of exploitation and vulnerability;
- to secure or maintain affective ties with the trafficker;
- to rise within an organizational hierarchy;
- to make money; and
- where they had no choice but to comply with the trafficker's orders;<sup>148</sup>

These motives were noted by the courts while describing the facts of cases and in their evaluation of the victim-defendant's culpability and at sentencing.

## 1. Pimping/prostitution relationships

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<sup>144</sup> See, e.g., U.S.: *U.S. v. Bell*, 2013 WL 12086759, 2013; *People v. G.M.*, 2011 NY Slip Op 21176, 2011; *M.G. v. Florida*, 260 So.3d 1094, 2018, p. 1096; Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018..

<sup>145</sup> U.S., *People v. G.M.*, 2011 NY Slip Op 21176, 2011, p. 2.

<sup>146</sup> U.S., *M.G. v. Florida*, 260 So.3d 1094, 2018, p. 1096.

<sup>147</sup> Argentina, *Ledesma*, Sentencia No. 457, p. 11; U.S.: *People v. G.M.*, 2011 NY Slip Op 21176, 2011, p. 2; *People v. Deshay*, California Court of Appeals, Case No. C062691, 2011; Italy, *JE*, Case Number 1081/2019.

<sup>148</sup> See also Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, *Crime, Law and Social Change* 72, 53, 2019, p. 61, a study in the Netherlands, finding motives to include: they were afraid of their male co-offender; they cooperated out of love for their male co-offender; for the money; to stop working in prostitution; and, to help the victims to earn more money than in their country of origin.

Within the context of pimping/prostitution relationships, the literature and the court cases reviewed reveal that female victim-defendants may assume some of the roles of perpetrators to alleviate their own exploitation and vulnerability. They may also do so because they have no alternative, given the significant power imbalance between them and their trafficker/s.<sup>149</sup> Victims also clearly entered into romantic relationships with their traffickers to alleviate or escape exploitation, and in doing so were coerced and compelled into acts of perpetration. In other cases, the victim-defendants acted out of feelings of love for and dependency on the trafficker and as a way to secure romantic ties with him.

A few cases identified the trafficker's fraudulent engagement in a romantic relationship as a means to entice the victim into prostitution and, in turn, engage in acts of perpetration.<sup>150</sup> However, among the examined cases, courts rarely inquired into the nature of the couple's relationship for the purpose of evaluating the use of romance or another means for securing victim perpetration (with significant exceptions).<sup>151</sup>

### e. Purely pimping/prostitution relationships

In purely pimping/prostitution relationships, moving into perpetration not only serves to alleviate the victim's conditions and exploitation, but can also function as a business opportunity. In the South African case of *State vs. Veeran Palan and Edwina Norris*, the victim-defendant recruited the two victims from her home town as she needed to find a replacement in order to be freed by the principal trafficker.<sup>152</sup> Notably, the court did not address her lack of freedom of movement in her conviction.

In cases from the U.S., engaging in perpetration appeared to constitute an opportunity for victims to reduce their own exploitation and/or to gain power and income within the prostitution enterprise.<sup>153</sup> This model also seems to apply to cases involving Nigerian and other large trafficking enterprises, in which victims moved up to become *madames*, even as they remained indebted to and exploited by their own trafficker.<sup>154</sup>

Courts have taken different positions to the use of the same *modus operandi* by former victims for economic profit. For example, it was used as both a mitigating and aggravating factor for the purpose of sentencing in several cases;<sup>155</sup> while in other cases it was not considered.<sup>156</sup> A more detailed analysis follows below.

<sup>149</sup> Costa Rica, Resolución N° 00930 – 2002, pp. 3.

<sup>150</sup> See, e.g., U.S.: *M.G. v. Florida*, 260 So.3d 1094, 2018; *U.S. v. Bell*, 2013 WL 12086759, 2013.

<sup>151</sup> Exceptions include: Costa Rica, Resolución N° 00930 – 2002, p. 3; Netherlands, Cassation Court of Amsterdam, 23-000272-14, 2017; U.S., *U.S. v. Brown / Hollis*, 2:05-cr-80101-AJT-DAS Doc # 39, E.D.Michigan, 2015; Argentina: *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018; *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>152</sup> South Africa, *State vs. Veeran Palan and Edwina Norris*, Case No: RCD 13/14, 2014, p. 4.

<sup>153</sup> See, e.g., U.S.: *M.G. v. Florida*, 260 So.3d 1094, 2018; *People v. Williams*, 783 Fed.Appx. 269, 2019.

<sup>154</sup> Germany, District Court Duisburg, 33 KLs 17/18, 2019; Italy, *IC*, 2019; Belgium: First instance court of Bruges, B637.L6.961-X7-DF, 2017, p. 29; First instance court Liège, 19th Chamber, 2016.

<sup>155</sup> See, Australia: *Watcharaporn Nantakuhm*, SSC No. 149, 2012; *DS*, Appeals Court, Victoria, [2005] VSCA 99; Australia, *Lay Foon Khoo*, Document Number M20171128\_1017000571\_WADC\_PERTH\_PART\_0003, 2017, p. 11.

<sup>156</sup> *Leech v The Queen* [2011] VSCA 344, para 29.

## f. Mixed pandering and romantic relationships

Among the examined cases concerning a victim-defendant in a pimping/prostitution situation, most involved a mixed "romantic" and exploitative relationship.<sup>157</sup> Questions remain about the distinction, where it exists, between abuse, control and exploitation as a form of intimate partner violence and fraudulent romantic relationships, which are discussed separately below.

In addition to alleviating their levels of exploitation, romantic attachment (which is often trauma-induced) was a driving factor for victim-defendant engagement in acts of perpetration. Other victim-defendants were found to have no choice but to obey their traffickers, given the power differentials in their relationship. Another motive in these mixed relationships was to "move up" within the trafficking enterprise, which may more accurately reflect a move away from sexual exploitation and poverty.<sup>158</sup> Each of these modalities is described below. Abuse of the perceived romantic relationship was also used as a means by traffickers to obtain both victims' engagement in prostitution and their participation in acts of perpetration.

Significantly, few decisions explicitly inquired into the nature of the romantic relationships,<sup>159</sup> with several exceptions.<sup>160</sup> In one U.S. case, there was no description of the relationship between the male and female trafficker, despite the latter's role as a victim-defendant in preparing the victim for her dates and instructing her on prostitution.<sup>161</sup> Those that did inquire into the relationship found coercive and controlling behaviour, including through the use of physical violence, and the victim-defendant's absence of self-determination.<sup>162</sup>

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<sup>157</sup> Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, *Crime, Law and Social Change* 72, 53, 2019, p. 61, a study conducted in the Netherlands finding that 94.7% of female victim-defendants committed the offence together with others, and that a majority of the co-offenders were male (75.3%). Strikingly, it found that for 72.7% of the women, their co-offender "was also the man with whom they have or have had a romantic relationship".

<sup>158</sup> See, Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, *Crime, Law and Social Change* 72, 53, 2019, p. 56, stating: "Often a romantic relationship exists between the prostitute and one of the perpetrators. For these women, the transition from prostitute to perpetrator is perhaps a way to stop working as a prostitute."

<sup>159</sup> Courts' inquiries into the relationship dynamics at issue may be limited as the prosecution and defence may fail to produce evidence on this aspect of the case.

<sup>160</sup> These exceptions include: U.S.: *Hicks v Rackley*, Case No. 16-03270 BLF (PR), (N.D.Ca) 2018; *People v. Williams*, 783 Fed.Appx. 269, 2019; Netherlands, Cassation Court of Amsterdam, 23-000272-14, 2017; Serbia, K-133/11, High Court in Novi Sad, 2012; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018; Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018..

<sup>161</sup> U.S., *U.S. v. Brown / Hollis*, U.S. District Court, Eastern District of Michigan, 2:05-cr-80101-AJT-DAS Doc # 39, 2005.

<sup>162</sup> See, Costa Rica, Resolución N° 00930 – 2002, pp. 1, 3; Netherlands, First Instance Court of The Hague, 09/754126-08, 2010; Argentina: *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018; *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018; U.S., *People v. G.M.*, 2011 NY Slip Op 21176, 2011, p. 2.

Courts also engaged in conflicting readings of the dynamics within the relationships at issue. For example, in the *Justino Horacio Abel y otra* case from Argentina, the Cassation Court overturned the lower court's conviction of the victim-defendant for her engagement as a secondary participant in the trafficking enterprise. It observed that the lower court had treated the co-perpetrators as being in an equal position because of their relationship as a couple. It found this to result from a "rigid stereotype that couples are characterized by equality, partnership and love". It found such a characterization to be impossible when the antecedent of the relationship was the subjection of the woman to exploitation, violence and vulnerability.<sup>163</sup>

In a case from the Netherlands, the Supreme and Cassation Courts observed that there was no power imbalance in a relationship between the victim-defendant and her partner, the principal trafficker. Rather, the Cassation Court appeared to read gender parity into the reversal of traditional gender roles: the male co-accused took care of the household while the victim-defendant worked in prostitution to secure income for the family. The Dutch Courts assumed the victim-defendant's free will in this case in light of the lack of objective indicia of coercion or force.<sup>164</sup> Yet, the decision itself contains clear indicators of both a power imbalance and economic violence. The principal trafficker, G.K., was eight years older than the victim-defendant and the relationship and his exploitation of her in prostitution began when she was a minor. They came to the Netherlands from Hungary when she was 18 to increase the amount of money they could earn off of her prostitution. The victim-defendant continued to be sexually exploited during the trafficking of other women from Hungary, while G.K. did not work. The Cassation Court found that the victim-defendant was in love with G.K. during the charged period, felt dependent on him, and had lower than average intelligence.

In its decision, the Cassation Court considered that the victim-defendant financially benefited from the proceeds of the victims' exploitation by the mere fact of her cohabitation with G.K., the principal trafficker. No reference was made to her actual access to and control over financial resources. It also found that she was only "aware of" the financial arrangement between the principal trafficker and the victims.<sup>165</sup> Strikingly, the male principal trafficker was acquitted in this case, while the victim-defendant was convicted.

In contrast, in another case involving Hungarian traffickers and victims, and a victim-defendant in an intimate partner relationship, the First Instance Court of The Hague found that the traffickers "abused the vulnerable, isolated and dependent position in which these women were in the Netherlands," making it "impossible for the women to make free choices when it came to practicing prostitution, and to make independent decisions as free Dutch prostitutes can".<sup>166</sup> The case can be distinguished by the use of physical violence and threats

<sup>163</sup> Argentina, *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017, p. 31; see also, Costa Rica, Resolución Nº 00930 – 2002, p. 3, referencing the "circle of violence".

<sup>164</sup> The court came to the opposite conclusion (trafficking for the purpose of sexual exploitation as a violation of the victim-defendant's self-determination) under a similar set of factual circumstances in the case from Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa nº 2.559, nº, CFP 7677/2014/TO1, 2018.

<sup>165</sup> Netherlands, Cassation Court of Amsterdam, 23-000272-14, 2017.

<sup>166</sup> First Instance Court of The Hague, 09/754126-08, 2010; see also, Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet nº LI37.LA.99538-09, 2018.

by the traffickers against the victim-defendant, as well as the absence of coercion by the victim-defendant against the victim.

In the *Ledesma* case from Argentina, the victim-defendant had been sexually exploited at the trafficker's brothel prior to entering into a relationship with him. After the beginning of the relationship, she ceased being exploited, became the manager of the bar, and was assigned to monitor the other women. She also recruited family members and others from the Dominican Republic. The court in this case described her relationship with the trafficker as "affective dependency".<sup>167</sup>

In a few cases from the Netherlands, Canada and the U.S., courts described the influence of the trafficker over the victim-defendant in light of her feelings of love towards him, and promises of a future together.<sup>168</sup> In several cases, the romantic relationship between the victim-defendant and the principal male trafficker was observed by the court but was not analysed in any detail, including in a few cases when there were suggestions of violence perpetrated against the victim-defendant.<sup>169</sup>

### i. Alleviation of conditions of exploitation

The maintenance of romantic relationships is often very important for the particularly vulnerable women in these cases. For example, in the *Blanco José Constantin y otros* case in Argentina, the victim-defendant worked at the bar of a brothel and was exploited under the direction of the co-perpetrators. She had a romantic relationship with one of them, Blanco, who provided her with privileges not enjoyed by other victims. These included her own room, the fact that she was allowed to work exclusively with a select group of clients, and that she could return home each night to be with her young children.<sup>170</sup> Another example, again from Argentina, is the *Sanfelippo* case. In this case the Court found that the victim-defendants had been "chosen" as the "women" or "wives" of the traffickers.<sup>171</sup> As such, they engaged in recruitment, reception, monitoring and the infliction of punishment on other victims. The court found that their participation in the crime improved their quality of life.<sup>172</sup>

The significance of entering into a romantic relationship with the pimp/brothel owner was also apparent from the facts in the Argentinian cases of *Justino Horacio Abel y otra* and *Ledesma*. The victim-defendants charged in these cases had changed their positions from being prostituted to working at the bar and had recruited new victims only once the

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<sup>167</sup> Argentina, *Ledesma*, Sentencia No. 457, p. 11.

<sup>168</sup> Netherlands: First Instance Court of The Hague, 09/754126-08, 2010, p. 3; Cassation Court of Amsterdam, 23-000272-14, 2017; Canada: *R. v. Robitaille*, [2017] O.J. No. 5954, p. 35, 36; *U.S. v. Bell*, 2013 WL 12086759, 2013.

<sup>169</sup> See, e.g., Serbia, K-133/11, High Court in Novi Sad, 2012, noting relationships between both victim-defendants and male traffickers. U.S.: *People v. Deshay*, California Court of Appeals, Case No. C062691, 2011; *U.S. v. Williams*, Appellate Brief, 2019 WL 1422366 (C.A.4); *U.S. v. Willoughby*, (E.D. Mich), 2007.

<sup>170</sup> Argentina, *Blanco José Constantin y otros*, Expte. No. 72000674, 2014, p. 8. See also, Argentina, *Ledesma*, Sentencia No. 457, where the victim-defendant improved her situation upon engaging in a romantic relationship with the pimp.

<sup>171</sup> The Spanish word "mujer" can be translated as woman or wife. In this case, the victim-defendants were probably engaged in a romantic relationship with the traffickers, but it remains unclear from the text of the decision if the couples were actually married.

<sup>172</sup> Argentina, *Sanfelippo*, Causa No. 15-554, 2014, pp. 30, 31.

relationships had started.<sup>173</sup> In the *Justino Horacio Abel y otra* case, the Cassation Court found that the victim-defendant "chose" to manage the brothel and recruit in order to escape a prolonged situation of sexual exploitation and to continue providing for her daughter.<sup>174</sup>

Some cases involved only a romantic relationship between the trafficker and the victim-defendant. In the *C. M. S. y Otros* case, the victim-defendant was sexually exploited when she met the co-accused as a client. They started a romantic relationship and she eventually moved in with him, bringing her seven year old son.<sup>175</sup> The Cassation Court found that she came from the same socio-economic circumstances as the victims, had been sexually exploited, and that her relationship with the co-accused was characterised by inequality and violence. It found that she had escaped prostitution through the financial support of the co-accused, and described her as being "freed from her victimisation".<sup>176</sup> It found that she went from being a victim to a perpetrator under the orders of the co-accused, without interruption in her victimisation.

Again, the Cassation Court of Argentina found that due to their romantic relationship, the lower court had put the trafficker and the victim-defendant in the same position based on a stereotypical understanding of romantic relationships based on equality and partnership, which it found not to be true in a case in which the woman was subjected to violence, exploitation and vulnerability.<sup>177</sup> The factual scenario of this case also raises the issue of possible abuse of perceived romance.

## ii. Fraudulent romantic engagement as means /securing affection

Seven of the identified decisions involved traffickers using romance as a means of control over the victim-defendants. Other cases involved fraudulent romance in trafficking the victim. Where victim-defendants were in a romantic relationship with their pimps, engaging in acts of perpetration also seemed to be undertaken to strengthen romantic ties. In other words, there appears to be link between fraudulent romance as a means element and the motives of very vulnerable victims with strong emotional needs. Fraudulent romantic engagement with the victims was recognized by some courts as a *modus operandi* or means in these cases. In the *Blanco José Constantin y otros* case described above, the Court explicitly found that Blanco used his romantic relationship with the victim-defendant to control the other women working in the bar.<sup>178</sup>

In the case of *U.S. v. Bell*, the male trafficker engaged in a "pattern" of recruitment that involved initiating romantic relationships with women and then sexually exploiting them with deceptive promises of long-term, stable relationships involving marriage and children. This was despite the fact that he was married at the time and had a child.<sup>179</sup> In that case, two

<sup>173</sup> Argentina: *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017, pp. 3, 27, 28; *Ledesma*, Sentencia No. 457.

<sup>174</sup> Argentina: *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017, p. 31.

<sup>175</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, pp. 28, 29.

<sup>176</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, pp. 46, 49.

<sup>177</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 50.

<sup>178</sup> Argentina, *Blanco José Constantin y otros*, Expte. No. 72000674, 2014, p. 10.

<sup>179</sup> U.S., *U.S. v. Bell*, 761 F.3d 900, (8th Cir 2014), pp. 903-905, 908. Fraudulent romance was also found to be the pattern of recruitment in the case from Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal

of the victims described themselves as his "bottom," one of whom was "branded," in the context of competing for his affections.<sup>180</sup> The victims engaged in acts of perpetration to secure their romantic relationships with the trafficker. In the Belgian *T.* case, the Court characterised the traffickers as "lover boys" when characterising the *modus operandi* of recruitment of victims.<sup>181</sup>

In one case from Bosnia and Herzegovina, the trafficker fraudulently seduced the minor, E.Ć., and then used her feelings towards him and threats toward her and her family to force her into prostitution and to help him recruit other victims. E.Ć. complied due to her affection for him, in addition to the fear that he would fulfil his threats against her and her family.<sup>182</sup>

The Canadian *R. v. Robitaille* case involved a young woman, aged 18 1/2 at the time of the offence, who participated in the sexual exploitation of two minors along with her trafficker, with whom she believed that she was in love. The text of the decision makes this distinction between the adolescent's belief that she was in love and her actually being in love, signalling an inquiry by the Court into the nature of their relationship. The Court also referenced a report submitted by an expert psychologist, who indicated that due to past trauma the victim-defendant could not empathize with the victims, and that she viewed them as competition.<sup>183</sup>

The vulnerability of the female victims in these cases should be emphasised. Notably, the courts did stress the vulnerability of the victims in the *U.S. v. Bell* and *R. v. Robitaille* cases (see below). The victim-defendants in these two cases were variously: victims of childhood sexual exploitation and abuse, homeless, engaged in substance abuse, and suffering from mental illness, among other factors increasing their vulnerability.<sup>184</sup> These decisions and the literature describe traffickers as targeting this type of extreme vulnerability.

### iii. "Moving up" and escaping poverty

Several cases involved victims "moving up" to becoming perpetrators. In the Australian case of *Watcharaporn Nantakuhm*, the Court observed not only that the victim-defendant being tried in the case had become a perpetrator using the *modus operandi* employed on her when she was a victim, but that one of her victims also went on to establish a prostitution

No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018, and the Belgian case *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018.

<sup>180</sup> U.S., *U.S. v. Bell*, 2013 WL 12086759, 2013, pp. 9, 11. See also, Carlos Morselli and Isa Savoie-Gargiso, *Coercion, Control, and Cooperation in a Prostitution Ring*, *Annals of the American Academy of Political and Social Science*, vol. 653, 2014, p. 254, observing via a two-year electronic surveillance project competition between two prostituted persons over the affection of their pimp, whom they described as their "boyfriend" and "partner".

<sup>181</sup> Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018.

<sup>182</sup> Bosnia and Herzegovina, Court of BiH, K-71/05, 2006; OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *A Caselaw Compendium on Trafficking in Human Beings*, 2015, pp. 13-14.

<sup>183</sup> Canada: *R. v. Robitaille*, [2017] O.J. No. 5954, p. 35, 36.

<sup>184</sup> Similarly, in the *Landriel, Daniel y Otros* case from Argentina, fraudulent romance was used as a pattern by the trafficker to target at least two minor victims, one a victim of child sexual abuse, the other mentally disabled. *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

business.<sup>185</sup> Similarly, in the Australian *Lay Foon Khoo* case, the victim-defendant trafficked a victim using the same *modus operandi* that was used on her as a victim.<sup>186</sup> In both cases the victim-defendants trafficked victims from their countries of origin (Thailand and Malaysia, respectively).

Several cases made reference to victims becoming *madames* through romantic relationships.<sup>187</sup> In one such Belgian case, the Court observed that:

Within the Nigerian prostitution environment, it is a well-known fact that prostitutes follow entering into a relationship with their pimp for some time and thus work their way up in turn to let other women work for them as prostitutes.<sup>188</sup>

One of the characteristic elements of Nigerian trafficking networks is also the “possibility [for victims] to make a career and ultimately become madams themselves”.<sup>189</sup>

In other cases, involving Nigerian trafficking networks, female victim-defendants became perpetrators in an effort to move up in the enterprise, absent any recourse to a romantic relationship with their trafficker.<sup>190</sup> Several cases involved Nigerian *madames*, who were contemporaneously and/or formerly sexually exploited. In a few cases, like traffickers elsewhere, *madames* utilized a victim working under them in order to control the other victims and to collect their money. Use of the “madame’s favourite” constituted an important example of the transition from victim to perpetrator. The madame bestows small favours on the victim, and an alleviation of the conditions of exploitation, in exchange for additional tasks, such as monitoring other victims and working as a personal assistant.<sup>191</sup> This was the function served by the victim-defendant, D., in a case examined from Germany,<sup>192</sup> and the victim-defendants in several cases from Belgium.<sup>193</sup>

Important questions remain regarding the extent to which trafficking by victim-defendants is used to alleviate the conditions of their exploitation. The degree to which victim-defendants have a choice as to their engagement in trafficking should also be the subject of further inquiry. It should be stressed that, due to their significant social isolation and marginalization—including their irregular status—many victims of trafficking have few options outside the sex trade.<sup>194</sup> This issue was only addressed by the case law in Argentina, which qualified as hypocritical the imposition of criminal punishment and the implicit

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<sup>185</sup> Australia, *Watcharaporn Nantahkuhm*, SSC No. 149, 2012, p. 5.

<sup>186</sup> Australia, *Lay Foon Khoo*, Document Number M20171128\_1017000571\_WADC\_PERTH\_PART\_0003, 2017, p. 11.

<sup>187</sup> Belgium: First Instance Court Bruges, B637.L6.961-X7-DF, 2017, p. 52; First instance court Antwerp, Parquet system number 17RA16990, 2018, p. 11; Italy, *IC*, 2019.

<sup>188</sup> Belgium, First instance court of Bruges, B637.L6.961-X7-DF, 2017, p. 29.

<sup>189</sup> *Trafficking in Human Beings: Seventh Report of the Dutch National Rapporteur*, 2010, pp. 362.

<sup>190</sup> Germany, District Court Duisburg, 33 KLs 17/18, 2019; Italy, *IC*, 2019.

<sup>191</sup> Eva Lo Iacono, *Victims, sex workers and perpetrators: gray areas in the trafficking of Nigerian women*, Trends in Organised Crime, 110, 2014, p. 122.

<sup>192</sup> Germany, District Court Duisburg, 33 KLs 17/18, 2019.

<sup>193</sup> Belgium: *E.G.*, Parquet system number 18G1175, 2018; First Instance Court Bruges, B637.L6.961-X7-DF, 2017. See also, *Trafficking in Human Beings: Seventh Report of the Dutch National Rapporteur*, 2010, p. 360.

<sup>194</sup> Eva Lo Iacono, *Victims, sex workers and perpetrators: gray areas in the trafficking of Nigerian women*, Trends in Organised Crime, 110, 2014, pp. 122, 123, quoting interviews that underscored that becoming a “partner in crime...is basically the only chance to have a comfortable life”.

expectation that a victim of exploitation return to conditions of extreme vulnerability rather than try to escape the violence and exploitation to which she had been subjected throughout her life.<sup>195</sup>

#### iv. No alternative but to obey orders

In a few cases in which the victim-defendant and the trafficker were engaged in a romantic relationship, the courts recognised that the victim-defendant had no alternative but to obey the orders of the trafficker. In addition to the privilege conferred on the victim-defendant through her status as the trafficker's girlfriend, in the *Blanco José Constantin y otros* case from Argentina, the Court found that the victim-defendant was not in a position to reject any of the tasks assigned to her by Blanco.<sup>196</sup> It found her to be immune from prosecution, which it defined as "whoever acts without will and conscience, that is to say, does not have the capacity to understand and intent at the moment of committing the punishable act".<sup>197</sup>

In a Costa Rican case, the Cassation Court overturned the victim-defendant's conviction for trafficking in light of the lower court's failure to assess her actions in the context of her relationship with the trafficker, which involved both an imbalance of power and violence.<sup>198</sup> It found that the victim-defendant had "no margin to act differently" and that, when picking up other victims from the airport under the trafficker's orders, she "never thought that this action constituted a crime".<sup>199</sup>

In the Belgian *T.* case, the Court found that the victim-defendant had engaged in monitoring the other victims "without real autonomy due to the degree of control exercised over her by the traffickers".<sup>200</sup> It qualified her acts as stemming from "beyond a position of dependence, to a simple instinct for survival".<sup>201</sup>

In the U.S. case of *People v. Cross*, the California Court of Appeal found that the lower court "expressly, clearly, and unambiguously found that the trafficker inflicted violence on [the victim-defendant] to the point [she] did not act willingly but acted under duress".<sup>202</sup> It found that there was substantial evidence to support the magistrate's finding that in their pimping-prostitution relationship, "[the victim-defendant] was under a constant threat of imminent violence" from her "gorilla pimp" who repeatedly beat her.<sup>203</sup> A Dutch first

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<sup>195</sup> Argentina: *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017, p. 32; see also, *C. M. S. y Otros*, Cassation Court, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 50.

<sup>196</sup> Argentina: *Blanco José Constantin y otros*, Expte. No. 72000674, 2014, p. 8.

<sup>197</sup> Argentina: *Blanco José Constantin y otros*, Expte. No. 72000674, 2014, p. 10, defining *Inimputable* as "quien actúa sin voluntad y conciencia, es decir no tiene la capacidad de entender y querer al momento de cometer el acto punible".

<sup>198</sup> Costa Rica, Resolución N° 00930 – 2002, pp. 3, 5.

<sup>199</sup> Costa Rica, Resolución N° 00930 – 2002, pp. 1-3.

<sup>200</sup> Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, p. 26.

<sup>201</sup> Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, p. 26.

<sup>202</sup> U.S., *People v. Cross*, 2019 WL 1306324 (Not Officially Published), p. 10.

<sup>203</sup> U.S., *People v. Cross*, 2019 WL 1306324 (Not Officially Published), pp. 11, 12.

instance court also found that the victim-defendant committed acts of trafficking under the duress of her trafficker/intimate partner.<sup>204</sup>

Courts in several cases also found that victim-defendants had no alternative but to act as they did in cases outside of the intimate partner trafficking context.<sup>205</sup>

## 2. Familial relationship with traffickers

When a trafficker is exploiting an intimate partner or family member, the familial relationship itself may be used to create and perpetuate an exploitative power imbalance. Trafficking as a familial enterprise was apparent in several of the examined cases. These involved: cases in which human trafficking constituted the family business, cases in which family members participated in a larger trafficking network, and cases in which perpetrators trafficked members of their own families.

“Research suggests that a significant number of sex trafficking rings are run by [...] families.”<sup>206</sup> Indeed, this was evident in the examined case law. A large portion of the cases occurred in the context of intimate partners and family relations and did not involve large or complex criminal organisations—although there was some overlap, as described below. This distinct social context, one that challenges human trafficking stereotypes, may have a significant impact on the adjudication of these cases given the distinct nature of the “means” employed.

With respect to familial sex trafficking, it is interesting to note that in the U.S. pimp/prostitution context several decisions referred to use of language that mimics familial relationships. Examples include insistence on victims referring to traffickers as “Daddy,” and other exploited individuals as “wifey” and the whole groups as a “family”.<sup>207</sup> Use of such language attempts to reinforce loyalty and strengthen the psychological ties between a trafficker and victim.<sup>208</sup> It may also reflect the extent of the normalisation of family violence.

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<sup>204</sup> See, e.g., First Instance Court of The Hague, 09/754126-08, 2010, pp. 3, 4, finding that the victim-defendant monitored the other victims under duress from her intimate partner/trafficker.

<sup>205</sup> See, e.g., South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016, p. 54.

<sup>206</sup> Jessica Pomerantz, *Elaboration: Coercive control in sex trafficking*, 2018, p. 5; Carlos Morselli and Isa Savoie-Gargiso, *Coercion, Control, and Cooperation in a Prostitution Ring*, *Annals of the American Academy of Political and Social Science*, vol. 653, 2014.

<sup>207</sup> U.S.: *People v. Deshay*, California Court of Appeals, Case No. C062691, 2011; *U.S. v. Willoughby*, (E.D. Mich), 2007; *U.S. v. Bell*, 2013 WL 12086759, 2013, p. 10, referring to one of the prostituted persons as part of the “family;” *U.S. v. Williams*, Appellate Brief, 2019 WL 1422366 (C.A.4), p. 16; *People v. Aarica S.*, 223 Cal. App. 4th 1480, 2014, p. 1484; ASU, *Trick Roll Study*, p. 3, referring to the “family” or trafficking enterprise.

<sup>208</sup> See, UNICEF, *Domestic Violence and Human Trafficking*, available at:

<https://www.unicefusa.org/stories/domestic-violence-and-human-trafficking/33601>, last checked 27 June 2020.

## g. Trafficking as the family business

In several cases, human trafficking constituted the family business. In these cases, the sexual exploitation of women seemed to be normalized. In other cases, victim-defendants (and the principal traffickers) relied on the participation of family members to support elements of the crime, including recruitment, threatening victims and victims' families, and arranging immigration documents, transport and other logistics.<sup>209</sup> At times, familial participation appeared sporadic or informal, while in other cases the participation of family members was integral to the enterprise.

The *Bar California* case from Argentina involved a human trafficking enterprise that functioned as the family business of a married couple and their nephews.<sup>210</sup> The victims were denied freedom of movement, housed in unhygienic conditions and physically abused, including with a whip. Notably, one of the victim-defendants in the *Bar California* case was the couple's daughter-in-law. She was sold to them at the age of 14. The other victim-defendant engaged in recruitment, managed and cleaned the bar and cleaned the trafficker's home. Her daughters were also exploited by the traffickers.<sup>211</sup>

In a few cases, the victim-defendant was either married to the trafficker or a married couple engaged in sex trafficking. The *Landriel, Daniel y Otros* case, for example, involved inter-generational family trafficking. This included a husband who sexually exploited his wife (the victim-defendant) and their daughter, while their two sons also engaged in trafficking. One of the sons used fraudulent romance as a pattern to traffic minor vulnerable victims. The parents were secondary participants in trafficking their son's "girlfriends" and benefitted economically from their exploitation.<sup>212</sup>

The Italian *JE* case involved a married Nigerian couple who arranged for the travel and entry of two Nigerian girls, one a minor, into Italy for the purpose of sexual exploitation. Financial gain was the sole motive and the Court made reference to their "unscrupulousness and brutal insensitivity".<sup>213</sup> In the U.S. *People v. Deshay* case, the victim-defendant and the trafficker, a couple in their thirties, sexually exploited a 16-year-old whom they met online.<sup>214</sup>

The cases involving larger Nigerian trafficking networks consistently involved the participation of family members in Nigeria and in destination countries. In Nigeria, family members in the examined cases engaged in recruitment, accompanied victims through the required *juju* rituals,<sup>215</sup> conducted *juju* rituals, received wire transfers, threatened and in one case physically harmed family members of victims, and made logistical arrangements for

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<sup>209</sup> See, e.g.: Belgium: First instance court Bruges, B637.L6.961-X7-DF, 2017; *IM*, First instance court Antwerp, Parquet system number 17RA16990, 2018, pp. 8-9; Italy, *IC*, 2019; Germany, District Court Duisburg, 33 KLS 17/18, 2019; Argentina, *Bar California*, 40066/2013, pp. 28-31; South Africa, *State vs. Veeran Palan and Edwina Norris*, Case No: RCD 13/14, 2014, Argentina, *Dulcinea*, Causa nro. 91017032, 2014.

<sup>210</sup> Argentina, *Bar California*, 40066/2013, pp. 3, 6, 7, 31.

<sup>211</sup> Argentina, *Bar California*, 40066/2013, pp. 28-31, 71.

<sup>212</sup> Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>213</sup> Italy, *JE*, Case Number 1081/2019, p. 6.

<sup>214</sup> U.S., *People v. Deshay*, California Court of Appeals, Case No. C062691, 2011.

<sup>215</sup> Voodoo, also referred to as *juju* rituals, are undertaken to bind the victim and often her family members to repay the costs incurred in arranging her trip to Europe.

obtaining necessary travel documents and transportation.<sup>216</sup> In destination countries, family members engaged in transporting and monitoring victims. The number of family members was sufficient in a few cases to constitute a criminal organization for the purpose of aggravating circumstances in many jurisdictions.

In the Belgian *IM* case, the Court noted that the victim-defendant's relatives had recruited the victims in Nigeria, her brother was involved in the transport of victims from Nigeria to Europe, her mother and sister were present at the victims' voodoo ritual, and her sister threatened the victim's mother and sister to pressure the victim to make more money.<sup>217</sup> The Court in the *I.M.* case also found that the only motivation of the victim-defendants was financial gain, although they had been prior victims of trafficking. The Court recognized that one victim-defendant was at a lower level in the organizational hierarchy and she continued to be exploited along with one of the victims.<sup>218</sup> A German case involved the participation of family members of the victim-defendant, who was the principal trafficker, as well as the family members of her intimate partner and of her former intimate partner in Nigeria, functioning as a loosely knit network.

In the South African *State vs. Veeran Palan and Edwina Norris* case, the victim-defendant contacted friends from her hometown through the help of her mother, who was their neighbour. The mother approached the victims with the victim-defendant, their childhood friend, on her cell phone. She also showed the victim pictures of the victim-defendant dressed as hotel cleaning staff, deceiving them as to the nature of the proposed employment.<sup>219</sup> In a Costa Rican case, the Cassation Court noted that the trafficker's sister performed all migration and logistical arrangements.<sup>220</sup>

Pretended affections also constituted the means element of the trafficking offence in cases involving family trafficking enterprises. The Court in the *Dulcinea* case from Argentina found that one of the means used by the traffickers was to pretend affection towards the victims, such as by filming videos together to send to family members in the Dominican Republic.<sup>221</sup> The Court relied on expert testimony of staff of the Office for Escape and Accompaniment of Victims of Trafficking, which explained the more subtle forms of coercion commonly used by traffickers. The expert noted that the "subtle mechanisms to generate trust [...] inhibit the victims' ability to decode the abusive situation".<sup>222</sup>

#### ***h. Trafficking members of the family***

Cases across jurisdictions involved the trafficking of family members for the purpose of sexual exploitation. In these cases, the courts did not delve into the exploitation of family ties and its implications vis-à-vis the definition of human trafficking. In several cases, the

<sup>216</sup> See below for the full citations of the cases examined addressing Nigerian trafficking networks.

<sup>217</sup> Belgium, *I.M.*, First instance court Antwerp, Parquet system number 17RA16990, 2018, pp. 8, 9, 10.

<sup>218</sup> Belgium, *I.M.*, First instance court Antwerp, Parquet system number 17RA16990, 2018, p. 11.

<sup>219</sup> South Africa, *State vs. Veeran Palan and Edwina Norris*, Case No: RCD 13/14, 2014, p. 3.

<sup>220</sup> Costa Rica, Resolución N° 00930 – 2002.

<sup>221</sup> Argentina, *Dulcinea*, Causa nro. 91017032, 2014, p. 23.

<sup>222</sup> Argentina, *Dulcinea*, Causa nro. 91017032, 2014, p. 26. See also, UNODC, *Issue Paper: The role of "consent" in the trafficking in persons protocol*, 2014, pp. 81-82, fn. 137.

traffickers and victim-defendants trafficked their daughters and daughters-in-law,<sup>223</sup> while in others they trafficked their nieces,<sup>224</sup> their sisters<sup>225</sup> and their mother.<sup>226</sup> In other cases, more distant family members were trafficked.

In the *Dezorzi* case from Argentina, the accused was charged with capturing and housing minor and adult victims for the purpose of sexual exploitation by abuse of a situation of vulnerability.<sup>227</sup> One of the victims was her niece; the victim-defendant was the ex-wife of the victim's uncle. Notably, the lower court did not find the capture element of the crime because the victim went freely with the accused, her aunt; it based the charges on other acts.<sup>228</sup>

Similarly, in the Philippines case of *People vs. Ruth Dela Rosa y Likinon, aka "Sally,"* the Court found that the accused did not "recruit" her minor niece, who went willingly with her to meet the male client, although the niece had no idea where they were going. The Court stated that "despite the absence of any explicit agreement, AAA voluntarily went with the accused when the February 2013 incident transpired. With such voluntariness, no act of recruitment can be deduced".<sup>229</sup> The Court based the conviction on the accused's commission of other acts.

In both the *Dezorzi* and *People vs. Ruth Dela Rosa y Likinon, aka "Sally,"* cases, the courts' reading of the familial relationship masked the apparent abuses of trust. The approach of the courts in these cases, which included child victims, mitigated against a finding of an element of the crime of human trafficking. Significantly, in both cases, the courts' finding turned on the consent of a minor to go with her aunt, demonstrating the ways in which consent continues to manifest as an obstacle to victims' access to justice in human trafficking cases, despite clear recognition of consent as irrelevant in the texts of the decisions, especially as applied to minors.<sup>230</sup> In the Philippines case, the victim's voluntary decision to go with her aunt was also the basis of the Court's refusal to award civil damages for moral or mental suffering.<sup>231</sup>

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<sup>223</sup> Argentina: *Ledesma*, Sentencia No. 457; *Bar California*, 40066/2013; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa nº 2.559, nº, CFP 7677/2014/TO1, 2018.

<sup>224</sup> Belgium, First instance court Bruges, B637.L6.961-X7-DF, 2017, p. 27; Argentina: *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa nº FCB 53200033/2012/T01/CFC1, 2017; *Dulcinea*, Causa nro. 91017032, 2014; Philippines, *People vs. Ruth Dela Rosa y Likinon, aka "Sally,"* Criminal Cases Nos 13-9820 and 13-9821, 2013; South Africa: *Mabuza and Chauke*, SHG 9 / 13, 2016.

<sup>225</sup> South Africa: *Mabuza and Chauke*, SHG 9 / 13, 2016; Colombia, *Roldán Giraldo*, Case No. 66-01-60-00035-2006-01458.

<sup>226</sup> Colombia, *Roldán Giraldo*, Case No. 66-01-60-00035-2006-01458.

<sup>227</sup> Argentina, *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa nº FCB 53200033/2012/T01/CFC1, 2017, p. 4.

<sup>228</sup> Argentina, *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa nº FCB 53200033/2012/T01/CFC1, 2017, p. 6. Significantly, the victim-defendant had also experienced prostitution along with the victims.

<sup>229</sup> Philippines, *People vs. Ruth Dela Rosa y Likinon, aka "Sally,"* Criminal Cases Nos 13-9820 and 13-9821, 2013, pp. 18-19.

<sup>230</sup> Philippines, *People vs. Ruth Dela Rosa y Likinon, aka "Sally,"* Criminal Cases Nos 13-9820 and 13-9821, 2013, pp. 20-21.

<sup>231</sup> Philippines, *People vs. Ruth Dela Rosa y Likinon, aka "Sally,"* Criminal Cases Nos 13-9820 and 13-9821, 2013, p. 21.

The South African case of *Mabuza and Chauke* involved a fugitive perpetrator, referred to as "Aunt Juliet", who had trafficked her younger sister named Violet. Violet was trafficked as a very young girl from Mozambique for the purpose of sexual exploitation by a 62-year-old owner of a remote timber farm in South Africa. Once Violet reached puberty and was no longer of sexual interest to the owner, she assisted Aunt Juliet to traffic her nieces and other girls from Mozambique, all under the age of 12, for the same purpose. Aunt Juliet escaped and Violet, the victim-defendant, was charged and convicted.<sup>232</sup> Notably, in the case, the Court found that the victim-defendant believed that she "had no other choice but to abide with the arrangement".<sup>233</sup>

The Colombian case *Roldán Giraldo* involved a mother-daughter human trafficking enterprise in which other family members were trafficked. The victim-defendant trafficked her sister and her sister-in-law from Colombia to Singapore for the purpose of sexual exploitation.<sup>234</sup>

The *Ledesma* case in Argentina involved a female victim-defendant who had brought her daughters from the Dominican Republic to be engaged in prostitution in the bar that she managed.<sup>235</sup> The victim-defendant had previously engaged in prostitution there, but had improved her position upon becoming romantically involved with the pimp/bar owner, named Ledesma. According to interviews undertaken by the Office for Trafficking Victim Rescue and Assistance, within a week of their arrival in Argentina the victim-defendant's teenage daughters were channelled to the brothel. The victim-defendant also facilitated the arrival of another woman from the Dominican Republic, with whom she had an extended family relation, as well as a friend of her daughter's.<sup>236</sup> The Court found her testimony credible when she declared herself innocent. It found her testimony that she brought her children to Argentina for the purpose of family reunification and to improve their economic situation credible, and acquitted her *in dubio pro reo*.<sup>237</sup>

Similarly, "Nigerian traffickers, particularly during the recruitment phase, are relatives, friends, boyfriends or husbands of the victims".<sup>238</sup> A Belgian case involving a large Nigerian trafficking organisation also made reference to a female victim-defendant trafficking her niece to be exploited by her boyfriend, as well as to death threats by the traffickers against two other victims, an aunt and her niece.<sup>239</sup>

The trafficking of family members for the purpose of sexual exploitation raises the issue of the normalisation of sexual exploitation in the context of existing structural economic possibilities for particular classes of people, especially poor women.

<sup>232</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016.

<sup>233</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016, p. 54.

<sup>234</sup> Colombia, *Roldán Giraldo*, Case No. 66-01-60-00035-2006-01458, pp. 2, 15. The court repeatedly refers to Roldán Giraldo as the mother of Hernández Tabares.

<sup>235</sup> Argentina, *Ledesma*, Sentencia No. 457.

<sup>236</sup> Argentina, *Ledesma*, Sentencia No. 457, pp. 18, 23.

<sup>237</sup> Argentina, *Ledesma*, Sentencia No. 457, pp. 25, 32.

<sup>238</sup> Eva Lo Iacono, *Victims, sex workers and perpetrators: gray areas in the trafficking of Nigerian women*, Trends in Organised Crime, 110, 2014, p. 113, underscoring that "[k]inship between the victim and the trafficker is common".

<sup>239</sup> Belgium, First Instance Court Bruges, B637.L6.961-X7-DF, 2017, pp. 27, 30.

The first instance decision in the *Dezorzi* case described the victim-defendant's situation as a "difficult reality" limited by her intellectual abilities. It noted that the victim-defendant did not think she did anything wrong, as she believed that offering sex for money was a normal way of earning a living. The Court described this as a "cultural pattern conditioned by an erroneous scale of values" and emphasised her confusion over the charges.<sup>240</sup> In several of the examined cases, the courts in Argentina have refused to criminalize impoverished women who have engaged in acts of sexual exploitation involving family members and others as a means of economic survival, when they themselves have been victims of sexual exploitation.

### 3. Victim-defendants acting alone

A few of the identified cases involved victim-defendants apparently acting on their own, outside of the context of a criminal organization, and/or taking a leading/sole role in the trafficking enterprise.<sup>241</sup> In such cases, economic gain appeared to be the driving factor, although in some of these cases the female victim-defendants were themselves sexually exploited.<sup>242</sup> In other cases, the "profit motive" was in reality a survival strategy.<sup>243</sup>

In the Australian *Watcharaporn Nantahkuhm* case, the Court found that the victim-defendant was the principal trafficker in a small-scale unsophisticated trafficking enterprise in which she accrued all financial benefits.<sup>244</sup> The Court found that the victim-defendant was motivated by greed, although she supported herself by working in a supermarket.<sup>245</sup> In another Australian case, *Lay Foon Khoo*, the victim-defendant employed the same *modus operandi*, involving debt and confiscation of travel documents, that she had undergone to traffic another Malaysian victim.<sup>246</sup>

In a few cases involving Nigerian trafficking networks, female victim-defendants who were prior victims of trafficking and became *madames* were prosecuted as the principal trafficker, often collaborating with subordinate male partners.<sup>247</sup> A few cases appeared to involve female victim-defendants acting alone, but supported by, or feeding into, a larger criminal organization. For example, in the Italian case, *IC*, the traffickers were found not only to smuggle girls and young women into Europe for the purpose of trafficking them for sexual

<sup>240</sup> Argentina, *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa n° FCB 53200033/2012/T01/CFC1, 2017, p. 8.

<sup>241</sup> Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, Crime, Law and Social Change 72, 53, 2019, p. 61, a study conducted in the Netherlands finding that 94.7% of female victim-defendants committed the offence together with others, and that a majority of the co-offenders were male (75.3%). Strikingly, it found that for 72.7% of the women, their co-offender "was also the man with whom they have or have had a romantic relationship".

<sup>242</sup> Belgium, Correctional facility Antwerp, 2015.

<sup>243</sup> Examples include: Argentina, *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa n° FCB 53200033/2012/T01/CFC1, 2017.

<sup>244</sup> Australia, *Watcharaporn Nantahkuhm*, SSC No. 149, 2012, p. 9.

<sup>245</sup> Australia, *Watcharaporn Nantahkuhm*, SSC No. 149, 2012, p. 12.

<sup>246</sup> Australia, *Lay Foon Khoo*, Document Number M20171128\_1017000571\_WADC\_PERTH\_PART\_0003, 2017.

<sup>247</sup> Belgium, Correctional facility Antwerp, 2015; Germany, District Court Duisburg, 33 Kls 17/18, 2019.

exploitation, but also to procure such young girls for third-party Nigerian *madames* throughout Europe (Belgium, Germany, UK, Italy and Spain).<sup>248</sup>

### III. The “means” element in cases involving female victim-defendants

When addressing the culpability of victim-offenders for their engagement in crimes committed as a direct consequence of being trafficked, or that they were compelled to commit during the course of being trafficked, an examination of the means identified in the underlying crime of trafficking can shed light on the evaluation of their commission of subsequent crimes. This section focuses on the “means” element of the underlying crime of trafficking in which the victim-defendant was the victim.

Article 3(a) of the Trafficking in Persons Protocol defines the “means” as:

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.

Many of the examined cases involved “fraud” and “deception” coupled with other means. These involved scenarios of fraudulent recruitment practices, in which victims were lured with false promises regarding the nature of the jobs they were to fulfil, the amount of money they would make in prostitution, or by fraudulent romance. “Fraud” and “deception” was often coupled with “the threat or use of force” and/or “abuse of position of vulnerability”. At the same time, in several decisions, courts identified evolving “means” which relied less on violent tactics.

An examination of the jurisprudence revealed ways in which the application of the means element of the underlying crime, in particular the use of force, coercion and abuse of a position of vulnerability, together with the issue of consent, are critical to application of the non-punishment principle. In turn, they are important for ensuring the protection of the rights of victim-defendants.

#### A. Threats, use of force and coercion

Most, but not all, of the examined cases involved “threats and use of force and other forms of coercion” as defined in Article 3 of the Protocol. In the cases examined, courts established “coercion” in various ways, with many equating it with “threats and use of force”. In its Issue

<sup>248</sup> Italy, IC, 2019.

Paper: *Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, UNODC spoke to this lack of clarity:

A number of practitioners considered there to be an important distinction between coercion and [abuse of a position of vulnerability]: principally related to the presence or absence of physical force. This interpretation is supported by the definition in the Trafficking in Persons Protocol, which links coercion to the threat and use of force. However, ... many of those interviewed noted that coercion could in fact extend beyond physical force to include threats and practices commonly associated with APOV such as psychological manipulation.<sup>249</sup>

Courts varied in their definitions of “coercion”. The legislation in some countries defines “coercion” in terms of physical force or the threat thereof (and abuse of legal process).<sup>250</sup> Although a statutory standard limited to physical force and the threat thereof was applied in the case of *U.S. v. Bell*, the jury instruction defining the “threat of serious harm” did include “non-physical types of harm” such as psychological, financial or reputational harm”.<sup>251</sup> The application of this formulation in practice was further tempered in the *Bell* case by the “reasonable person” standard, as applied to a person in the victim’s situation.<sup>252</sup> In that case, the Court evaluated coercion as:

threats of any consequences, whether physical or non-physical, that are sufficient, under all the surrounding circumstances, *to compel or coerce a reasonable person of the same background and in the same circumstances* to perform commercial sex acts that the person would not have otherwise been willing to perform.<sup>253</sup> (Emphasis added).

In contrast, the Court in the Belgian *T.* case defined coercion more broadly as including “the continual presence of a monitor, the obligation to reside at one’s place of work without the possibility of leaving, to be under surveillance or constantly accompanied, or to be indebted”.<sup>254</sup>

Other international instruments have defined coercion more broadly to include not only violence and threats, but also deceit and abuse of a position of vulnerability.<sup>255</sup> For example,

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<sup>249</sup> See, UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 73.

<sup>250</sup> For example, The U.S. Victims of Trafficking and Violence Protection Act of 2000 (Section 103 (2)) defines coercion solely in terms of physical harm or restraint or abuse of the legal process:

- (A) threats of serious harm to or physical restraint against any person;
- (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- (C) the abuse or threatened abuse of the legal process.

<sup>251</sup> U.S., *U.S. v. Bell*, 2013 WL 12086759, 2013, p. 15.

<sup>252</sup> The internal U.S. Justice Department guidelines require for the determination of coercion “whether the defendants’ conduct would intimidate and coerce a reasonable person in the victim’s situation to believe he or she must remain in the defendants’ service”. UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 42.

<sup>253</sup> U.S., *U.S. v. Bell*, 2013 WL 12086759, 2013, p. 15.

<sup>254</sup> Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, p. 19.

<sup>255</sup> See, e.g., European Parliament Resolution on trafficking in human beings, Resolution A4-0326/95 of 18 January 1996, OJ C 032, Feb. 5, 1996 (“deceit or any other form of coercion”); Council of Europe 1997 Joint Action

the ECtHR has recently held that the term “force” may encompass subtle forms of coercive conduct.<sup>256</sup> The 2009 UNODC Model Law on Trafficking in Persons indicates that “abuse or any threat linked to the legal status of a person” and “psychological pressure” are both forms of coercion that would satisfy that aspect of the means element.<sup>257</sup> Yet, as observed by UNODC, “[t]here has been little discussion to date about the requisite seriousness or extent of the coercion, deception or fraud that could constitute a “means” for the purposes of the definition of trafficking”.<sup>258</sup>

Many statutory definitions of coercion require “severe” forms of physical violence, or the threat of “serious harm”, in cases of trafficking in an attempt to reflect the “seriousness” of the crime. This mirrors the legislative requirements, still present in some countries, to demonstrate physical injury to establish domestic violence—despite the fact that such requirements have been found to violate the European Convention on Human Rights, as well as the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).<sup>259</sup> They conflict with international standards on violence against women, which call on UN Member States to ensure that all forms of violence against women are criminalized and prohibited,<sup>260</sup> including not only physical and sexual violence, but also economic or psychological violence against women.<sup>261</sup>

The scope and definition of “coercion” thus holds critical relevance for a comprehensive understanding of the trafficking experience, particularly as it relates to victim-defendants. As described in detail in the sections below, trafficking experts have identified forms of coercion employed by traffickers in their *modus operandi* that rely little on the threat or use of force.

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on Trafficking (“coercion, in particular violence or threats, or deceit”); 2000 Committee of Ministers Recommendation (“coercion, in particular violence or threats, deceit, abuse of authority or a position of vulnerability”).

<sup>256</sup> ECtHR, *S.M. v. Croatia*, Application No. 60561/14, 2020, para 301.

<sup>257</sup> UNODC, Model Law against Trafficking in Persons, p. 11.

<sup>258</sup> UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 17.

<sup>259</sup> See, *Balsan v. Romania*, Application No. 49645/09, 2017, para 60, stating:

the ill-treatment of the applicant, which on three occasions caused her physical injuries, combined with her feelings of fear and helplessness, was sufficiently serious to reach the required level of severity under Article 3 of the Convention [prohibiting torture and ill-treatment].

See also, Evan Stark, *From Battered Woman Syndrome to Coercive Control*, Albany Law Review, Vol. 59, 1995, pp. 989, 995, noting that pursuant to this historical approach to domestic violence:

the justice of a woman's response could be measured by the severity of the physical injury which had been inflicted upon her. Threats, fear, minor assaults, and the most basic components of battering, control over money, food, sexuality, and other aspects of daily life, fell outside the range of court protection. The courts defined only the most severe injury as worthy of protection, excluding the vast majority of battering situations, namely those where entrapment and fear motivate retaliation. The result was that legal intervention effectively legitimized the most common forms of domestic violence.

Further observing that “[p]unishing only the most heinous cases of wife-abuse set normative boundaries around female subordination, thereby leaving its essential dynamic undisturbed.”

<sup>260</sup> United Nations updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/Res/65/228, annex, para. 14 (b).

<sup>261</sup> See, *inter alia*, United Nations Declaration on the Elimination of Violence against Women, A/Res/65/52/86, annex; Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

## B. Coercive control

“Coercive control” is a term increasingly used in the field of domestic and intimate partner violence and sex trafficking. It has shifted the understanding of these crimes from offending primarily involving violent incidents, to offending that includes a wider “pattern of coercion and control”.<sup>262</sup> Coercive control has been defined as: “[a] strategic course of oppressive conduct that is typically characterised by frequent physical abuse and sexual coercion in combination with tactics to intimidate, degrade, isolate and control victims”.<sup>263</sup> By focusing on patterns of violence, intimidation and control, the concept of coercive control emphasises the relevance of “minor” assaults and other tactics, such as “stalking, death threats, isolation, and control over material necessities (food, transportation, money)”.<sup>264</sup> It also draws attention to “entrapment” of victims, and conduct that otherwise deprives them of their liberty and self-determination. Coercive control was first criminalized in the U.K. in 2015 and has since been made an offence in a number of other countries.<sup>265</sup>

Studies have demonstrated that forms of coercive control are present in the vast majority of domestic and intimate partner violence cases.<sup>266</sup> Use of coercive control is also documented in the context of trafficking for the purposes of sexual exploitation in the pimp/prostitution context.<sup>267</sup>

The concept of coercive control takes a gendered approach. It is often understood as the central means by which men undermine women’s capacity for, and exercise of, independent decision-making. It is specifically grounded in women’s structural subordination in their cultures and societies, rather than on instances of episodic violence. As a concept, it reflects male offenders’ exploitation of persistent gendered inequalities in society and the economy and the distribution of gender roles and responsibilities. This exploitation relies on women’s

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<sup>262</sup> Evan Stark, *From Battered Woman Syndrome to Coercive Control*, Albany Law Review, Vol. 59, 1995, p. 975.

<sup>263</sup> Stark, E. ‘The dangerousness of danger assessment’, *Domestic Violence Report*, Vol. 17, No 5, pp. 65-69, 2012.

<sup>264</sup> Evan Stark, *From Battered Woman Syndrome to Coercive Control*, Albany Law Review, Vol. 59, 1995, p. 983.

<sup>265</sup> The U.K. has defined the terms controlling and coercive as follows:

Controlling behaviour is: a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Coercive behaviour is: a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.

U.K. Home Office, *Controlling or Coercing Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework*, 2015.

<sup>266</sup> The estimates vary between 80-95% of domestic violence cases. See, e.g., New York State, Office for the Prevention of Domestic Violence, available at: <https://opdv.ny.gov/professionals/abusers/genderandipv.html>; U.K. Women’s Aid, <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/>, citing Kelly, L., Sharp, N. and Klein, R. (2014) *Finding the Costs of Freedom How women and children rebuild their lives after domestic violence*. London: [Child and Woman Abuse Studies Unit](#) and [Solace Women’s Aid](#), p. 19.

<sup>267</sup> Nicole, C. Bassil, *Coercive control in sex trafficking relationships: Using exhaustion to control victims*, 2019, p. 3; Jessica Pomerantz, *Elaboration: Coercive control in sex trafficking*, 2018.

subordination to protect and extend male offenders' privileged access to money, sex, leisure time, domestic service and other benefits.

The concept of coercive control falls squarely within the definition of the means element of human trafficking articulated in the Trafficking in Persons Protocol. As such, it can be extended to apply to human trafficking cases in which the victim-defendant is the intimate partner or family member of the trafficker. Recognition of coercive control as a potential "means" of trafficking would be facilitated by greater attention to, and interrogation of, the dynamics of domestic and intimate partner relationships by courts and other actors in criminal justice systems.

In this regard, it is interesting to note that during discussions concerning "abuse of authority" (an earlier, alternative formulation) in the *travaux préparatoires* to the Trafficking in Persons Protocol, drafters noted that the term "should be understood to include the power that male family members might have over female family members in some legal systems and the power that parents might have over their children".<sup>268</sup> The concept of control is also present in the Trafficking in Persons Protocol in the term "the giving or receiving of payments or benefits to achieve the consent of a person having control of another person," which may refer to legal (parental) or *de facto* control.<sup>269</sup>

In contexts in which there is a "romantic" or familial relationship between the trafficker and the victim, coercive control appears to be a significant aspect of the means used by traffickers not only to traffic victims, but to get victims to engage as co-perpetrators. It can involve a diverse range of acts, generally characterized in terms of what perpetrators prevent women from doing for themselves, rather than as what they are doing to the women. These behaviours include:

- isolating victims from their support systems,
- monitoring victims' activities,
- denying freedom and autonomy,
- humiliation and degrading treatment,
- limiting access to money,
- reinforcing traditional gender roles,
- jealous accusations,
- regulating sexuality, and
- threatening children.

All of the above-listed behaviours were present in many of the cases involving sexual exploitation in the context of intimate partner relationships and/or familial trafficking. The Annexes to this study include a trafficking power and control wheel adapted from the one employed to understand domestic and intimate partner violence. The following sections provide a few examples from the cases examined, demonstrating the use by traffickers of coercive control as the means of perpetrating the crime.

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<sup>268</sup> Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Organized Crime and the Protocols thereto, p. 343, n. 20.

<sup>269</sup> See, UNODC, *Issue Paper: Abuse of a position of vulnerability and other "means" within the definition of trafficking in persons*, p. 18.

## 1. Isolation and monitoring

Traffickers often isolated their victims by transporting them for the purpose of exploitation away from their homes. This included, for example, moving them from state to state, taking away their cell phones<sup>270</sup> and prohibiting them from talking to other men or boys.<sup>271</sup> In the Belgian *T.* case, the Court noted that the traffickers constantly changed the victims' location within and across countries in Europe.<sup>272</sup> In the U.S. case of *Hicks v. Rackley*, the Court found that the trafficker dictated:

who [the victim-defendant] could communicate with and how to do so, and if [she] did not comply, Petitioner would physically or psychologically punish her; and when Petitioner discovered that [the victim-defendant] had been texting boys her age, he dragged her to the bathroom, headbutted her, and choked her with a belt until she passed out.<sup>273</sup>

In addition, in the *M.G. v. State of Florida* case, the victim-defendant was "forbidden to look at other men in the eye, could not have any friends, and all of her activities and interactions were controlled. If she broke any of these rules, Valdes would beat her in front of the other women".<sup>274</sup> These cases and others demonstrate that, similar to domestic abusers, traffickers intentionally isolate victims to increase and maintain their control over them. One study indicated that "traffickers were the primary source of emotional support for the victims, due to the extreme isolation from their family and friends,"<sup>275</sup> thus generating what one court referred to as "affective dependency".<sup>276</sup> In a number of cases, courts emphasised the intentional exploitation by traffickers of the cultural and linguistic isolation of victim-defendants who were migrants.<sup>277</sup>

Several cases referred to the close monitoring of victims by traffickers. For example, in the *People v. G.M.* case, the Court described the behaviour of the victim's trafficker/husband:

He exercised complete control over her, physically and psychologically, such that her "every move was tracked by [D.S.]" and she was not "allowed" to leave the room or apartment without him. He would often drop her off and pick her up from her jobs, waiting in a car parked outside to make sure she did not go somewhere else.<sup>278</sup>

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<sup>270</sup> U.S., *U.S. v. Bell*, 761 F.3d 90 (8th Cir 2014); Germany, District Court Duisburg, 33 KLS 17/18, 2019.

<sup>271</sup> U.S.: *M.G. v. Florida*, 260 So.3d 1094, 2018, p. 1096; *Hicks v Rackley*, Case No. 16-03270 BLF (PR), (N.D.Ca) 2018, p. 5.

<sup>272</sup> Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, p. 20.

<sup>273</sup> U.S., *Hicks v Rackley*, Case No. 16-03270 BLF (PR), (N.D.Ca) 2018, p. 5.

<sup>274</sup> U.S.: *M.G. v. Florida*, 260 So.3d 1094, 2018, p. 1096.

<sup>275</sup> Nicole, C. Bassil, *Coercive control in sex trafficking relationships: Using exhaustion to control victims*, 2019, p. 13-14, in a study based on wiretapped conversations.

<sup>276</sup> Argentina, *Ledesma*, Sentencia No. 457, p. 11.

<sup>277</sup> See, e.g., Argentina: *Dulcinea*, Causa nro. 91017032; *Soria*, FMP 32005377/2008/TO1, 2017; Bosnia and Herzegovina, *Kučević*, X-KŽ-06/181, 2009; Germany, District Court Duisburg, 33 KLS 17/18, 2019; Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, p. 19.

<sup>278</sup> U.S., *People v. G.M.*, 2011 NY Slip Op 21176, 2011, p. 2.

Studies have also demonstrated traffickers' monitoring and surveillance of victims,<sup>279</sup> finding that "[b]ecause the victim's everyday activities are monitored and controlled, forced compliance without explicit threats becomes a routine occurrence".<sup>280</sup> As noted above, the role played by many victim-defendants in trafficking is to monitor other victims on behalf of their traffickers.<sup>281</sup>

## 2. Limiting access to money

In almost all of the trafficking cases involving commercial sexual exploitation, the traffickers received most if not all money earned by the victim-defendants (and victims).<sup>282</sup> Like monitoring, collecting money from other victims is one of the functions often delegated by traffickers to victim-defendants.<sup>283</sup> In the Belgian *T.* case, the Court observed that the victims all carried very little money with them.<sup>284</sup> Similarly, in the U.S. case of *People v. G.M.*, the trafficker/husband took all of the money the victim-defendant earned from prostitution, as well as from her other jobs.<sup>285</sup> Studies have demonstrated that victims are dependent on traffickers "for basic necessities, such as food, shelter, and finances".<sup>286</sup>

## 3. Jealous accusations and regulating sexual activity

Several cases indicated jealous accusations and attempts to regulate the sexual activity of victim-defendants by their traffickers/intimate partners. For example, the trafficker/intimate partner in the *M.G. v. Florida* case forbid the victim-defendant "to look at other men in the eye, could not have any friends, and all of her activities and interactions were controlled".<sup>287</sup>

In the *Hicks v. Rackley* case, the Court observed the trafficker's jealous and controlling acts,

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<sup>279</sup> Nicole, C. Bassil, *Coercive control in sex trafficking relationships: Using exhaustion to control victims*, 2019, p. 3, in a study based on wiretapped conversations.

<sup>280</sup> Jessica Pomerantz, *Elaboration: Coercive control in sex trafficking*, 2018, p. 7; see also, Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>281</sup> See, e.g., Netherlands, First Instance Court of The Hague, 09/754126-08, 2010; Serbia, K-133/11, High Court in Novi Sad, 2012, pp. 4, 5; Argentina: *Sanfelippo*, Causa No. 15-554, 2014, p. 29; *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017, pp. 3, 27, 28; *Ledesma*, Sentencia No. 457; U.S., *People v. Deshay*, California Court of Appeals, Case No. C062691, 2011, p. 1, in which the victim-defendant was charged with supervising and aiding a prostituted person; Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, pp. 10, 19.

<sup>282</sup> See, e.g., U.S.: *M.G. v. Florida*, 260 So.3d 1094, 2018, p. 1096, noting the victim-defendant had to have sex with between 5-10 men per day to meet the trafficker's daily quota of \$1000; Netherlands, First Instance Court of The Hague, 09/754126-08, 2010; Germany, District Court Duisburg, 33 Kls 17/18, 2019; Serbia, K-133/11, High Court in Novi Sad, 2012; Canada: *R. v. Robitaille*, [2017] O.J. No. 5954; *R. v. Majdalani*, 2017 ONCJ 145, 2017; Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018; Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, pp. 12, 14.

<sup>283</sup> U.S., *People v. Deshay*, California Court of Appeals, Case No. C062691, 2011, p. 5.

<sup>284</sup> Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, pp. 6, 18.

<sup>285</sup> U.S., *People v. G.M.*, 2011 NY Slip Op 21176, 2011, p. 2.

<sup>286</sup> Nicole, C. Bassil, *Coercive control in sex trafficking relationships: Using exhaustion to control victims*, 2019, p. 13-14, in a study based on wiretapped conversations.

<sup>287</sup> U.S.: *M.G. v. Florida*, 260 So.3d 1094, 2018, p. 1096.

including dictating:

who she could communicate with and how to do so, and if Antoinette did not comply, Petitioner would physically or psychologically punish her; and when Petitioner discovered that Antoinette had been texting boys her age, he dragged her to the bathroom, headbutted her, and choked her with a belt until she passed out.<sup>288</sup>

Notably, in that case, the perpetrator claimed that the violence exerted against the victim stemmed out of tensions and jealousy from their romantic relationship, and was not used as a form of control for the purpose of exploiting her. The Court disagreed and affirmed the trafficking conviction.<sup>289</sup>

## 4. Threatening children

Traffickers who were victim-defendants' husbands, intimate partners or fraudulent intimate partners threatened children as a means of exercising control in several cases.<sup>290</sup> For example, threats to the victim-defendants' children were a tactic used by the trafficker in the *U.S. v. Bell* case. The trafficker engaged in fraudulent romantic relationships with all of the victims in that case.

In the *Landriel, Daniel y Otros* case from Argentina, after the victim fled following a severe beating from the principal trafficker (also her intimate partner), he disappeared with their 20-month-old daughter and refused to let the victim see their daughter until she promised to return to him. This continued for 10 months until a police raid located the child and returned her to her mother.<sup>291</sup>

## 5. Summing up on coercive control

The examined cases are replete with diverse examples indicative of the use of coercive control. For example, one Dutch case made reference to the violence, threat of violence and control exercised by the trafficker over the victim-defendant, who was his intimate partner. It described the behaviour of the accused as “systematic oppression ... intended to break down possible resistance on the part of the women, and to prevent them from quitting prostitution or working for themselves”.<sup>292</sup>

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<sup>288</sup> U.S., *Hicks v. Rackley*, Case No. 16-03270 BLF (PR), (NDCA 2018), p. 5.

<sup>289</sup> U.S., *Hicks v. Rackley*, Case No. 16-03270 BLF (PR), (NDCA 2018), p. 6. This defence was also put forward in the *Landriel, Daniel y Otros* case, which asserted that the violence experienced by the victims constituted domestic violence and not the “means” to ensure their sexual exploitation. The court disagreed. See, Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>290</sup> Serbia, K-133/11, High Court in Novi Sad, 2012, p. 27; U.S.: *People v. G.M.*, 2011 NY Slip Op 21176, 2011, p. 2; *U.S. v. Bell*, 2013 WL 12086759, 2013, p. 6. Threatening of children also occurred in the cases involving Nigerian trafficking networks. See, e.g., Belgium: First instance court Bruges, B637.L6.961-X7-DF, 2017, p. 46; *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, p. 26.

<sup>291</sup> Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>292</sup> Netherlands, First Instance Court of The Hague, 09/754126-08, 2010.

In that case both the Cassation and Supreme Courts of the Netherlands rejected the victim-defendant’s claim of “psychological force majeure,” which requires a showing of an outside force that the person cannot reasonably and does not have the power to resist. The victim-defendant had argued that she had been misled by the trafficker and was dependent upon and under the influence of him. Due to her “miserable position,” she could not “be expected to resist” and “acting differently was not possible . . . . given her extremely vulnerable position combined with her feelings of falling in love”.<sup>293</sup>

In line with the definition of the term “coercive control”, the courts in Argentina and one in Belgium also referred to violations of the victim-defendants’ self-determination and their inability to act with autonomy.<sup>294</sup>

As a term, “coercion” covers more than simply physical violence. Extending understanding of the term to the behaviours illustrated above is essential to a more accurate appreciation of the many contexts in which trafficking for the purpose of sexual exploitation takes place.

## C. Abuse of a position of vulnerability

The inclusion of “abuse of a position of vulnerability” (APOV) as a means in the definition set forth in the Trafficking in Persons Protocol was intended “to ensure that all the different and subtle ways by which an individual can be moved, placed or maintained in a situation of exploitation were captured”.<sup>295</sup> The *travaux préparatoires* to the Protocol include an interpretative note defining abuse of a position of vulnerability as “any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved”.<sup>296</sup>

Not all countries include abuse of a position of vulnerability in the list of possible means in the definition of the crime. It is not included in the federal anti-trafficking legislation in the U.S., for example.<sup>297</sup> In Belgium and Italy, it constitutes an aggravated circumstance.

<sup>293</sup> Netherlands, Supreme Court, 17/03852, 2018, para 7.

<sup>294</sup> Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018; Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, p. 26.

<sup>295</sup> UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, pp. 2-3, further noting that “its inclusion enabled consensus on whether, and how, the issue of prostitution should be dealt with under the Protocol”.

<sup>296</sup> UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 3, 17-18, observing that “No further guidance is provided and it is unclear what ‘real and acceptable alternative’ actually means or how it is to be applied in practice”.

<sup>297</sup> As observed by UNODC, in U.S. practice, “aspects of victim vulnerability are most often and most closely associated with ‘coercion’ which, in this context, must amount to ‘threat of serious harm’”. In the U.S., vulnerability is thus “an adjective describing someone’s susceptibility to coercion”. UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 40.

## 1. Vulnerability factors

As underscored by UNODC in its *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons* “vulnerability is central to any understanding of trafficking” and that abuse of a position of vulnerability “is an inherent feature of most, if not all, trafficking cases”.<sup>298</sup> Indeed, abuse of vulnerability is a concept that reflects the structural element of human trafficking as the exploitation of society’s most vulnerable. In the context of human trafficking, “vulnerability” typically refers to:

inherent, environmental or contextual factors that increase the susceptibility of an individual or group to being trafficked. These factors are generally agreed to include human rights violations such as poverty, inequality, discrimination and gender-based violence – all of which contribute to creating economic deprivation and social conditions that limit individual choice and make it easier for traffickers and exploiters to operate.<sup>299</sup>

The Brasilia Regulations Regarding Access to Justice for Vulnerable People (Brasilia Regulations) defines “vulnerable people” as: “those who, due to reasons of age, gender, physical or mental state, or due to social, economic, ethnic and/or cultural circumstances, find it especially difficult to fully exercise their rights before the justice system as recognised to them by law”.<sup>300</sup> It lists the following vulnerability categories: “age, disability, belonging to indigenous communities or minorities, victimisation, migration and internal displacement, poverty, gender and deprivation of liberty”.<sup>301</sup>

The UNODC *Issue Paper* identified additional vulnerability factors, such as:

gender (typically being female, but also transgender); sexuality, religious and cultural beliefs; isolation caused through inability to speak the language, lack of social networks; dependency (on employer, family member, etc); threats to disclose information to family members or others; and abuse of emotional/romantic relationships.<sup>302</sup>

The Brasilia Regulations maintains that the “specific definition of vulnerable people in each country will depend on their specific characteristics, and even on their level of social or economic development”.<sup>303</sup> At the same time, “a genuine understanding of vulnerability will ... almost always require situation-specific analysis”.<sup>304</sup>

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<sup>298</sup> UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 3.

<sup>299</sup> UNODC, *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 13.

<sup>300</sup> Section 2(1)(3), Brasilia Regulations.

<sup>301</sup> Section 2(1)(4), Brasilia Regulations.

<sup>302</sup> UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 71.

<sup>303</sup> Section 2(1)(4), Brasilia Regulations.

<sup>304</sup> UNODC, *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 14.

Some of the above-listed vulnerability factors are intrinsic to individual victims, including age, gender, pregnancy and disability. Others are socially determined or constructed, such as poverty, migration status, linguistic isolation, religious and cultural beliefs and familial responsibilities. Although not listed above, many descriptions of the vulnerabilities of victim-defendants involved the economic burden of being the sole provider for their children, parents and ill members of their families. Other cases referenced the lack of education and professional skills.

In the context of trafficking, other vulnerabilities on the list are created by traffickers “in order to maximize control over the victim”.<sup>305</sup> These include: isolation, dependency, lack of social networks, abuse of emotional/romantic relationships and threats to disclose information to family members or others. As described above, these factors correlate with use of coercive control as the “means” element. At the same time, the distinction between the structural determinants creating situations of vulnerability, and proactive abuse of the conditions of such vulnerability, are sometimes blurred or overlap (as evident in the above lists of factors).<sup>306</sup>

Significantly, the case law examined for this study revealed victim-defendants at the intersection of multiple vulnerability factors: gender, age, poverty, limited education, obligations of economic support to their children and other family members, migration status in the country of destination and histories of victimisation.

### ***i. Structural determinants of vulnerability: poverty, migration and gender-based violence***

While the UNODC *Issue Paper* found that “few practitioners noted the distinction between pre-existing and created vulnerabilities,” these distinctions are particularly important for understanding the structural determinants of trafficking. They can also inform our understanding of the overlap between abuse of a position of vulnerability and coercive control as both the means element of the crime and the means of coercing victim perpetration.

Almost all of the examined cases involved female victim-defendants facing circumstances of extreme economic and social vulnerability. These circumstances increased their susceptibility to trafficking or led to abuse of their position of vulnerability. In approximately one-quarter of the cases (13), economic vulnerability was due in part to their obligations as sole providers for their children and other family members.<sup>307</sup>

<sup>305</sup> UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 71.

<sup>306</sup> But see, Miriam Wijkman and Edward Kleemans, *Female offenders of human trafficking and sexual exploitation*, *Crime, Law and Social Change* 72, 53, 2019, p. 65, a study conducted in the Netherlands finding that “[w]ithout exception all victims were ‘chosen’ because of their economic vulnerability”.

<sup>307</sup> Namibia, *Johanna Lukas*, High Court of Namibia, (CC 15-2013) [2015] NAHCMD 186, paras 22, 28; Australia, *Watcharaporn Nantakuhm*, SSC No. 149, 2012, p. 6; *C. M. S. y Otros*, Cassation Court, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 45; *Blanco José Constantin y otros*, Expte. No. 72000674, 2014, p. 8; *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa n° FCB 53200033/2012/TO1/CFC1, 2017, as sole provider for her

In the examined cases with a transnational element,<sup>308</sup> courts consistently referred to the irregular migration status of the female victims and victim-defendants, noting how linguistic and cultural challenges, among other factors, serve to isolate victims and prevent their escape.

Courts in Argentina consistently found migration as a significant factor in the vulnerability of victims and victim-defendants, defining the situation of irregular migrants as institutionalized social and political exclusion. For example, in the *Dulcinea* case, the Court underscored how migration exacerbated the vulnerability of the victims, given their lack of geographic, institutional and legal knowledge (how to find help). This was compounded by their lack of money and family ties. The migration status of the victims and its consequences were also identified as part of the traffickers' means of creating control over the victims.<sup>309</sup> Courts in decisions examined from Argentina also found that the perceived illegality of prostitution among migrant women impacted their perceptions of their ability to escape and other help-seeking behaviours.

Courts have found isolation, dependency stemming from irregular migrant status, and linguistic barriers to all constitute grounds for findings of vulnerability. Migrants' inability to speak the local language was also highlighted by courts in Belgium and Germany. Linguistic and cultural differences were further noted as a challenge in ensuring migrant victims' access to justice in South Africa, particularly with respect to testifying.<sup>310</sup>

As detailed above, the case law indicated that a large majority of the victims suffered prior forms of gender-based violence including: sexual and domestic violence, human trafficking and early/forced marriage. In approximately one-quarter of the cases (15), the decision attributed the victims' vulnerability to their prior and/or contemporaneous victimisation from one of the above-listed forms of violence.<sup>311</sup>

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daughter, whose father was incarcerated; *Dulcinea*, Causa nro. 91017032, 2014, pp. 47, 48; *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017; *Ledesma*, Sentencia No. 457, pp. 22, 30, providing for her daughter in Paraguay; *Ledesma*, Sentencia No. 457, pp. 7-10, 26, 27, describing her "obvious situation as an immigrant responsible for her family located in a far away country"; *Soria*, FMP 32005377/2008/TO1, 2017, pp. 41-42; Canada, *R. v. Majdalani*, 2017 ONCJ 145, 2017; U.S., *U.S. v. Bell*, 2013 WL 12086759, 2013.

<sup>308</sup> Alexandra Louise Anderson Baxter, *When the line between victimization and criminalization blurs: The victim-offender overlap observed in female offenders in cases of trafficking in persons for sexual exploitation in Australia*, *Journal of Human Trafficking*, 2019, p. 3, noting that all of the female victim-defendants in Australia examined were migrants from South East Asia.

<sup>309</sup> See, e.g., Argentina, *Dulcinea*, Causa nro. 91017032, pp. 11, 12, 42, 51, 52; The Philippines, *People v. Janet Java Onida*, Crim Case No-Q-08-151971, 2013, p. 4, noting the victim had no money and was in a foreign country and was only able to escape after one month.

<sup>310</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, p. 37.

<sup>311</sup> *Watcharaporn Nantakuhm*, SSC No. 149, 2012, pp. 3, 6; Argentina: *C. M. S. y Otros*, Cassation Court, Causa NG CFP 23D/2011/TO1/CFC1, 2018, pp. 5, 46; *Dulcinea*, Causa nro. 91017032, 2014, pp. 47, 78; *Ledesma*, Sentencia No. 457, p. 16; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018; Australia: *DS*, Appeals Court, Victoria, [2005] VSCA 99, para 7; Canada, *R. v. Robitaille*, [2017] O.J. No. 5954; Germany, District Court Duisburg, 33 KLS 17/18, 2019; U.S.: *People v. G.M.*, 2011 NY Slip Op 21176, 2011, p. 2; *People v. Aarica S.*, 223 Cal. App. 4th 1480, 2014, p. 1483; *M.G. v. Florida*, 260 So.3d 1094, 2018, p. 1096; *Hicks v. Rackley*, Case No. 16-03270 BLF (PR), (NDCA 2018), p. 6; South Africa, *Mabuza and Chauke*, SHG 9 / 13.

The common features of the vulnerability of the victims and victim-defendants in most of the cases reviewed emphasises the gendered structural constraints at play. These include the traumatic effects of victimisation by multiple forms of gender-based violence. Victim-defendants' ability to exercise self-determination is often severely limited by these constraints.

### **j. Trauma, mental illness and disability**

Individuals with disabilities may be targeted by traffickers because of vulnerability stemming from their disability. Furthermore, victims of human trafficking may develop disabilities as a result of abuse at the hands of their traffickers. Victim-defendants' exposure to violence and coercive control has significant health consequences, including on cognitive development.<sup>312</sup> As described in one study on coercive control and sex trafficking victims: "The unpredictable environment that sex trafficking victims live within is marked by chronic stress, anxiety, and fear. Victims of sex trafficking suffer from higher levels of depression, post-traumatic stress disorder and various other trauma symptoms," including: insomnia, fatigue, aggression, irritability and social withdrawal.<sup>313</sup>

Specific mention was made in a few cases to victims and victim-defendants suffering from psychiatric problems, such as PTSD and other disorders as a consequence of trauma.<sup>314</sup> Expert testimony in the *Dulcinea* and *Landriel, Daniel y Otros* cases from Argentina indicated that victims of sexual exploitation separate their physical and psychic lives. With respect to the victim-defendant in the *Dulcinea* case, an expert noted two attempted suicides in 2011 and a history of traumatic experiences that required psychological and medical treatment.<sup>315</sup> In addition, in the *Cáceres* case, the Court noted that the minor victim had been diagnosed with PTSD due to her trafficking experience.<sup>316</sup> Shared Hope International explains that:

[t]rafficking victimization and the resulting trauma response can uniquely impact a victim's susceptibility to coercion, not only in the context of being coerced into commercial sex, but also in the context of being coerced to commit other crimes. . . . Understanding the nature and power of the coercion that traffickers exert over victims to cause them to engage in trafficking conduct is fundamentally important and must be considered at every stage of the criminal justice process.<sup>317</sup>

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<sup>312</sup> Argentina, *Soria*, FMP 32005377/2008/TO1, 2017, pp. 22, 23, 41-43; Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>313</sup> Nicole, C. Bassil, *Coercive control in sex trafficking relationships: Using exhaustion to control victims*, 2019, p. 18.

<sup>314</sup> U.S., *U.S. v. Bell*, 761 F.3d 900, (8th Cir 2014), noting the victim suffered from psychiatric illness from a young age; Argentina, *Dulcinea*, Causa nro. 91017032, 2014, pp. 49-50, noting two suicide attempts and a history of traumatic experiences that require psychological and medical treatment; Australia, *Lay Foon Khoo*, Document Number M20171128\_1017000571\_WADC\_PERTH\_PART\_0003, 2017, pp. 14, 15; Belgium, Correctional facility Antwerp, 2015, p. 5.

<sup>315</sup> Argentina, *Dulcinea*, Causa nro. 91017032, 2014, pp. 49-50.

<sup>316</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 52.

<sup>317</sup> Shared Hope International, *Responding to Sex Trafficking: Victim-Offender Intersectionality*, 2020, p. iv.

Mental illness and intellectual or developmental disabilities appeared to be inconsistently and inadequately addressed as vulnerability factors for human trafficking in most of the examined cases. A few decisions observed evidence of possible mental disabilities, without explicitly making a finding. For example, courts in the U.S., the Netherlands and in Argentina observed in several cases that victim-defendants appeared to have lower than average levels of intelligence.<sup>318</sup> With the exception of the *Landriel, Daniel y Otros* case, in which extensive screening and testing was conducted related to the victim’s mental disability, in the other cases no mention was made of a court-ordered screening to identify potential disabilities. Such screenings have the aim of ensuring legal capacity, accessibility, and providing necessary reasonable accommodations to guarantee access to a fair trial, consistent with the Convention on the Rights of Persons with Disabilities.<sup>319</sup> In each of these cases, mentally disabled and mentally ill victim-defendants were arrested and detained,<sup>320</sup> prosecuted<sup>321</sup> and in one of the cases convicted and sentenced.<sup>322</sup>

Persons with disabilities may be particularly susceptible to psychological pressure. This may commit crimes under the coercive influence of traffickers and are susceptible to rights infringement related to making statements and pleading guilty.<sup>323</sup> Given the identified rise in the number of trafficking victims with mental or other disabilities,<sup>324</sup> disability determinations should be incorporated more consistently into identification tools and victim assessment forms.

Furthermore, in-depth analysis of the impacts of trauma, mental illness and disability on victim-defendant perpetration should be incorporated, where appropriate, into judicial reasoning. Specific in-court measures should be undertaken to ensure disabled victim-defendants’ access to justice. When combined with age, language limitation, irregular migration status or other vulnerability factors, in addition to having been a victim of trafficking, many of the victim-defendants at issue in this report were extremely vulnerable. There should be increased awareness of intersectional and structural vulnerabilities.

## 2. Abuse of a position of vulnerability

The examined jurisprudence revealed broad recognition of diverse forms of vulnerability across jurisdictions, yet “considerations of ‘abuse of a position of vulnerability’ indirectly

<sup>318</sup> Argentina, *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa nº FCB 53200033/2012/T01/CFC1, 2017; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa nº 2.559, nº, CFP 7677/2014/TO1, 2018; U.S., *U.S. v. Bell*, 761 F.3d 900, (8th Cir 2014); Netherlands, Supreme Court, 17/03852, 2018.

<sup>319</sup> See, Article 13 (access to justice), Article 9 (accessibility) and Article 5(3) (reasonable accommodation to promote equality and eliminate discrimination) of the Convention on the Rights of Persons with Disabilities.

<sup>320</sup> U.S., *U.S. v. Bell*, 761 F.3d 900, (8th Cir 2014).

<sup>321</sup> Argentina, *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa nº FCB 53200033/2012/T01/CFC1, 2017.

<sup>322</sup> Netherlands, Supreme Court, 17/03852, 2018.

<sup>323</sup> U.S.: *U.S. v. Willoughby*, (E.D. Mich), 2007, victim-defendant entered into plea agreement; *People v. Williams*, 783 Fed.Appx. 269, 2019, victim-defendants pled guilty and cooperated with the prosecution; *U.S. v. Brown / Hollis*, US District Court, Eastern District of Michigan, 2:05-cr-80101-AJT-DAS Doc # 39, 2005, p. 2, victim-defendant entered plea agreement; *U.S. v. Britton*, 567 Fed.Appx. 158, 2014, victim-defendant pled guilty.

<sup>324</sup> European Commission, *Study on high-risk groups for trafficking in human beings*, 2015, p. 74.

arise as part of the narrative of the victim’s story”.<sup>325</sup> They are often cast only in terms of susceptibility to trafficking and afforded unclear or limited legal importance. For example, in the *U.S. v. Britton* case, the Court observed in the recitation of the facts only that the trafficker “sold the sexual services of young girls who often had poor home lives, had dropped out of school, had been sexually abused, and had dismal hope for the future”.<sup>326</sup>

At the same time, depending on the jurisdiction, many of the reviewed decisions found APOV to be the “means” of the underlying crime of trafficking.<sup>327</sup> For example, in the *Ledesma* case, the Court extensively addressed the vulnerability of the victims, all of whom economically maintained children and family members who either lived with them or in the Dominican Republic. It observed that they travelled to Argentina with their own savings or by taking out a loan, with the purpose of supporting their families in the Dominican Republic and improving their economic conditions. None of the victims had completed school, none had professional skills, and none had the necessary documentation to work formally in Argentina. The Court concluded that their decisions to come to Argentina and work in the brothel were conditioned by their vulnerability.<sup>328</sup>

The case law in Argentina, where APOV as the “means” element of the crime is discussed, makes repeated reference to the Brasilia Regulations. This grounds the jurisprudence in international standards and increases consideration of the structural discrimination and violence at play. In this regard, it is unique among the countries whose case law was examined for the purpose of this study.

As described in UNODC’s *Issue Paper*, evidentiary requirements to establish APOV as the means element vary. In general, they included: (i) proof of the existence of a position of vulnerability on the part of the victim; and (ii) proof of abuse of that vulnerability as the means by which a particular act (recruitment, harbouring, etc.) was undertaken. However, in practice, the focus of judicial inquiry sometimes rests on establishing the fact of vulnerability only, which in effect:

means that the mere existence of vulnerability may be sufficient to satisfy the means element and thereby help support a conviction. Some countries have established that abuse of, or intention to abuse vulnerability, may be inferred from a defendant’s knowledge of the (proven) vulnerability.<sup>329</sup>

<sup>325</sup> UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, pp. 4, 5, noting that this occurred in countries that have established a “low threshold for determining abuse of vulnerability and/or exploitation”.

<sup>326</sup> U.S., *U.S. v. Britton*, 567 Fed.Appx. 158, 2014, p. 159.

<sup>327</sup> Bosnia and Herzegovina: *Kučević*, X-KŽ-06/181, 2009, pp. 4, 48; Court of BiH, K-71/05, 2006, in addition to the threat and use of force and giving or receiving of payments or benefits to achieve the consent of a person having control over another person; Argentina: *Montoya, Pedro Eduardo y otras*, Causa N° FCR 52019312/2012/T01/18/CFC2, 2018, p. 82; *Bar California*, 40066/2013, pp. 67, 80; *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa n° FCB 53200033/2012/T01/CFC1, 2017, pp. 4, 11, 12; *Dulcinea*, Causa nro. 91017032, 2014, p. 52; *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017; *Ledesma*, Sentencia No. 457, pp. 7-10; *Montoya, Pedro Eduardo y otras*, Causa N° FCR 52019312/2012/T01/18/CFC2, 2018, p. 82; *Soria*, FMP 32005377/2008/TO1, 2017, pp. 70, 87-90; Germany, District Court Duisburg, 33 KLs 17/18, 2019, pp. 8, 11; Netherlands: First Instance Court of the Hague, 09/754126-08, 2010, p. 6.

<sup>328</sup> Argentina, *Ledesma*, Sentencia No. 457, pp. 7-10.

<sup>329</sup> UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition*

The defendant's knowledge of the vulnerability was the basis of decisions on APOV in some of the cases, including from Argentina, Germany and Bosnia and Herzegovina.<sup>330</sup> In the latter case, the Court found that the accused were:

aware of [the victims'] difficult material position resulting from leaving their place of residence, aware that they do not have BiH citizenship and residence permit in BiH, no employment, no accommodation and livelihoods, [and were] hoping to provide funding for this life and legal residence in BiH.<sup>331</sup>

In contrast, in the *Landriel, Daniel y Otros* case from Argentina, the Court found that, in addition to demonstrating the vulnerability of the victims, to establish APOV as the "means" element of the crime it must also be shown that the position of vulnerability was abused "to the point of invalidating the consent of the victim".<sup>332</sup> This approach departs from the Trafficking Protocol, which stipulates that consent is irrelevant.<sup>333</sup>

APOV was contemplated by one court in the U.S. not as the "means" itself, but as a factor in assessing the means. In the case of *U.S. v. Bell*, the Court found that the trafficker targeted vulnerable young women including: those with mental health problems, school drop-outs, single mothers, persons with a substance abuse disorder, persons living in poverty and homeless, persons suffering domestic and child abuse including child sexual abuse, and persons without the support of, or far away from, their families. In that case, the Court found that:

The evidence submitted at trial supports a jury finding that Defendant targeted women who came from broken families, had no home to return to, had mental health issues, were drug abusers, or had other vulnerabilities that made them more susceptible to his promises of love and security and more willing to succumb to his coercive tactics....Based on the evidence in this record, a reasonable jury could have concluded that [the victims] had different vulnerabilities that allowed them to simultaneously fear Defendant and yet seek to stay with him instead of walking away permanently.<sup>334</sup>

Although APOV is not an element of the means in U.S. federal anti-trafficking legislation, on appeal the Court found that the victims' vulnerability was a factor in assessing whether or not they were coerced.<sup>335</sup> Nonetheless, while acknowledging the victims' extreme vulnerability,<sup>336</sup> the Appeals Court did not consider this issue when addressing the criminal

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*of trafficking in persons*, p. 5.

<sup>330</sup> See, e.g., Argentina, *Soria*, FMP 32005377/2008/TO1, 2017, p. 38; Germany, District Court Duisburg, 33 KLS 17/18, 2019, pp. 36, 38; Bosnia and Herzegovina: *Kučević*, X-KŽ-06/181, 2009, p. 6.

<sup>331</sup> Bosnia and Herzegovina: *Kučević*, X-KŽ-06/181, 2009, p. 6.

<sup>332</sup> Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018, pp. 193-194.

<sup>333</sup> UNODC, *Issue Paper: The role of "consent" in the trafficking in persons protocol*, 2014, pp. 84, 85, noting that no further inquiry is required as to their effect on the quality of apparent consent.

<sup>334</sup> U.S., *U.S. v. Bell*, 2013 WL 12086759, 2013, p. 15.

<sup>335</sup> U.S., *U.S. v. Bell*, 761 F.3d 900 2014, p. 913, noting that "at least one [U.S.] court has upheld introduction of vulnerable-victim testimony in a sex-trafficking case when the testimony helped explain why a victim continued to succumb to the defendant's persuasion," citing *U.S. v. Alzanki*, 54 F.3d 994, 1005 n. 10 (1st Cir.1995).

<sup>336</sup> U.S., *U.S. v. Bell*, 761 F.3d 900 2014, p. 908. The court did not consider the impact of the initial arrest of the most vulnerable victim as a perpetrator during the raid.

responsibility of the victim-defendant.

The UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons* highlighted the applicability of APOV to two types of scenarios: “(i) trafficking through emotional manipulation of the victim (for example through an existing or created relationship); and (ii) trafficking through the use of ritual oaths”.<sup>337</sup> The first scenario was found in the examined case law, reflecting practitioners’ findings that “abuse of a position of vulnerability” was not only the easiest “means” to prove, but for those involving abuse of a romantic relationship, it sometimes constituted the only available means.<sup>338</sup> The examined cases revealed an express connection between the use of fraudulent romance and the extreme vulnerability of the victims and victim-defendants. For example, fraudulent romance constituted the means in the *U.S. v. Bell* case and in the *Dulcinea, Bar California* and *Landriel, Daniel y Otros* cases from Argentina, all of which involved victim-defendants trafficked by members of their families using APOV as one of the “means”. Coercive control was also apparent in the facts of these four cases.

The second scenario was observed in the use of voodoo rituals in cases involving Nigerian trafficking networks. These magic rites, grounded in Nigerian culture, are used to obtain “a high level of psychological conditioning” in human trafficking cases.<sup>339</sup> Significantly, they are coupled with the harsh economic living conditions in Nigeria and a “strong patriarchal family structure”.<sup>340</sup> In this way, religious and cultural beliefs can result in increased vulnerability.<sup>341</sup>

The Court in a German case observed that the victims’ testimony regarding the voodoo rituals was “emotionally charged”.<sup>342</sup> Other cases revealed very similar ceremonies, involving the victim providing biological materials, such as pubic hair, blood or nails, or garments.<sup>343</sup> Some victims had to drink the blood or eat the heart of a sacrificed animal, while others suffered incisions on the tongue or other body parts.<sup>344</sup> Victims were threatened with death or illness, including incessant menstruation, if they failed to honour their commitments. Family members also face physical threats and losing possessions they may have offered as

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<sup>337</sup> UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 72.

<sup>338</sup> UNODC, *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 36.

<sup>339</sup> Eva Lo Iacono, *Victims, sex workers and perpetrators: gray areas in the trafficking of Nigerian women*, Trends in Organised Crime, 110, 2014, p. 114.

<sup>340</sup> Eva Lo Iacono, *Victims, sex workers and perpetrators: gray areas in the trafficking of Nigerian women*, Trends in Organised Crime, 110, 2014, p. 114.

<sup>341</sup> UNODC, *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, pp. 15, 39, noting that case law from Nigeria implies that “the taking of ‘juju’ oaths is a coercive means resulting in victims feeling that they have no real or acceptable alternative to submit to the exploitation, though it is not necessarily categorized as ‘deceit’, ‘threat or other particular type of coercion”.

<sup>342</sup> Germany, District Court Duisburg, 33 Kls 17/18, 2019, p. 29.

<sup>343</sup> Belgium: First instance court of Bruges, B637.L6.961-X7-DF, 2017, pp. 38, 41, 45, 50, 51; ; *I.M.*, First instance court Antwerp, Parquet system number 17RA16990, 2018, p. 6.

<sup>344</sup> Germany, District Court Duisburg, 33 Kls 17/18, 2019, pp. 6, 12, 15, 17, 19, 21; Belgium, First Instance Court Bruges, B637.L6.961-X7-DF, 2017.

security.<sup>345</sup> The rituals create an exaggerated sense of obligation and dependency upon the victims.<sup>346</sup>

In a few cases, those conducting voodoo rituals directly threatened the victims and imposed curses on behalf of traffickers, which the victims then had to pay them extra to lift. In one case, the man conducting the rituals was the brother of the principal trafficker.<sup>347</sup>

As observed by the Dutch National Rapporteur, Nigerian victims also often:

face enormous social pressure that prevents them from rebelling against their exploitation. They dare not to return to Nigeria without any money, because their families have often vested all their hopes of a better future in them. The stigma of ‘failure’ is attached to anyone who returns to Nigeria without a story of success in the West (in other words with money).<sup>348</sup>

Notably, UNODC has further observed that, “‘recruitment’ is the act most frequently cited in connection with [abuse of a position of vulnerability]”.<sup>349</sup> The recognized link between the “means” of abuse of a position of vulnerability and the act of recruitment—one of the acts in which victim-defendants are most commonly involved—should both be examined in greater detail and made more explicit in judicial decision-making. The examined cases revealed that female victim-defendants frequently engage in acts of recruitment as part of their gendered roles in human trafficking enterprises. Traffickers’ delegation of the role of recruitment can be attributed to victim-defendants’ gender, social status and linguistic, geographical and cultural ties to other vulnerable persons susceptible to being trafficked (as nationals of the same country, as current or formerly prostituted persons, etc).

APOV as the “means” element of the crime has significant relevance for the cases examined for this study. It was applied to the findings related to the “means” of trafficking for the victim-defendants as victims, as well as for trafficking that the victim-defendants were charged with committing. It further reflects the gendered and other structural discrimination that underlies the crime of trafficking. As detailed more extensively below, however, a finding of APOV as the “means” element of the crime has important, and potentially negative, implications for the application of the non-punishment principle.

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<sup>345</sup> Belgium: First instance court of Bruges, B637.L6.961-X7-DF, 2017, pp. 27, 28, 30, 46, 50, 51; Correctional facility Antwerp, 2015, pp. 7, 9; *E.G.*, Parquet system number 18G1175, 2018, p. 10; *I.M.*, First instance court Antwerp, Parquet system number 17RA16990, 2018, pp. 8, 9; Germany, District Court Duisburg, 33 KLs 17/18, 2019, pp. 6, 40, 41; Italy, *IC*, 2019, p. 77; see also, *Trafficking in Human Beings: Seventh Report of the Dutch National Rapporteur*, 2010, pp. 361, 362, stating: “Victims do not dare to escape during the period of their sexual exploitation, mainly because of the fear instilled in them by the voodoo ritual they went through. They believe that they will go crazy or die if they do not repay the debt and so fail to honour the contract.”

<sup>346</sup> Eva Lo Iacono, *Victims, sex workers and perpetrators: gray areas in the trafficking of Nigerian women*, Trends in Organised Crime, 110, 2014, p. 120.

<sup>347</sup> Italy, *IC*, 2019; Italy, *JE*, Case Number 1081/2019.

<sup>348</sup> *Trafficking in Human Beings: Seventh Report of the Dutch National Rapporteur*, 2010, p. 362.

<sup>349</sup> UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, p. 4.

## D. Changes in *modus operandi*

Findings of various courts in the cases examined revealed growing recognition of changes in the *modus operandi* of traffickers. They relied less on overtly coercive techniques and used more subtle methods, including as a means to protect themselves from criminal liability. For example, in the *Ledesma* case, the Court referenced the expert testimony of the Office of Victim Assistance qualifying the perpetrator's "kindness" as a *modus operandi* to avoid prosecution, and as a way of "taking care of themselves".<sup>350</sup> The Court agreed that the help provided by the perpetrator to the victims (e.g., lending them money to purchase basic appliances) functioned as a form of control. It found that, by ensuring that the victims were given their basic needs, the traffickers were able to maintain control over the victims and continue their situation of exploitation.

Similarly, in the *S.M. v. Croatia* case, the ECtHR recently found that investigations into human trafficking "required a careful and subtle assessment in the context of the 'means' element of human trafficking".<sup>351</sup> Studies have also found that "the ability to identify and prosecute commercial sexual exploitations increases in difficulty as the methods and tactics used by these exploiters are more implicit".<sup>352</sup>

These recognised changes in *modus operandi*—reflective of both the extreme vulnerability of many victims as well as traffickers' explicit efforts to avoid detection and criminal liability—must be adequately taken into consideration when adjudicating the "means" of trafficking and the criminal responsibility of victim-defendants. This is a particular issue in jurisdictions that require more severe forms of threats or uses of force, or other forms of physical coercion, to establish trafficking.

## IV. Application of non-punishment principle

This section details the international standards on the non-punishment principle in human trafficking, its implementation at the national level, and its application to female victim-defendants. It covers some distinct national legislative approaches and issues that have arisen in the examined jurisprudence on their application. It should be noted that, in some jurisdictions, statutory provisions were introduced following adjudication of the case law examined. As such, it must be stressed that the following section is not an attempt to map general applications of the non-punishment principle. Rather, it provides an overview of key aspects of judicial decision-making in cases involving victim-defendants.

UNODC has described the non-punishment principle broadly as encapsulating "the notion that trafficked persons should not be subject to arrest, charge, detention or prosecution, or be penalized or otherwise punished for illegal conduct that they engaged in as a direct

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<sup>350</sup> Argentina, *Ledesma*, Sentencia No. 457, pp. 27-29.

<sup>351</sup> ECtHR, *S.M. v. Croatia*, Application No. 60561/14, 2020, para 332.

<sup>352</sup> Jessica Pomerantz, *Elaboration: Coercive control in sex trafficking*, 2018, p. 5.

consequence of being trafficked”.<sup>353</sup> Member States from all regions have taken specific steps to implement the non-punishment principle. At the same time, while the international community has continued to develop and refine guidance on the principle, its implementation remains uneven.

Although it does not appear in the Trafficking in Persons Protocol, the non-punishment principle is at the forefront of any consideration of prosecution of victim-defendants. International standards developed outside the Protocol itself recognise the principle of not punishing victims of human trafficking for crimes they were compelled to commit or that were committed as a consequence of their situation as a trafficked person. As described by the UN Special Rapporteur on trafficking in persons, especially women and children:

the right to non-punishment can be considered as ‘the beating heart’ of victim’s human rights protection at the international, regional, and domestic level. It must be given high-level prominence since it relates to the unassailable legal right of the victim to be protected by law.<sup>354</sup>

The non-punishment principle is considered as justified because:

the punishment of victims of trafficking for crimes they committed directly related to their trafficking is a denial of justice and that it blames victims for crimes they would not have committed but for their status as trafficked persons. Underlying this justification is the notion of free choice and, specifically, that trafficked persons who commit crimes in connection with their trafficking are not acting freely. To punish someone in such circumstances would be a departure from a long-established criminal law principle, common to legal systems around the world, that only those who engage in criminal behaviour of their own free choice should be subject to punishment by the State. Under this approach, it is not merely the status of the person (i.e., victim of trafficking) that anchors the principle. This would amount to providing blanket immunity to victims of trafficking, which was not intended when the principle was first articulated. Rather, it is the fact that trafficked persons may commit crimes as a result of force or other types of coercion at the hands of traffickers, which shows that they have acted in an involuntary manner.<sup>355</sup>

In several cases examined for this study, the courts explicitly recognised this “but for” causation; that is, but for the (male) trafficker, the victim-defendant would not have

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<sup>353</sup> UNODC, Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked, CTOC/COP/WG.4/2020/2, paras 9-11 and reference therein to Inter-Agency Coordination Group against Trafficking in Persons, “Non-punishment of victims of trafficking”, issue brief No. 8 (2020).

<sup>354</sup> UN Special Rapporteur on trafficking in persons, especially women and children, *The importance of implementing the non-punishment provision: the obligation to protect victims*, 2020, para 9.

<sup>355</sup> UNODC, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*, CTOC/COP/WG.4/2020/2, para 20, citing OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, 2013, p. 10 and referencing OHCHR, *Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations publication, Sales No. E.10.XIV.1), pp. 132–133.

engaged in acts of perpetration.<sup>356</sup> Even prior to the enactment of a non-punishment provision,<sup>357</sup> the magistrate judge in the *People vs. Cross* case asked the prosecutor: "Would [the victim-defendant] have done that conduct without the male in the picture at all?" Later in the proceedings he states:

We're going to potentially send someone away for life in prison on a [section] 209 when she is that entrenched as a victim of human trafficking because she walked up some stairs at the direction of a male. I mean, doesn't that give you pause, I mean, as a human being? . . . I can't do it and I am not going to do it.<sup>358</sup>

A concurring opinion in a case from Argentina also explicitly found that "but for" the influence of the male perpetrator, the victim-defendant would not have engaged in acts of perpetration.<sup>359</sup>

## A. International standards on non-punishment

The non-punishment principle is contained in the OHCHR's 2002 *Recommended Principles and Guidelines Principles and Guidelines on Human Rights and Human Trafficking*. Principle 7 provides that:

[t]rafficked persons shall not be **detained, charged or prosecuted** for the illegality of their entry into or residence in countries of transit and destination, **or for their involvement in unlawful activities** to the extent that such involvement **is a direct consequence of their situation as trafficked persons**. (Emphasis added)

Similarly, Guideline 4(5) provides that States should consider:

[e]nsuring that legislation prevents trafficked persons from being **prosecuted, detained or punished** for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons. (Emphasis added).

In 2010, the UN General Assembly affirmed the non-punishment principle and urged Member States, as appropriate and taking into account all relevant international legal instruments, in particular the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, "to refrain from penalizing victims who have been trafficked for having

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<sup>356</sup> Notably, these decisions come from jurisdictions that take a "duress-based" approach (the *People v. Cross* case was decision on the basis of duress prior to the passage of non-punishment legislation) and a "causation-based" approach (Argentina), respectively. See UNODC, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*, CTOC/COP/WG.4/2020/2, paras 59-62.

<sup>357</sup> U.S., *People v. Cross*, 2019 WL 1306324 (Not Officially Published), fn.3. The trial in the *People v. Cross* case took place during the summer of 2016. About the time the trial ended, the Legislature enacted section 236.23, which offered human trafficking victims an affirmative defense to certain crimes they were coerced into committing. Section 236.23 became effective January 1, 2017.

<sup>358</sup> U.S., *People v. Cross*, 2019 WL 1306324 (Not Officially Published), p. 6.

<sup>359</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 60, concurring opinion of Judge Angela Ledesma.

entered the country illegally or for having been involved in unlawful activities that they were forced or compelled to carry out”.<sup>360</sup> Calls for Member States to take action to implement the non-punishment principle can also be found in General Assembly Resolution 64/293 and Security Council Resolutions 2331 (2016) and 2388 (2017).

Unlike the Protocol, the 2005 Council of Europe Convention on Action against Trafficking (CoE Convention) in Human Beings expressly incorporates the non-punishment principle. Article 26 states:

Each Party shall, in accordance with the basic principles of its legal system, **provide for the possibility of not imposing penalties** on victims for their involvement in unlawful activities, **to the extent that they have been compelled to do so.** (Emphasis added).

Article 14(7) of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children reads:

Each Party shall, subject to its domestic law, rules, regulations and polices, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are **directly related** to the acts of trafficking. (Emphasis added).

The non-punishment provision of the EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims was also referenced in some of the case law of EU member States.<sup>361</sup> Article 8 reads:

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.

Unlike the CoE Convention, which applies only to the penalty phase, the Directive contemplates the decision not to prosecute, and incorporates both the “compelled” and “direct consequence” standards.

In 2009, the Working Group on Trafficking in Persons of the Conference of the Parties recommended that in order to ensure non-punishment and non-prosecution, States parties should:

Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of

<sup>360</sup> United Nations updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/Res/65/228, annex, para. 18(k).

<sup>361</sup> Article 8, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JH. See, e.g., Netherlands, Appeals Court of Amsterdam 23-000272-14 (2017); Supreme Court Case 17/03852, 2018; Italy, *JE*, Case Number 1081/2019; Italy, *IC*, 2019; U.K., *R. v. M.K. / R. v. Persida Gega (aka Anna Maione)*, [2018] EWCA Crim 667.

their situation as trafficked persons or where they were compelled to commit such unlawful acts.<sup>362</sup>

At its seventh meeting, in 2017, the Working Group on Trafficking in Persons of the Conference of the Parties reiterated its previous recommendation on non-punishment. In addition, it referred to the concept of “prosecutorial discretion” as relevant when considering application of the non-punishment principle. The Working Group reiterated that recommendation at its eighth meeting, in 2018. In addition, in 2020, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime adopted a Resolution on “Effective implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime” which makes reference to the non-punishment principle and asks States to:

Consider providing, in accordance with their domestic law, that victims of trafficking in persons are not inappropriately punished or prosecuted for acts they commit as a direct consequence of being trafficked and, where appropriate, provide access to remedies if they are punished or prosecuted for such acts and, accordingly, establish, as appropriate, domestic laws, guidelines or policies that espouse these principles.<sup>363</sup>

Procedurally, while OHCHR’s *Recommended Principles and Guidelines* covers the criminal justice chain, namely detention, charging and prosecution, the EU Directive covers prosecution and punishment, the ASEAN Convention is couched in terms of “liability” thus extending beyond the penalty phase, and the CoE Convention covers only the penalty phase. These differences have important implications for victim-defendants. As underscored by the OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, “even an unpenalized conviction is in fact a punishment”.<sup>364</sup> As seen in the case law, some jurisdictions continue to convict but condition the sentence, while others fully acquit the victim-defendant.<sup>365</sup> Moreover, it is important to note the difference in the language between “as a direct consequence of their **situation** as trafficked persons”, “to the extent that they have been **compelled** to do so”, and “if such acts are **directly related to** the acts of trafficking”.

The differences in these standards are reflected in the jurisprudence examined at the national level on this issue.<sup>366</sup> As observed by the Supreme Court of the Netherlands, the international standards “do not provide any basis for determining the type or nature of the

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<sup>362</sup> UN, Report on the meeting of the Working Group on Trafficking in Persons, 2009.

<sup>363</sup> CTOC/COP/2020/L.6/Rev.1

<sup>364</sup> OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, 2013, para 77.

<sup>365</sup> As underscored by the UN Special Rapporteur on trafficking in persons especially women and children, the OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings and the Group of Experts on Action against Trafficking in Human Beings (GRETA) take the position that “non-punishment relates to a protection from liability, not just protection from being sentenced for the offence or otherwise punished”. See, UN Special Rapporteur on trafficking in persons, especially women in children, *The importance of implementing the non-punishment provision: the obligation to protect victims*, 2020, para 11.

<sup>366</sup> Of the countries covered, only Argentina incorporated the standard pertaining to illegal conduct as a “direct consequence of their situation” as a victim of trafficking into its legislation, with clearly distinguishable outcomes.

offences that must be covered by the non-punishment principle”.<sup>367</sup> This is due, in part, to the “wide-ranging and strongly differing viewpoints on the non-punishment principle and how to support its implementation,” that have led the Working Group on Trafficking in Persons of the Conference of the Parties to highlight “the importance of having flexibility in the justice system when implementing the principle”.<sup>368</sup>

An additional set of international standards relevant to the non-punishment of trafficked persons are the instruments relating to non-custodial measures at the pre-trial, sentencing and post-sentencing stages, namely the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)<sup>369</sup> and, more specifically, the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules).<sup>370</sup> In particular, Tokyo Rule 5.1 stipulates that “the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender, if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims”. Bangkok Rules 58 and 59 call for diversionary measures and pretrial and sentencing alternatives that take into account “the history of victimization of many women offenders,” as well as their caretaking responsibilities. These broader instruments applicable to any type of crime, beyond the field of trafficking, to both alleged and convicted offenders, provide an additional or alternative basis for preventing the detention, prosecution and punishment of victims of human trafficking. No reference to the Tokyo and Bangkok Rules was made in any of the cases examined.

## 1. Recognizing victims for the purpose of preventing detention, prosecution and punishment

In light of international standards, victim-defendant status should be considered in decisions made during the arrest, detention, prosecution and adjudication phases of trafficking cases. With regard to charging victims with human trafficking-related offences, a few cases referred to instances of the withdrawal of charges based on prosecutorial discretion as evidence of the victim-defendant’s victimisation came to light.<sup>371</sup>

For example, in a Dutch case from 2009, the prosecution withdrew the charges against the victim-defendant as both her statements and those of the other victims revealed that she was also a victim in the case, basing its decision on the non-punishment principle.<sup>372</sup> Notably, however, the victim-defendant had been initially detained for two days upon her arrest with the principle traffickers, one of whom was her boyfriend. Similarly, the

<sup>367</sup> Netherlands, Supreme Court Case 17/03852, 2018, para 5.5.

<sup>368</sup> UNODC, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*, CTOC/COP/WG.4/2020/2, para 27.

<sup>369</sup> A/Res/45/110, annex.

<sup>370</sup> A/Res/65/229, annex.

<sup>371</sup> Argentina: *Blanco José Constantin y otros*, Expte. No. 72000674, 2014, p. 8. Notably, the Prosecution requested a suspension of the process after a review of the case, as it found her to be a victim at the same time as a perpetrator. *Soria*, FMP 32005377/2008/TO1, 2017, p. 35; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa nº 2.559, nº, CFP 7677/2014/TO1, 2018; Netherlands, First Instance Court of The Hague, 09/754126-08, 2010, p. 3.

<sup>372</sup> Netherlands, First Instance Court of The Hague, 09/754126-08, 2010, p. 3.

prosecution requested that the victim-defendant be absolved of any guilt in the *Landriel, Daniel y Otros* case.<sup>373</sup> In direct contrast, in the U.S. case, *People v. Cross*, the prosecutor re-filed the charges *twice*, despite judicial findings that the victim-defendant was a victim of human trafficking.<sup>374</sup>

Prosecutorial discretion and guidelines were also at issue in a few cases. Two cases from the European region explicitly addressed the role of prosecutorial guidelines and discretion in ensuring the non-prosecution and non-punishment of victim-defendants. In one, the Netherlands Supreme Court found that the existing Criminal and Criminal Procedural Code provisions providing for prosecutorial discretion and judicial pardon, in addition to prosecutorial guidelines, were sufficient to comply with Article 8 of the EU Directive.<sup>375</sup> In another, from the U.K., prosecution guidelines related to non-prosecution served to complement the application of the non-punishment principle.<sup>376</sup>

In the U.K. case of *LM, MB, DG, Betti Tabot and Yutunde Tijani*, which predated the introduction of Section 45 of the Modern Slavery Act, the Court recognized the challenges for cases involving "cycles of abuse". It found that, in such cases, the prosecution must make a determination based on the seriousness of the offence. A judicial stay for abuse of process constituted "a safety net to ensure that this obligation is not wrongly neglected in an individual case to the disadvantage of the defendant".<sup>377</sup> It stated that:

Article 26 [the non-punishment provision in CoE Convention] is not an obligation to grant immunity, but rather an obligation to put in place a means by which active consideration is given to whether it is in the public interest to prosecute. We accept that the power to stay for 'abuse' exists as a safety net to ensure that this obligation is not wrongly neglected in an individual case to the disadvantage of the defendant.<sup>378</sup>

In a few cases, courts recognised the prior victimisation of the victim-defendant, with varying effect. In the U.S. *People v. M.D.* case, for example, the Court rejected the minor's argument that "whether she was such a victim is 'not a fact peculiarly within [her] personal knowledge'" for the purpose of determining who carried the burden of proof. It found, rather, that:

The facts necessary to establish that the minor was a victim of human trafficking are in fact "peculiarly" within *her* personal knowledge. She has the most knowledge as to the circumstances that led her to engage in prostitution, who—if anyone — induced or persuaded her to do so, and to whom —if anyone —she is reporting or

<sup>373</sup> Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa nº 2.559, nº, CFP 7677/2014/TO1, 2018.

<sup>374</sup> U.S., *People v Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published), p. 5.

<sup>375</sup> Netherlands, Supreme Court Case 17/03852, 2018, para 4.2.

<sup>376</sup> U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, 2010, p. 4, observing that the guidelines indicate that where there is evidence that a suspect is a credible trafficked victim, prosecutors should consider the public interest in proceeding. Where there is clear evidence that the defendant has a credible defence of duress, the case should be discontinued on evidential grounds.

<sup>377</sup> U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, 2010, para 18.

<sup>378</sup> U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, paras 16, 18.

delivering the proceeds of her prostitution activity.<sup>379</sup> (Emphasis in original).

While constituting the basis of the Court's decision to place the persuasive burden of proof on the victim-defendant, this finding runs contrary to the findings of other courts, as well as the literature, that victims of trafficking often do not recognize themselves as victims.<sup>380</sup> For example, the Court in the *Dezorzi* case from Argentina observed that the victim-defendant believed that offering sex for money was a normal way of earning a living, underscoring her confusion over the charges.<sup>381</sup>

The facts of several decisions observed that victims had engaged in acts of perpetration, namely recruitment and training minor victims in prostitution, but did not designate these acts as criminal offending. Consequently, their victim status was not called into question as charges were not brought by the prosecution. In one case from Bosnia and Herzegovina, for example, elements of victim perpetration were present as minor victims recruited other victims (their friends) for the trafficker, though this was simply noted in passing by the Court.<sup>382</sup> Similarly, in the *People vs. Ruth Dela Rosa y Likinon, aka "Sally,"* case from the Philippines, the Court did not address the minor victim's role in recruiting another minor, her friend, to have sex with a male client. It simply found the trafficker not guilty of that charge.<sup>383</sup> The inter-related *IM* and *EG* cases in Belgium also referenced the role of one victim in training a minor victim in prostitution.<sup>384</sup> While mentioning these acts, in all of these cases, the courts consistently treated these primarily minor victims as such.<sup>385</sup>

At the post-adjudication phase, in the *People v. G.M.* case from the U.S., the prosecution exercised its discretion in consenting not only to the expungement of the victim-defendant's criminal conviction for the prostitution-related crimes covered by the statute, but to other convictions for crimes not expressly covered by the statute.<sup>386</sup>

## 2. National legislative approaches to non-punishment

States have taken various approaches when legislating the non-punishment principle. Some have established severity thresholds or have limited recognition to status-related offences.

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<sup>379</sup> U.S., *People vs. M.D.*, 231 Cal. App. 4th 993, 2014, p. 1000.

<sup>380</sup> Argentina: *Dulcinea*, Causa nro. 91017032, 2014, p. 91, referring to the testimony of the Office of Escape and Accompaniment for Victims of Trafficking stating that victims of human trafficking often do not recognize themselves as victims; *Ledesma*, Sentencia No. 457, p. 28, finding that victims of trafficking in situations of extreme vulnerability do not always perceive themselves as such, and consequently, their testimony must be complemented with the rest of the circumstances in the case.

<sup>381</sup> Argentina, *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa n° FCB 53200033/2012/T01/CFC1, 2017, p. 8.

<sup>382</sup> Bosnia and Herzegovina, Court of BiH, K-71/05, 2006.

<sup>383</sup> Philippines, *People vs. Ruth Dela Rosa y Likinon, aka "Sally,"* Criminal Cases Nos 13-9820 and 13-9821, 2013, pp. 18-19.

<sup>384</sup> Belgium, *IM*, First instance court Antwerp, Parquet system number 17RA16990, 2018, p. 8; *EG*, Parquet system number 18G1175, 2018, p. 7.

<sup>385</sup> In the *EG* case, the court limited the moral damages to be claimed by the victim who trained the minor to EUR 250, while the minor victim received EUR 2,500. However, the court did not explain the basis for this low award, nor the difference between the awards.

<sup>386</sup> U.S., *People v. G.M.*, 2011 NY Slip Op 21176, 2011, p. 5. The judge agreed.

Others have emphasised prosecutorial discretion and judicial review over specialised legislation.

For example, the U.S. Victims of Trafficking and Violence Protection Act of 2000 limits its application to victims of “severe” forms of human trafficking as related to the extent of the means and exploitation. It states:

Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.<sup>387</sup>

Notably, the examples of crimes to which the principle applies in the above-referenced legislation concern status-related crimes only. This is a common approach in other States, reflected in the United Nations updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice,<sup>388</sup> and in the scope of the principle as set forth in the EU Directive 2011/36/EU, which states:

Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment 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.<sup>389</sup> (Emphasis added).

Limiting the application of respective non-punishment provisions to only status-related offences was observed in the jurisprudence as a basis for denying such protection when the crime involved acts of trafficking.<sup>390</sup> At the same time, a few cases outside of the EU region, did not provide protection from prosecution and punishment for status-based offences related to both prostitution<sup>391</sup> (including minors)<sup>392</sup> and migration-status.<sup>393</sup>

Common law and statutory defences of duress and necessity can also be raised, as indicated by the courts in a few cases.<sup>394</sup> Importantly, the duress and necessity defences establish a

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<sup>387</sup> 114 STAT. 1464 Section 102(b)(19).

<sup>388</sup> A/Res/65/228, annex, para. 18(k).

<sup>389</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Recital 14.

<sup>390</sup> See, e.g., Netherlands, Supreme Court, 17/03852, 2018, para 8.1, referring to the types of crimes listed in Directive 2011/36/EU as basis of the appeals court’s decision.

<sup>391</sup> See, e.g., U.S.: *People v. G.M.*, 2011 NY Slip Op 21176, 2011, in which the victim-defendant filed to expunge prostitution charges from her criminal record.

<sup>392</sup> U.S.: *People v. Aarica S.*, 223 Cal. App. 4th 1480, 2014; *People vs. M.D.*, 231 Cal. App. 4th 993, 2014.

<sup>393</sup> See, e.g., South Africa, *Mabuza and Chauke*, SHG 9 / 13, pp. 55, 56, where the victim-defendant was denied bail due to her irregular migration status, had been in pre-trial detention almost two years, and her immediate deportation was also ordered; Australia, *Leech v The Queen* [2011] VSCA 344.

<sup>394</sup> U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, 2010, p. 4; U.S., *People v. Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published); Netherlands, First Instance Court of The Hague, 09/754126-08, 2010; Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup>

higher threshold of requirements than the "to the extent that they have been compelled to do so" standard. Moreover, some countries' statutory non-punishment provisions contain many of the stricter requirements of duress integrated into the "compelled" standard for what has been termed a "duress-based" approach. It should be noted here that as UNODC has indicated, "statutory defences based on compulsion should not require the same type of evidence as the traditional criminal law defence of duress. Were that to be the case, the non-punishment principle would be redundant and fail to provide any specific additional protection to victims of trafficking".<sup>395</sup>

Finally, not all countries have implemented a non-punishment provision into national legislation.<sup>396</sup> Some jurisdictions adopted non-punishment provisions after the issuance of the decision, if at all, for several of the identified cases.<sup>397</sup> For example, the Criminal Code of Belgium was amended in 2019 to provide that victims of trafficking in persons who commit crimes as a direct consequence of their exploitation shall not be subject to punishment for such crimes. At the same time general rules of sentencing may be relied upon, including that by which sentences should properly reflect the blameworthiness of the offender.

A few of the examined cases made no reference to a non-punishment provision or principle in declining to punish or convict the victim-defendant.<sup>398</sup> It should also be noted that in a few cases, the courts rejected attempts by the victim-defendant to invoke the non-punishment provision, perceiving it to be a false claim.<sup>399</sup>

## B. Availability of the defence of non-punishment to victim-defendants and the "means" element

Courts from different legal traditions and systems have applied an array of legal standards when assessing the criminal liability of victim-defendants. These range from the strictest

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Chambre, Parquet n° LI37.LA.99538-09, 2018, pp. 26, 27, basing the decision on duress/necessity in the absence of the implementation of a non-punishment provision as required by Directive 2011/36/EU.

<sup>395</sup> UNODC, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*, CTOC/COP/WG.4/2020/2, para 60.

<sup>396</sup> Only 17 of the 42 States Parties that submitted a report to GRETA in line with their obligations under the CoE Convention have enacted legislation on non-punishment for victims of trafficking. See UNODC, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*, CTOC/COP/WG.4/2020/2, para 34.

<sup>397</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, noting that anti-trafficking legislation had not yet become operational; U.S.: *People v. Aarica S.*, 223 Cal. App. 4th 1480, 2014; *People vs. M.D.*, 231 Cal. App. 4th 993, 2014; *People v. Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published); Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018.

<sup>398</sup> Costa Rica, Resolución N° 00930 – 2002, basing the decision on the imbalance of power in the victim-defendant's relationship with the trafficker, and that her participation in the acts of trafficking were under his orders; South Africa, *Mabuza and Chauke*, SHG 9 / 13, decided before an anti-trafficking law had been adopted, and basing the suspended sentence on her prior experience as a victim; the victim-defendant was, however, convicted and deported.

<sup>399</sup> Colombia, *Roldán Giraldo*, Case No. 66-01-60-00035-2006-01458; U.K., *R. v Persida Gega (a.k.a. Anna Maione)*, [2018] EWCA Crim 667; Brazil, *Gloris Marlene Mereles*, 4<sup>th</sup> Federal Regional Court, ACR 2006.72.03.003070-2 TRF4, 2009.

standards, through duress and necessity, to the current international standards requiring either “compulsion,” or the “direct consequence” of the trafficking situation. All of these standards reflect a parallel “means” analysis, targeting those methods used against victim-defendants to instigate their perpetration of acts of human trafficking and/or other crimes. In other words, in considering the availability of the defence of non-punishment “in the case of adults, it is [] necessary to establish that the prohibited act was accomplished through the use of specific illicit means”.<sup>400</sup>

Not all courts in the cases examined engaged in analysis of the means employed against victim-defendants to instigate their participation in human trafficking. The means used in the underlying trafficking offence against the victim-defendants, as well as the level of influence exerted against them to commit an act of trafficking or other offence, should both be considered in weighing the application of the non-punishment principle. This section details the application of these standards in the examined jurisprudence in cases in which the non-punishment principle was invoked.

### 1. Duress and necessity

The strictest statutory and common law standards available in different legal systems and traditions for precluding the application of criminal responsibility are the defences of duress and necessity. Both, put simply, require a showing of the threat of imminent death or physical violence to the defendant or another person.<sup>401</sup>

Broadly speaking and with some variation, in common law jurisdictions duress also requires that a reasonable person in the defendant’s position would have committed the crime. It further requires proof that the defendant had a reasonable fear that the threat would be carried out. In other words, the fear of the threat or use of physical force must be objective and not based solely on the subjective perceptions of the defendant. The defendant must also show that there was no alternative to committing the crime and that there was no other way to escape the threat.

The defence of necessity also relates to being forced to commit a crime to avoid serious harm. The key difference between necessity and duress is that the latter involves the commission of a crime because someone directly forced the person to do it. Necessity involves a choice between two bad alternatives that could not be avoided, arising from

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<sup>400</sup> UNODC, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*, CTOC/COP/WG.4/2020/2, para 60.

<sup>401</sup> The Joint Separate Opinion of Judge McDonald and Judge Vohrah, in *Prosecutor v. Erdemovic*, provides a useful summary of these concepts in civil and common law traditions:

The penal codes of civil law systems, with some exceptions, consistently recognise duress as a complete defence to all crimes. The criminal codes of civil law nations provide that an accused acting under duress “commits no crime” or “is not criminally responsible” or “shall not be punished”. We would note that some civil law systems distinguish between the notion of necessity and that of duress. Necessity is taken to refer to situations of emergency arising from natural forces. Duress, however, is taken to refer to compulsion by threats of another human being. Case No. IT-96-22-A, ICTY, available at: <https://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>, page 25 onwards.

circumstances rather than from the actions of a specific person. Both these concepts were considered in some of the cases examined.

In a case from 2009, a first instance court in the Netherlands stated that, pursuant to Article 26 of the CoE Convention, it must be possible for victims not to be punished "for criminal acts committed under duress".<sup>402</sup> Duress was established in a 2017 case in California, decided just prior to the legislative enactment of a non-punishment provision in California. In the *People v. Cross* case, the Court overturned the victim-defendant's conviction, basing its decision on the lower court's factual finding of substantial evidence that the trafficker's "repeated used violence against [the victim-defendant] during the course of the pimp-prostitute relationship supported the court's express factual finding that the [victim-defendant] was under a constant threat of imminent violence".<sup>403</sup> The California Court of Appeals found that: "the magistrate expressly, clearly, and unambiguously found Cross inflicted violence on [the victim-defendant] to the point [that the victim-defendant] did not act willingly but acted under duress".<sup>404</sup> The Court thus reversed the conviction on three of the charges.

The Belgian *T.* case was also determined on the grounds of duress, based on the fact that the EU Directive (which contained a non-punishment clause) had not yet been transposed into national law.<sup>405</sup> It held that acting under the coercion of the traffickers, the victim-defendant had "no other choice" to protect her life, physical and psychological integrity, and that of her family, than to participate in the crime vis-à-vis other victims. It thus declined to convict her.

In the 2010 U.K. case, *LM, MB, DG, Betti Tabot and Yutunde Tijani*, the Criminal Court of Appeal found no special modifications to the defences of duress and necessity for victims of human trafficking. It stated of the duress defence:

Duress is a defence (except to murder and attempted murder) if the offence has been committed as the direct (not indirect) result of a threat of death or serious injury aimed at the defendant or someone sufficiently close to him. But the defence is not established if there was evasive action which the defendant could reasonably be expected to take, including report to the authorities, and nor can it be established if the defendant has voluntarily associated with people in circumstances which amount to laying himself open to the compulsion to commit offences.<sup>406</sup>

Necessity, the Court stated:

is available only where the commission of a crime was necessary or was reasonably believed to be necessary to avoid or prevent death or serious injury where, objectively viewed, commission of the crime was reasonable and proportionate

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<sup>402</sup> Netherlands, First Instance Court of The Hague, 09/754126-08, 2010.

<sup>403</sup> U.S., *People v. Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published), p. 9.

<sup>404</sup> U.S., *People v. Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published), p. 10.

<sup>405</sup> Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, p. 27.

<sup>406</sup> U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, p. 4.

having regard to the evil to be avoided or prevented and the crime would not have been committed without that necessity.<sup>407</sup>

The U.K. Crown Prosecution Guidelines further indicate that: “[w]here there is clear evidence that the defendant has a credible defence of duress, the case should be discontinued on evidential grounds.”<sup>408</sup> In another case, *R v M.K.*, the Court’s ruling shifted the burden of proof to the prosecution to prove that an individual is not a victim of trafficking once the defence is raised by that individual.<sup>409</sup>

As mentioned above, Section 45 of the Modern Slavery Act of 2015 introduced a statutory defence that can be raised by accused who, in the case of adults, have been compelled to commit an offence as a direct result of their being a victim of trafficking, or in the case of a child, have committed an offence as a direct result of being the victim of trafficking.

In January 2020, the U.K. Independent Anti-Slavery Commissioner launched a call for written evidence on the use of this clause, indicating that: “[c]oncerns have been raised about the ability of the prosecution to disprove accounts which often lack detail... Conversely, there are concerns that genuine victims of modern slavery are failing to be identified and are incorrectly being prosecuted for crimes committed as a result of their exploitation.”<sup>410</sup>

## 2. Compulsion

The standard of “to the extent they have been compelled to do so” in the context of the non-punishment principle was applied in most of the jurisdictions covered by the review of the case law. This section touches upon this “duress-based” approach taken by courts in assessing compulsion and what type of threshold applies, e.g., requirements of proof of the use of force, threat of force or other forms of coercion.<sup>411</sup> It also touches upon the application of coercive control to the concept of the “voluntariness” with which the victim-defendant engaged in criminal perpetration.

In line with the EU Directive and the CoE Convention, the identified cases from the European region addressing the non-punishment provision apply the standard of “to the extent they

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<sup>407</sup> U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, p. 4.

<sup>408</sup> U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, p. 4.

<sup>409</sup> This is in line with international standards according to which “an accused person should not be required to prove the existence of a defence beyond a reasonable doubt or even on a balance of probabilities, as doing so could infringe on the presumption of innocence. Once the defence has become a live issue in a trial, the prosecutor should be required to show, beyond a reasonable doubt, that it does not apply”. UNODC, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*, CTOC/COP/WG.4/2020/2, para 65.

<sup>410</sup> IASC Call for Evidence: Use of the Modern Slavery Act's Section 45 statutory defence, <http://www.antislaverycommissioner.co.uk/news-insights/closed-iasc-call-for-evidence-use-of-the-modern-slavery-act-s-section-45-statutory-defence/>

<sup>411</sup> As UNODC has noted, “statutory defences based on compulsion should not require the same type of evidence as the traditional criminal law defence of duress”. See UNODC, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*, CTOC/COP/WG.4/2020/2.

have been compelled to do so" in cases involving victims as defendants. In a case on this issue in the Netherlands, the Supreme Court held that acts of trafficking can only be considered a direct consequence of human trafficking if the coercive measures applied to the victim-defendant for the purpose of her own exploitation and the conditions in which she was kept led her to commit the alleged offences.<sup>412</sup> It thus required that the means element for the underlying trafficking offence in which she was trafficked be related to the means used to compel her to commit the crime. As described below, this approach appears to reflect *de facto* application of the non-punishment principle, and calls for the parallel analysis to be more explicit in judicial decision-making on this issue.

Furthermore, the Dutch Supreme Court held that such determinations should be made based on the concrete circumstances of the individual case, including consideration of the following elements:

- the coercive measures of the human trafficker;
- the duration of the human trafficking situation;
- the degree of dependence on the human trafficker;
- the nature of offences committed by victim; and
- the role and interests of the victim and the degree of voluntariness in committing these offences.<sup>413</sup>

Specifically, the Supreme Court upheld the Cassation Court's finding in this case that the victim-defendant's engagement in acts of trafficking, namely monitoring the victims while they worked and pressuring them to earn more money, was not a "direct consequence" of having been trafficked. The victim-defendant was the girlfriend of the principal trafficker, who also lived off of her prostitution. It agreed with the Cassation Court that the victim-defendant had engaged in those acts voluntarily.

The U.K. case *LM, MB, DG, Betti Tabot and Yutunde Tijani* discussed the term "compelled" with reference to Article 26 of the CoE Convention, finding that it was not limited to the common law defences of duress and necessity.<sup>414</sup> The Court emphasized at the outset that: "[t]here is normally no reason not to prosecute, even if the defendant has previously been a trafficked victim, if the offence appears to have been committed without with any reasonable nexus of compulsion (in the broad sense) occasioned by the trafficking, and hence is outside Article 26."<sup>415</sup> It found that the determination:

will depend on all the circumstances of the case, and normally no doubt particularly on the **gravity of the offence** alleged, the **degree of continuing compulsion**, and the **alternatives reasonably available to the defendant**.<sup>416</sup> (Emphasis added).

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<sup>412</sup> In line with EU Directive, the Dutch Supreme Court combined the "direct consequence" and "compelled" standards.

<sup>413</sup> Netherlands, Supreme Court, 17/03852, 2018, p. 8.

<sup>414</sup> U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, para 11.

<sup>415</sup> U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, para 11.

<sup>416</sup> U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, 2010, para 14(v).

Section 45 of the 2015 U.K. Modern Slavery Act sets out two additional requirements for showing that an adult victim was compelled to commit the crime. Subsections (1)(c) and (d) require that:

- (c) The compulsion is attributable to slavery or to relevant exploitation, and
- (d) A reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.

An analysis of all the decisions examined for this study reveals a suggested tendency by some courts to apply the non-punishment principle in cases in which the victim-defendant engaged in an act reflecting secondary participation in trafficking (tending bar, picking victims up from the airport), and an unwillingness to do so where the victim-defendant also engaged in the means element of the crime.<sup>417</sup> However, this distinction cannot be applied to all of the cases examined.

### a. Threat and use of force and coercion

The case law review examined the extent to which States required the threat and use of force to trigger non-punishment provisions when evaluating the means used to compel the victim to engage in acts of trafficking in persons.<sup>418</sup>

Despite the language of the Californian Penal Code, which requires that the victim was caused, induced or persuaded to commit a crime, the Court in the case of *People v. M.D.* required that the victim-defendant establish that she was compelled to commit the crime by force or threat. The decision stated: "[i]t is clear, however, that the evidence of any purported encouragement would not be sufficient to show the encouragement was accomplished by promise, threat, violence or any device or scheme. There is no suggestion of threats or violence."<sup>419</sup> It appears that the Court read an increased evidentiary threshold into the non-punishment provision.

Similarly, in the case of *People v. Aarica S.* the Court read a force or threat of force requirement into the statutory framework. Although the California Penal Code required that "the victim must have been "cause[d], induce[d], or persuade[d] . . . to engage in a commercial sexual act" by another person, the lower court had found that "she was acting as an independent contractor, nobody [was] threatening her or threatening to kill her if she doesn't make money".<sup>420</sup>

This reliance on the "compelled" standard and the *de facto* emphasis on "threat, use of force or other forms of coercion" to meet that standard does not take into account that violence inflicted upon victim-defendants is not always overt and physical. It perpetuates a common trafficking stereotype of female victims being abducted and locked up in chains. The impact

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<sup>417</sup> Nicole, C. Bassil, *Coercive control in sex trafficking relationships: Using exhaustion to control victims*, 2019, p. 18.

<sup>418</sup> It is significant to note that this use of force requirement reflects the *de facto* standard often applied in domestic violence cases, in which courts often require visible and documented physical injuries for making domestic violence determinations.

<sup>419</sup> U.S., *People vs. M.D.*, 231 Cal. App. 4th 993, 2014, p. 1004.

<sup>420</sup> U.S., *People v. Aarica S.*, 223 Cal. App. 4th 1480, 2014, p. 1485.

of this victim stereotype is further evidenced in sentencing practices, as described in more detail below.

### b. Coercive control

Albeit not explicitly, elements of coercive control were considered in decisions absolving victim-defendants from criminal responsibility in several cases. Without reference to the non-punishment principle, the Cassation Court in Costa Rica found that the lower court's conviction of the victim-defendant failed to "weigh the power exercised by the trafficker over her" given that he was 25 years older and had a higher level of education and economic power, rendering her unable to act against his orders.<sup>421</sup> It further emphasized their "conflictual" romantic relationship, which it described as a "circle of violence".<sup>422</sup>

Briefly looking back at the cases described in the section above on coercive control, the courts in the *People v. G.M.* and *M.G. v. State of Florida* detailed intimate partner/domestic violence cases characterised by coercive control in assessing whether to expunge crimes from the victim-defendants' records.<sup>423</sup> Coercive control was also apparent in the recitation of the facts in the *U.S. v. Bell* and *Hicks v. Rackley* cases, both of which involved a combination of intimate partner and pimping/prostitution relationships.

Elements of coercive control, which may or may not involve elements of physical violence, should be considered when evaluating the "means" used in victim-defendant participation in human trafficking, particularly in cases involving intimate partner and family trafficking. As already observed, in most of the examined cases courts did not interrogate the nature of the domestic, intimate partner or pimping/prostitution relationship, nor did they explore the possibility of coercive control as the means employed to obtain participation of the victim in trafficking.

## 3. Direct consequence of the situation as a trafficked person

The OHCHR *Recommended Principles and Guidelines* articulate the "direct consequence of their situation as trafficked persons" standard as the correct approach to the non-punishment principle. Argentina included a non-punishment provision within its anti-trafficking law that is based on the victim-defendant's trafficking situation, rather than on compulsion. Article 5 of Law No. 26.364 states:

Victims of human trafficking cannot be punished for any crime that directly results from having been a victim of human trafficking. Nor do the established sanctions of migration law apply when the infraction is a consequence of acts undertaken during

<sup>421</sup> Costa Rica, Resolución N° 00930 – 2002, p. 1.

<sup>422</sup> Costa Rica, Resolución N° 00930 – 2002, p. 3.

<sup>423</sup> U.S.: *People v. G.M.*, 2011 NY Slip Op 21176, 2011, in which the victim-defendant filed to expunge prostitution charges from her criminal record; *M.G. v. Florida*, 260 So.3d 1094, 2018, p. 1096.

the crime for which they are accused.<sup>424</sup>

The jurisprudence reveals that, in practice, courts in Argentina have expanded the application of the “direct consequence of their situation as trafficked persons” standard. It is important to note in this regard that the national anti-trafficking legislation contemplates APOV as the means element of the crime, and this was commonly considered during application of the non-punishment provision.

Specifically, courts referred to abuse of a position of vulnerability in several cases when evaluating the “means” employed to obtain a victim-defendant’s engagement in human trafficking.<sup>425</sup> In Argentina, the courts consistently defined vulnerability as an absence of “vital options,” and found that meaningful choice required a “horizon of possibilities”. Most significantly, they defined human trafficking as a violation of the right to self-determination.

While observing that the vulnerability of a person is not enough to free them of criminal responsibility, the Cassation Court found in the *C. M. S. y Otros* case that the victim-defendant came from the same socio-economic circumstances as the victims, had been sexually exploited, and that her relationship with the male co-accused was characterized by inequality and violence.<sup>426</sup> The Cassation Court thus applied the non-punishment provision with reference to her vulnerability.<sup>427</sup> A concurring opinion found the victim-defendant's participation in the crime to be directly and causally linked to her original situation of vulnerability. It underscored that it was upon starting her relationship with the co-accused that she switched from being a victim to a perpetrator. It considered the victim-defendant to be a presumed victim of trafficking, qualifying her for medical and psychological and material assistance.<sup>428</sup>

Cases from Canada and the U.S. considered the psychological impact of the victimisation on the victim-defendant.<sup>429</sup> In the Argentinian *Dulcinea* case, the Court made reference to the testimony of a forensic psychologist, who stated that the victim-defendant was vulnerable, had scant defensive resources and had a tendency to establish ties of dependency. The expert further characterized the victim-defendant as unstable with tendencies toward inaction and anxiety. Indeed, a consistent basis for acquittals based on vulnerability was the psychological impact of the victims’ experience of trafficking or exploitation. In some cases, acquittals were also a result of the victim-defendants’ extreme vulnerability.

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<sup>424</sup> The original Spanish reads: *Las víctimas de la trata de personas no son punibles por la comisión de cualquier delito que sea el resultado directo de haber sido objeto de trata. Tampoco les serán aplicables las sanciones o impedimentos establecidos en la legislación migratoria cuando las infracciones sean consecuencia de la actividad desplegada durante la comisión del ilícito que las damnificara.*

<sup>425</sup> See, e.g., Argentina: *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa n° FCB 53200033/2012/T01/CFC1, 2017, p. 4; *C. M. S. y Otros*, Cassation Court, Causa NG CFP 23D/2011/TO1/CFC1, 2018, pp. 49-51; *Montoya, Pedro Eduardo y otras*, Causa N° FCR 52019312/2012/T01/18/CFC2, 2018, p. 82; *Bar California*, 40066/2013, pp. 67, 80; *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa n° FCB 53200033/2012/T01/CFC1, 2017, pp. 4, 11, 12; *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017, p. 32; *Ledesma*, Sentencia No. 457, pp. 8-10; Netherlands: First Instance Court of the Hague, 09/754126-08, 2010, p. 6.

<sup>426</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 46.

<sup>427</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, pp. 50, 51.

<sup>428</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, pp. 60, 61. The defense did not specifically claim that *Cáceres* was a victim of human trafficking.

<sup>429</sup> See, e.g., Canada: *R. v. Robitaille*, [2017] O.J. No. 5954; U.S., *U.S. v. Bell*, 2013 WL 12086759, 2013.

Notably, the Court in the *Dulcinea* case found that the imposition of a criminal sentence would further victimize the victim-defendant, who had suffered gender-based violence and unscrupulous exploitation. The Court stated that:

[i]n its eagerness to go after traffickers, it's possible that the administration of justice ends up criminalizing those who are engaged in prohibited conduct, but who are in reality victims of human trafficking, constituting the weakest links, who find themselves in a situation of extreme social, economic and emotional vulnerability to prosecutions of victim-offenders as revictimization and a form of "institutionalized violence".<sup>430</sup>

The Court concluded that it had to extend protection to "this trafficking victim that was found responsible for the commission of an offence as a direct result of her condition of vulnerability, which is what the legislator had in mind with respect to [the non-punishment provision]".<sup>431</sup> It characterised a criminal conviction in this case as "illegitimate".

As highlighted above, in several cases, the courts in Argentina dedicated a large section of the decision to detailing the numerous vulnerability factors affecting both victims and victim-defendants. Several decisions also cited the Brasilia Regulations, highlighting its identification of poverty and violence against women as vulnerability factors.<sup>432</sup>

The privileging of the victims' vulnerability among the factors to be considered in the application of the non-punishment provision provides greater protection to victim-defendants and helps prevent revictimization through prosecution. It is important to note, however, that a sole focus on the victim-defendant(s)' vulnerability omits consideration of deterrence (as an aim of convictions and sentencing), as well as punishment as an element of the right to an effective remedy for those potentially victimised by the victim-defendants.

#### ***k. Vulnerability and prostitution as sexual exploitation***

Argentina's legislative framework facilitates recognition of victim-defendants' vulnerability in the analysis of the application of the non-punishment principle through the "direct consequence" standard and by using APOV as a "means". In turn, Argentina has taken a unique and expansive approach to the application of the national non-punishment provision by considering the victim-defendants' level of vulnerability in terms of their engagement in prostitution. Further, the courts in Argentina have taken a specific stance on prostitution as a form of sexual exploitation *per se*. This has had an important effect on application of the non-punishment provision to victim-defendants in the sex industry.

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<sup>430</sup> Argentina, *Dulcinea*, Causa nro. 91017032, p. 57, stating in the original:

En el afán del Estado por perseguir a los responsables de este actuar criminoso, es posible que el sistema de administración de justicia termine criminalizando a quienes *a priori* estarían cometiendo alguna de las conductas prohibidas, pero que en realidad también son víctimas de la trata de personas y constituyen los eslabones más débiles, que se encuentran en una situación de extrema vulnerabilidad social, económica y emocional.

<sup>431</sup> Argentina, *Dulcinea*, Causa nro. 91017032, p. 52.

<sup>432</sup> See, e.g., Argentina: *Dulcinea*, Causa nro. 91017032, p. 54; *Montoya, Pedro Eduardo y otras*, Causa Nº FCR 52019312/2012/T01/18/CFC2, 2018, p. 81, concurring opinion.

In the *Dulcinea* case, the Court rejected the concept of the free and "happy prostitute" who consensually engages in prostitution, emphasising the differential power relations.<sup>433</sup> It quoted an academic paper for the proposition: "[t]he history of prostitution is the history of the reduction of persons".<sup>434</sup> Observing that prostitution is not agreed to under equal conditions, it cited precedent stating: "[t]his supposed consent [to prostitution] creates a global situation of human exploitation, in which who has the power takes advantage of the needs of those who don't".<sup>435</sup>

In its discussion of the victim-defendant's prior victimization by traffickers in the *Justino Horacio Abel y otra* case, the Cassation Court cited Primo Levi work on acceptance of privileged positions by persons enslaved in exchange for their betrayal of their own group.<sup>436</sup> It criticized as hypocritical the imposition of criminal punishment on victims, together with the implicit expectation that a victim of exploitation return to conditions of extreme vulnerability rather than try to escape the violence and exploitation to which she had been subjected throughout her life.<sup>437</sup>

The decision in the *Soria* case also took a very clear stance on prostitution as exploitation. It stated:

[i]t's impossible that everything can be converted into a commercial object, that it has a price and can be acquired. This applies to prostituted bodies that can be acquired without guilt, moral or penal, in what feminist movements call "heteropatriarchal capitalism," and thus achieve the occupation of all forms of life. ... no one has the right to buy the sexual subordination of women, nor enrich themselves through its exploitation or trafficking.

This is how "sex work" is valued, as emphatically alleged by the defence, criticizing the raids conducted in this case without realizing that they form a part of penal and social policy, successful or not, to offer new life opportunities to victims. Options that were not available to these women due their vulnerability, such options including: equality, freedom, autonomy, sexual pleasure and the right to life without violence and relative peace. It is impossible to be the owner of your own body without this horizon of possibilities open.<sup>438</sup>

In the *C. M. S. y Otros* case, the victim-defendant had worked as a prostitute, the context in which she met the male co-accused. The lower Court found that, at the time of the victim-defendant's offending, she was not a victim of human trafficking. The Court found that she had stopped engaging in prostitution six months prior to the offending, she was not forced

<sup>433</sup> See, Argentina, *Dulcinea*, Causa nro. 91017032, pp. 46, 92.

<sup>434</sup> Argentina, *Dulcinea*, Causa nro. 91017032, p. 91.

<sup>435</sup> Argentina, *Dulcinea*, Causa nro. 91017032, p. 92, ("El supuesto consentimiento se da en una situación global de explotación humana, en donde quien tiene el poder se vale de las necesidades de quienes no lo tienen.")

<sup>436</sup> Eva Lo Iacono, *Victims, sex workers and perpetrators: gray areas in the trafficking of Nigerian women*, Trends in Organised Crime, 110, 2014, pp. 115-116, also describing Primo Levi's concept of the "grey zone" related to prisoners-officers in Nazi concentration camps to the situation of victim-offender in Nigerian trafficking networks.

<sup>437</sup> Argentina: *Justino Horacio Abel y otra*, Cassation Court, Causa No. FGR 81000828/2012//CFC1, 2017, p. 32; see also, *C. M. S. y Otros*, Cassation Court, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 50.

<sup>438</sup> Argentina, *Soria*, FMP 32005377/2008/TO1, 2017, p. 24.

to collaborate with the male co-accused, and there was no evidence that he sexually exploited her. On this basis, the Court concluded that the Article 5 non-punishment clause was not applicable.<sup>439</sup>

On appeal, with respect to her prior experience of prostitution, the Cassation Court found that the victim-defendant had only escaped prostitution through the financial support of the male co-accused. Citing precedent for the proposition that the interruption of sexual exploitation precludes the application of the non-punishment provision, it found that she went from being a victim to a perpetrator under the orders of the co-accused, without interruption in her victimization and without the ability to exercise free choice.<sup>440</sup>

In the *Dezorzi, Valeria Soledad* case, wherein the victim-defendant experienced prostitution with the victims as a means of survival, the Court acquitted her in a split decision based on the non-punishment provision and *in dubio pro reo*, respectively. Both concurring opinions found that the non-punishment provision applies to those who were also in a situation of exploitation, exempting them from responsibility for crimes committed as a result of their own victimization. The first stated:

The wide intelligence of this provision derives from the objective of protecting victims of exploitation and avoiding revictimization, that is, criminalization, and thus avoid returning to past times in which vulnerable women who engaged in commercial sex were prosecuted.<sup>441</sup>

Citing Catharine MacKinnon (*Prostitution and Civil Rights*) regarding the confluence of the legal and social vulnerability of women that subordinates and isolates them in the name of the law, the second concurrence applied *in dubio pro reo* to acquit the victim-defendant.

### **I. *In dubio pro reo***

An examination of the jurisprudence in Argentina further revealed that the non-punishment provision was sometimes used interchangeably with the principle *in dubio pro reo*, according to which a defendant may not be convicted by the court when doubts about his or her guilt remain. For example, in the *Sanfelippo* case, the Court stated (in relation to the guilt of the victim-defendants):

It is evident that this reasoning [the fact that they engaged in actions of trafficking to improve their situation] does not lead to a criminal charge against the remaining accused—for lack of accusation and evidence—but imposes, at least for the application of the rule *in dubio pro reo*, consideration of acquittal provided for in [the non-punishment provision].<sup>442</sup>

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<sup>439</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, pp. 46-47.

<sup>440</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 49-50, citing *Montoya, Pedro Eduardo*.

<sup>441</sup> Argentina, *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa n° FCB 53200033/2012/TO1/CFC1, 2017, p. 12.

<sup>442</sup> See, Argentina, *Sanfelippo*, Causa No. 15-554, 2014, p. ??, stating in the original Spanish:

"Resulta evidente que este razonamiento no conduce a una imputacion penal contra los restantes acusados

In contrast, in the *Soria* case, a majority of the Cassation Court applied the non-punishment provision and found that, given the victim-defendant's background, criminalizing her would result in re-victimisation. A dissenting opinion found her not culpable on the basis of *in dubio pro reo* due to the lack of solid evidence against her.<sup>443</sup>

## 4. Consent and voluntariness

Article 3(b) of the Trafficking in Persons Protocol states that consent of the victim to the intended exploitation is irrelevant when any of the stipulated 'means' have been used. The Protocol does not require that the means used must operate to vitiate consent.<sup>444</sup> It should also be noted that the 'means' element has not been incorporated into all States' human trafficking legislation. No means are required to establish child trafficking and consent is irrelevant for child trafficking. Consent of the victim of trafficking continues to be a litigious issue.<sup>445</sup> Nonetheless, regardless of the approach taken by States to address the culpability of victim-defendants in the sex trafficking context, the issue of consent was often relevant in the cases examined. For example, the consent of the victim-defendants in being prostituted remained a factual issue in the case South Africa, *State vs. Veeran Palan and Edwina Norris*, despite the Court's reference of international standards that would render such consent irrelevant.<sup>446</sup>

The UNODC *Issue Paper: The role of "consent" in the trafficking in persons protocol* found that: "[t]he distinction between considerations of consent in relation to the crime of trafficking as compared to involvement of trafficking victims in criminal activities appears to be one of degree rather than substance."<sup>447</sup>

The UNODC *Issue Paper* emphasised the importance of the "extent of the means and purpose" as well as the seriousness of the crimes in question.<sup>448</sup> While observing that most States had not taken an explicit position on the extent to which a victim's apparent consent

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-por falta de acusacion y prueba-, pero impone, cuanto menos por aplicacion de la regla *in dubio pro reo*, considerar que opera en favor de sendas imputadas la excusa absoluta prevista en el art. 5 de la ley no 26.364."

See also, Argentina, *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa nº FCB 53200033/2012/T01/CFC1, 2017, pp. 11, 12, Judge Slokar's concurring opinion illustrates the similar uses of the non-punishment provision and *in dubio pro reo*; Argentina, *Soria*, FMP 32005377/2008/T01, 2017, p. 77, Judge Michelli's dissenting opinion;<sup>443</sup> Argentina, *Soria*, FMP 32005377/2008/T01, 2017, p. 77, Judge Michelli's dissenting opinion. See also, Argentina, *Bar California*, 40066/2013, pp. 67-69, 80, in which the majority exempts one victim-defendant from culpability under the non-punishment clause, and a concurring opinion would apply *in dubio pro reo*.

<sup>444</sup> UNODC, *Issue Paper: The role of "consent" in the trafficking in persons protocol*, 2014, pp. 84-85, noting that no further inquiry is required as to their effect on the quality of apparent consent.

<sup>445</sup> See, e.g., South Africa, *Mabuza and Chauke*, SHG 9 / 13, para 66, finding that the perpetrators knew that the minor girls did not consent to the sexual abuse; Australia, *DS*, County Court, Victoria, [2005] VSCA 99, paras 18, 24, finding "consent of a type," while finding an unequal social and economic situation, (issued prior to the Trafficking in Persons Protocol). See also, UNODC, *Issue Paper: The role of "consent" in the trafficking in persons protocol*, 2014, p. 90, finding that the survey confirmed that the question of whether 'means' used actually impacted consent is a live one in some jurisdictions.

<sup>446</sup> South Africa, *State vs. Veeran Palan and Edwina Norris*, Case No: RCD 13/14, 2014, p. 17.

<sup>447</sup> UNODC, *Issue Paper: The role of "consent" in the trafficking in persons protocol*, 2014, p. 90.

<sup>448</sup> UNODC, *Issue Paper: The role of "consent" in the trafficking in persons protocol*, 2014, p. 90.

to involvement in criminal activities should bear on their own culpability for such crimes, it confirmed that:

courts in multiple States have called into question the ‘victimhood’ of persons who have knowingly entered or returned to the criminal ‘workplace’ and have been relatively less willing to accept broad interpretations of ‘more subtle’ ‘means’ (such as abuse of a position of vulnerability) as a justification for disregarding apparent consent to involvement in criminal activities.<sup>449</sup>

In this way, the issue of victim-defendant consent and “re-entry” functions similarly in legal discourse around trafficking to the question “why does she stay” in domestic and intimate partner violence scenarios. One study on victim compliance in the context of trafficking for sexual exploitation in prostitution rings found that victims tended to respond compliantly to coercive control tactics, “such as micro-regulation and surveillance,” whereas “more aggressive tactics, such as intimidation, were followed by resistance amongst sex trafficking victims”. The study highlighted that “despite instances of momentary non-compliance, victims ultimately always complied with the demands of the pimp. This emphasizes the extremity of control by the pimps and the subsequent deterioration of autonomy of the victims”.<sup>450</sup>

In the context of sex trafficking, this finding underscores the significance of the legality of and social values related to prostitution, which vary considerably across States.<sup>451</sup> The UNODC Issue Paper found in this regard that “values and attitudes around what is acceptable or not within different spheres of activity can play a role in determining the relative relevance of consent in particular situations”.<sup>452</sup> As described above, some courts have found that the relationships between the victim-defendant and the traffickers, as well as broader structural determinants such as economic and social vulnerability, may operate to vitiate the victim-defendant’s meaningful consent to engaging in trafficking.<sup>453</sup>

The related issue of the victim-defendant’s voluntariness was clearly demonstrated in the joined U.K. case, *R. v. M.K. / R. v. Persida Gega (aka Anna Maione)*, which found that the non-punishment provision in Section 45 of the 2015 Modern Slavery Act removed the compulsion requirement for minors who commit crimes causally related to their being or having been trafficked in the same manner, as the means element is removed for minor victims.<sup>454</sup>

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<sup>449</sup> UNODC, *Issue Paper: The role of “consent” in the trafficking in persons protocol*, 2014, pp. 90. 91.

<sup>450</sup> Nicole, C. Bassil, *Coercive control in sex trafficking relationships: Using exhaustion to control victims*, 2019.

<sup>451</sup> UNODC, *Issue Paper: The role of “consent” in the trafficking in persons protocol*, 2014, p. 90, noting the “implications of legal responsibility in those States where prostitution is unlawful”.

<sup>452</sup> UNODC, *Issue Paper: The role of “consent” in the trafficking in persons protocol*, 2014, p. 86.

<sup>453</sup> The relationship between the inclusion of the APOV means and prostitution was identified in the UNODC *Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, pp. 2-3. See also, Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>454</sup> U.K., *R. v. M.K. / R. v. Persida Gega (aka Anna Maione)*, [2018] EWCA Crim 667, para 24.

## C. Omissions in considering prior victimization and disregard of the non-punishment provision

Several of the identified cases did not consider the victim-defendant's current or prior experience as a victim of trafficking. For example, in the South African case *State vs. Veeran Palan and Edwina Norris*, the Court did not address the fact that the victim-defendant experienced the same forms of deprivation of liberty and exploitation as the victims. The fact that she engaged in recruitment only as a means of freeing herself from the trafficker was also not considered by the Court. The Court observed that the victim-defendant "explained that she had to find a replacement for herself before she would be allowed to return to Cape Town. This was confirmed by accused 1".<sup>455</sup> Nonetheless, the Court found her guilty of all of the crimes with which it convicted the principal trafficker, save one. It did not address her motives for engaging in recruitment, kidnapping, and the illegal keeping of the brothel in which she was exploited, and did not link these acts to the victim-defendant's efforts to alleviate her own exploitation.<sup>456</sup>

Several of the identified cases in the U.S. did not consider the victim-defendant's prior experience as a victim of trafficking, despite acknowledging it in the recitation of the facts. In the case of *U.S. v. Willoughby*, two female victim-defendants were given a similar sentence to the primary (male) trafficker, despite the fact that they were only charged with aiding and abetting, and notwithstanding that he was also simultaneously exploiting their prostitution.<sup>457</sup> The non-punishment principle was also not considered in a Belgian case involving several victim-defendants and a large cross-border trafficking ring in Europe.<sup>458</sup>

In several cases, courts did not apply the non-punishment provision despite the fact that it was raised expressly by the defence.<sup>459</sup> It is interesting to note the Cassation Court's qualification of the lower court's rejection of the non-punishment provision to the victim-defendant in the *Justino Horacio Abel y otra* case in Argentina as "pernicious and sexist prejudice," given that punishment would "extend her suffering" despite the scope of protection offered by national legislation and international standards.<sup>460</sup>

## D. Burden of proof and temporal requirements

In addition to a lack of consideration of the non-punishment principle, victim-defendants' face further challenges when seeking its application. These include the burden and standard of proof required, as well as temporal limitations requiring that the victim-defendant's

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<sup>455</sup> South Africa, *State vs. Veeran Palan and Edwina Norris*, Case No: RCD 13/14, 2014, p. 4.

<sup>456</sup> South Africa, *State vs. Veeran Palan and Edwina Norris*, Case No: RCD 13/14, 2014, pp. 24, 25.

<sup>457</sup> U.S., *U.S. v. Willoughby*, US District Court, Eastern District of Michigan, 2007, sentencing determination.

<sup>458</sup> Belgium: First instance court Liège, 19th Chamber, 2016; Appeals Court Liège, 18<sup>ème</sup> Chamber, 2017.

<sup>459</sup> See, e.g., Argentina: *Justino Horacio Abel y otra*, Causa No. FGR 81000828/2012//CFC1, 2017, p. 29; *Montoya, Pedro Eduardo y otras*, Causa N° FCR 52019312/2012/T01/18/CFC2, 2018, p. 57, finding that the victim-defendant's sexual exploitation had been interrupted for six years; Colombia, *Roldán Giraldo*, Case No. 66-01-60-00035-2006-01458; Netherlands, 17/03852, 2018, para 8.1.

<sup>460</sup> Argentina, *Justino Horacio Abel y otra*, Causa No. FGR 81000828/2012//CFC1, 2017, pp. 35-36.

victim status be contemporaneous with their engagement in perpetration.

## 1. Burden of proof

In the joint U.K. cases of *R. v. M.K. / R. v. Persida Gega (aka Anna Maione)*, the primary issue was:

whether the legal (or persuasive) burden of proof rests on the defendant when a defence is raised under section 45 of the Modern Slavery Act 2015, or whether the defendant bears only an evidential burden with the prosecution having to disprove to the criminal standard one or more of the elements of the defence.<sup>461</sup>

The U.K. Court of Appeal (Criminal Division) held that the non-punishment provision (Section 45) of the Modern Slavery Act placed the evidential burden on the defendant, but not the legal or persuasive burden of proof. It stated that "it is for a defendant to raise the evidential burden that she has been subjected to trafficking, slavery or servitude, and that once raised, it falls to the prosecution to disprove such a claim to the criminal standard".<sup>462</sup> It requires objective evidence of compulsion that is directly and causally related to the trafficking.

In a case decided prior to a legislative amendment, the California Court of Appeals held in *People vs. M.D.* that the minor victim-defendant carried the persuasive burden of proving that she was a victim of human trafficking.<sup>463</sup> It found that, while evidence that the adult with whom she was found loitering with the intent to commit prostitution was arrested by the police for pandering "might have been sufficient to support a finding that she was a victim of human trafficking, it does not establish that she was a victim as a matter of law".<sup>464</sup> The Court rejected the minor's argument that:

[i]n light of the deep concern for the welfare of minors involved in the commercial sex industry, who are legally incapable of consenting to sexual acts, it is unlikely that the voters wanted to place the onus on minors to attempt to convince the court of the often traumatizing and debasing situations they survived. There is a growing national consensus that these sexually exploited minors, who are by definition abused and often traumatized, are presumptively victims.<sup>465</sup>

Rather, the Court found that: "Placing the burden of proof on the minor does not require the minor to establish 'the often traumatizing and debasing situations they survived,' as the minor argues, but simply to prove that she (or he) was induced or persuaded to engage in the activity by another".<sup>466</sup> In addition to imposing the persuasive burden on the minor

<sup>461</sup> U.K., *R. v. M.K. / R. v. Persida Gega (aka Anna Maione)*, [2018] EWCA Crim 667, para 1.

<sup>462</sup> U.K., *R. v. M.K. / R. v. Persida Gega (aka Anna Maione)*, [2018] EWCA Crim 667, paras 13(i), 16, 45. The decision further found that the burden of establishing a statutory defence does not violate the presumption of innocence reflected in Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms.

<sup>463</sup> U.S., *People vs. M.D.*, 231 Cal. App. 4th 993, 2014, p. 1001, stating: "the [relevant] section does not create an affirmative defense that can be asserted at trial".

<sup>464</sup> U.S., *People vs. M.D.*, 231 Cal. App. 4th 993, 2014, p. 1002.

<sup>465</sup> U.S., *People vs. M.D.*, 231 Cal. App. 4th 993, 2014, p. 1001.

<sup>466</sup> U.S., *People vs. M.D.*, 231 Cal. App. 4th 993, 2014, p. 1001.

victim, the Court imposed an evidentiary threshold higher than that strictly required by statute.<sup>467</sup>

Legislative amendments came into effect in California just after *People v. M.D.* was decided, establishing an affirmative defence "to a charge of a crime that the person was coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and had a reasonable fear of harm".<sup>468</sup> The victim-defendant has the burden of establishing the affirmative defence by the preponderance of the evidence standard.<sup>469</sup>

## 2. Temporal requirements

In several cases, courts have required that the victimisation be contemporaneous with the crimes committed.<sup>470</sup> For example, in the U.S. case of *People v. Aarica S.*, the California State Court of Appeals found that the minor was not a victim of trafficking, as the victim-defendant claimed, at the time she offered sexual services to an undercover police officer. This was due to the fact that she did not have a pimp, and was not giving a pimp the money she earned at the time.<sup>471</sup> While finding that she had been raped by her father at the age of four, and been sexually exploited from the age of 14, having approximately ten pimps, the Court concluded that at the time of the offence of solicitation of prostitution, "she was acting as 'an independent contractor'".<sup>472</sup> The Court found that there was no causal relationship between the victim-defendant's solicitation of prostitution and her experience as a victim of trafficking. It referred to the statutory requirement that the victim-defendant "engaged in any commercial sexual act as a result of being a victim of human trafficking".

In the *Montoya, Pedro Eduardo y otras* case from Argentina, the Cassation Court rejected the application of the non-punishment clause to the victim-defendant as her exploitation had been interrupted six years before she began working for the principal trafficker. It found that her vulnerability while working for Montoya did not involve sexual or labour exploitation.<sup>473</sup>

## E. Exploitation of criminal activities as "purpose" and statutory exclusions

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<sup>467</sup> U.S., *People vs. M.D.*, 231 Cal. App. 4th 993, 2014, p. 1004.

<sup>468</sup> Section 236.23(2)(a), California Penal Code.

<sup>469</sup> Section 236.23(2)(b), California Penal Code.

<sup>470</sup> See, e.g., U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, para 4.

<sup>471</sup> U.S., *People v. Aarica S.*, 223 Cal. App. 4th 1480, 2014, p. 1488.

<sup>472</sup> U.S., *People v. Aarica S.*, 223 Cal. App. 4th 1480, 2014, p. 1488, citing the Californians Against Sexual Exploitation Act and the Evidence Code §1161.

<sup>473</sup> Argentina, *Montoya, Pedro Eduardo y otras*, Causa Nº FCR 52019312/2012/T01/18/CFC2, 2018, p. 55. The first instance court in the *Cáceres* case rejected the application of the non-punishment provision as the victim-defendant was no longer experiencing sexual exploitation at the time of the offence. On appeal, the Cassation Court applied the non-punishment provision while at the same time upholding the requirement that the victimization be contemporaneous with the crime and citing to the *Montoya* case. Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/T01/CFC1, 2018.

The “exploitation of criminal activities” constitutes a purpose of exploitation in the definition of human trafficking. In this regard, the *OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* has called attention to increases in human trafficking committed for the purpose of enforced criminality, and to the “deliberate strategy of the traffickers to expose victims to the risk of criminalization and to manipulate and exploit them for criminal activities”.<sup>474</sup>

Article 2(3) of EU Directive 2011/36/EU adds to the Protocol’s non-exhaustive list of exploitative purposes “exploitation of criminal activities” in the context of trafficking for the purpose of forced labour.<sup>475</sup> It is to be understood as “the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain”.<sup>476</sup>

Limited national and international legal recognition of enforced criminality as a purpose of human trafficking, and its placement in international instruments solely within the context of forced labour, have so far limited its application to victim-defendants in the context of trafficking for the purpose of sexual exploitation. Yet, as the case law reveals, courts have recognised that forced criminality constitutes an entrenched element of trafficking for the purpose of sexual exploitation.

## 1. Exploitation of criminal activities

Human trafficking can have multiple purposes, some of which can evolve over time. In essence, victim-defendant involvement in human trafficking could also be qualified as exploitation for the purpose of committing a criminal offence. Several decisions recognised this phenomenon. For example, the *Bar California* case in Argentina called for increased attention to the “role of victims as a gear in criminal organisations”.<sup>477</sup> In the U.K. case of *LM, MB, DG, Betti Tabot and Yutunde Tijani*, the Court recognised “that one tool of those in charge of trafficking operations is to turn those who were trafficked and exploited in the past into assistants in the exploitation of others”.<sup>478</sup> The Australian *D.S.* case also referred to the victim-defendant as a “minor cog” in the large transnational organisation.<sup>479</sup>

One possible determinative factor for the application of the non-punishment principle may be whether the national legislation in question contemplates “exploitation of criminal activities” as one of the purposes.<sup>480</sup> Given increased understanding of victim-defendant perpetration in the context of trafficking for the purpose of sexual exploitation, international standards and national legislation should be modified to include enforced criminality. This

<sup>474</sup> OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, 2013, para 1.

<sup>475</sup> EU Directive 2011/36/EU, Recital 11.

<sup>476</sup> EU Directive 2011/36/EU, Recital 11.

<sup>477</sup> Argentina, *Bar California*, 40066/2013, p. 81.

<sup>478</sup> U.K., *LM, MB, DG, Betti Tabot and Yutunde Tijani*, [2010] EWCA Crim 2327, 2010, para 14(v).

<sup>479</sup> Australia, *R. v. D.S.*, County Court, para 27.

<sup>480</sup> UNODC, *Issue Paper: The role of "consent" in the trafficking in persons protocol*, 2014, p. 90.

would better cover many of the scenarios detailed in this report and would align with commitments to ensure victim protection and the recognise trafficking as a “gender-specific phenomenon”.<sup>481</sup>

## 2. Statutory and case law exclusions

Another factor in the limited application of non-punishment provisions relates to the scope of crimes contemplated by the particular legislation in question. Several countries have excluded the commission of specific crimes from the application of the non-punishment provision, as well as from criminal expunction statutes. For example, in the U.K. case of *R. v. M.K. / R. v. Persida Gega (aka Anna Maione)*, the Court referred to the list of 140 offences excluded from the application of the non-punishment provision of the Modern Slavery Act, which encompasses the crime of human trafficking. The list further includes:

murder, manslaughter, piracy, false imprisonment, kidnapping and perverting the course of justice, the most serious offences of violence under the Offences Against the Person Act 1861 ... sexual offences, offences under the Domestic Violence, Crime and Victims Act 2004, cruelty to children, female genital mutilation, certain firearms offences, robbery, burglary, blackmail, hostage-taking, hijacking and other offences endangering the safety of aircraft, offences under the Explosive Substances Act 1883, and terrorism offences.<sup>482</sup>

Courts have also interpreted limits on the types of crimes to which the non-punishment principle can be applied. While noting that the Court of Appeals based its reasoning concerning the scope of the principle on the crimes listed in the preamble of EU Directive 2011/36/EU, namely, the use of false documents, or violations of prostitution or immigration laws, the Netherlands Supreme Court specifically excluded its application to participation in the exploitation of other victims as a matter of judicial interpretation. It stated that “[a]fter all, the coercion with which a victim is put into and exploited in an exploitation situation does not directly lead to him also committing exploitation himself.”<sup>483</sup> As observed by UNODC:

States confronting trafficking for the purpose of exploitation in criminal activities are reluctant to fully embrace the principle of the irrelevance of consent, even in situations where the ‘means’ relevant to trafficking in persons can be established. The principal concern seems to be the risk of providing a blanket immunity that would enable criminally responsible persons to escape the consequences of their actions and be used to an even greater extent by criminal entrepreneurs to further their activities.<sup>484</sup>

This concern was expressed in the Court’s rejection of the victim-defendant’s claim in the

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<sup>481</sup> EU Directive 2011/36/EU, Recital 3.

<sup>482</sup> U.K., *R. v. M.K. / R. v. Persida Gega (aka Anna Maione)*, [2018] EWCA Crim 667, paras 8, 9, citing Schedule 4 of the 2015 Modern Slavery Act. The court noted that crimes resulting in long imprisonment sentences, such as drug-related offences, were not excluded.

<sup>483</sup> The Netherlands, 17/03852, 2018, para 8.1.

<sup>484</sup> UNODC, *Issue Paper: The role of "consent" in the trafficking in persons protocol*, 2014, p. 90.

U.S. *People v. Aarica S.* case, in which the victim-defendant had claimed that “because she presented evidence that she was a minor victim of human trafficking, ... the evidence that she solicited a commercial sex act ... was inadmissible to prove that her conduct was criminal”.<sup>485</sup> The Court found that her interpretation of the legislation in question “would provide victims of human trafficking with a blanket immunity for the commission of commercial sexual acts, regardless of whether there was any specific causal connection between their victim status and the particular commercial sex act at issue”.<sup>486</sup> It concluded that the legislation did not apply to her case, given the absence of a causal connection.

The identified cases and literature reveal that sex trafficking victims engage in other crimes due to their situation as victims and/or because they coerced. The crimes committed in the examined cases were: possessing fraudulent identity documents,<sup>487</sup> robbery, including trick rolls, prostitution, soliciting prostitution,<sup>488</sup> illegally keeping a brothel,<sup>489</sup> forced abortion, sexual<sup>490</sup> and physical violence, kidnapping,<sup>491</sup> and drug-related offences, among others.<sup>492</sup> Examining the scope of crimes committed by the victim-defendants underscores gaps in the application of existing non-punishment provisions to their situation, as well as for the possibility of expunging crimes from their criminal records.

Certain, particularly violent, crimes have been excluded from the application of record expunction legislation. Kidnapping was the subject of the victim-defendant's appeal to expunge the felony from her criminal record in the U.S. case of *M.G. v. State of Florida*.<sup>493</sup> In that case, the 2017 Florida Human Trafficking Victim Expunction Statute excluded felony offences resulting in extended imprisonment, including kidnapping. Other excluded crimes included, *inter alia*: sexual battery, robbery, armed burglary and aggravated battery.<sup>494</sup>

A few of the female victim-defendants in the identified cases had committed acts of sexual violence, not all of which were detailed in the decisions. In the Italian *JE* case, the female perpetrator penetrated the victim's vagina with a banana. In the *People v. Deshay* case, the victim-defendant was charged with oral copulation with a minor.<sup>495</sup>

In sum, exceptions carved from the application of national non-punishment and expunction statutes exclude protection related to crimes commonly committed by victim-defendants

<sup>485</sup> U.S., *People v. Aarica S.*, 223 Cal. App. 4th 1480, 2014, pp. 1486-1487. The legislation in question, Evidence Code section 1161(a) provides: “Evidence that a victim of human trafficking, as defined in Section 236.1 of the Penal Code, has engaged in any commercial sexual act as a result of being a victim of human trafficking is inadmissible to prove the victim's criminal liability for the commercial sexual act.”

<sup>486</sup> *Ibid.*

<sup>487</sup> Serbia, K-133/11, High Court in Novi Sad, 2012, p. 27.

<sup>488</sup> U.S., *People v. Aarica S.*, 223 Cal. App. 4th 1480, 2014, p. 1482.

<sup>489</sup> South Africa, *State vs. Veeran Palan and Edwina Norris*, Case No: RCD 13/14, 2014, pp. 24, 25.

<sup>490</sup> U.S., *People v. Deshay*, California Court of Appeals, Case No. C062691, 2011, p. 2.

<sup>491</sup> South Africa, *State vs. Veeran Palan and Edwina Norris*, Case No: RCD 13/14, 2014, pp. 24, 25.

<sup>492</sup> See, e.g., U.S., *People v. Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published); *Trick Roll Study*; U.S., *M.G. v. Florida*, 260 So.3d 1094, 2018.

<sup>493</sup> U.S., *M.G. v. Florida*, 260 So.3d 1094, 2018.

<sup>494</sup> Notably, violent crimes such as murder are also exempted from the common law defences of duress and necessity.

<sup>495</sup> U.S., *People v. Deshay*, California Court of Appeals, Case No. C062691, 2011, p. 2.

in the course of their trafficking experience. These exceptions could have significant negative repercussions on the lives of victim-defendants. For example:

Criminal records can have long-term adverse consequences on an individual. These may include: (a) limiting future employment or volunteer opportunities; (b) making immigration or travel to another country difficult or impossible; (c) child custody orders may be negatively impacted; (d) access to housing may be restricted; and (e) access to certain benefits may not be possible for those with criminal records.<sup>496</sup>

## V. Sentencing

As recognised by UNODC in its background document for the Working Group on Trafficking in Persons of the Conference of Parties to the United Nations Convention against Transnational Organised Crime, entitled “*Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*”:

some criminal justice systems give priority to rehabilitation and addressing the harm caused by crime, while others give priority to punishment and denunciation. How certain principles are prioritized can impact the means in which non-punishment will be implemented.<sup>497</sup>

Jurisdictions also vary greatly in their sentencing practices, depending on the emphasis placed within the criminal justice system on deterrence, punishment, rehabilitation and other aims.<sup>498</sup> An examination of sentencing practices revealed significant diversity in judicial approaches to consideration of victim-defendant victimization for the purpose of sentencing. In the U.S., rather than non-punishment, national legislation specifically contemplates sentences for victim-defendants of sex trafficking. Courts in other jurisdictions have explicitly rejected prior victimisation as a factor, or simply omitted any consideration of it in determining the sentence.

Some courts’ decisions operated within a dichotomous conceptual framework of “victim” or “offender”. At play were the “complex ways in which normative ideas of gender, sexuality and victimhood subsume processes of distinguishing between ‘victims’ and ‘criminals’”.<sup>499</sup> While courts often recognised that the victim-defendants’ victimisation was similar to that of the victims, that finding led to diverse results during sentencing. Consequently, in different cases, courts considered the prior victimisation of the victim-defendant as either an aggravating or a mitigating circumstance, or in some cases did not consider it at all. The

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<sup>496</sup> UNODC, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*, CTOC/COP/WG.4/2020/2, paras 48-49, also noting that they may face barriers to reintegration into society, “which can perpetuate vulnerability”.

<sup>497</sup> UNODC, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked*, CTOC/COP/WG.4/2020, p. 7.

<sup>498</sup> See, e.g., Australia, *Leech v The Queen* [2011] VSCA 344, para 35, indicating that deterrence was “paramount”; Canada, *R. v. Robitaille*, [2017] O.J. No. 5954, in which the court focused “primarily on the objectives of deterrence and denunciation”.

<sup>499</sup> Sine Plambech, *Between “Victims” and “Criminals”: Rescue, Deportation, and Everyday Violence among Nigerian Migrants*, *Social Politics*. Vol 24. No. 3, 2014, p. 385.

courts' approach had a direct impact on the length of sentence to be served, with potential discriminatory implications.

## A. Variations in considering prior or concurrent trafficking victimisation

Approaches to sentencing victim-defendants varied depending upon whether the court recognized the offender as a victim, and how that fact was taken into consideration. The U.S. legal framework specifically foresees penalties for the roles commonly played by female victim-defendants in the trafficking enterprise, such as recruitment and monitoring.<sup>500</sup> According to the U.S. Federal Sentencing Guidelines, a victim<sup>501</sup> "is considered a [criminal] participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim".<sup>502</sup>

In the *U.S. v. Britton* case, the victim-defendant pled guilty for her participation in a criminal conspiracy involving fifteen other defendants. The Court noted that the record revealed that the victim-defendant qualified "as a 'participant' led or organized by the trafficker because she assisted in promoting prohibited sexual conduct with respect to other victims".<sup>503</sup> It held that "as a result of her role as Britton's 'bottom bitch,' [the victim-defendant] pled guilty to conspiracy to engage in interstate prostitution. As a co-conspirator, [the victim-defendant] qualifies as a participant because she was 'criminally responsible for the commission of the offense'".<sup>504</sup>

In the Belgium *IM* case, the First Instance Court of Antwerp explicitly refused to consider the female victim-defendant's prior experience as a victim of trafficking. It stated that:

[i]t is also of no importance that defendants were initially victims of a similar network and seem to be using their knowledge to bring other girls over to do similar sex work. In this way, this reprehensible criminal phenomenon is perpetuated and even more women become victims of exploitation.<sup>505</sup> (Emphasis added).

As observed by academics, this reflects the way in which the criminal justice system "continues to rely heavily on a clear differentiation between the completely innocent victim

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<sup>500</sup> The United States Sentencing Commission Guidelines Manual, 2018, §2G1.1 defines "Promoting a commercial sex act" as "persuading, inducing, enticing, or coercing a person to engage in a commercial sex act, or to travel to engage in, a commercial sex act".

<sup>501</sup> The United States Sentencing Commission Guidelines define "victim" as:

a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, "victim" may include an undercover law enforcement officer.

United States Sentencing Commission Guidelines Manual, 2018, §2G1.1 on Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor.

<sup>502</sup> U.S.S.G. § 2G1.1, n.3.

<sup>503</sup> U.S., *U.S. v. Britton*, 567 Fed.Appx. 158, 2014, p. 161.

<sup>504</sup> U.S., *U.S. v. Britton*, 567 Fed.Appx. 158, 2014, p. 161.

<sup>505</sup> Belgium, *IM*, First instance court Antwerp, Parquet system number 17RA16990, 2018, p. 12.

and the guilty offender”.<sup>506</sup> This tendency toward a dichotomous paradigm could also be seen, for example, in the Philippines case of *People v. Janet Java Onida*. The decision in that case, in which the victim-defendant had trafficked one girl while also being exploited, stated: “[w]hile the Court may feel that the accused is a victim of exploitation, the evidence presented clearly shows that ... accused [victim-defendant] was one of the exploiters and thus violated the law.”<sup>507</sup> The victim-defendant was sentenced to 20 years imprisonment.

One theme that emerged in several cases was a tendency to refer to the victim-defendants as having experienced similar victimisation to that of victims in the case, which sometimes resulted in a mitigation of circumstances or non-punishment.<sup>508</sup> In other cases it resulted in dicta indicating that the victim-defendant “should have known”.<sup>509</sup>

In the Australian case of *Watcharaporn Nantahkuhm*, the victim-defendant’s prior experience as a human trafficking victim was not included on the list of factors to be considered at sentencing. Specifically, the Court found that her prior experience as a victim had an impact, both positive and negative, for the purpose of sentencing. It found that as a former victim, she “should have known”.<sup>510</sup> Despite acknowledging that her prior victimisation was severe, (the details were redacted), the Court found that: “[s]he knew what it was like to be constrained in this way ... She should have known that this was not the way to conduct such a business”.<sup>511</sup>

Similarly, in the Australian *D.S.* case, the Appeals Court stated of the victim-defendant:

The appellant well knew that the scheme involved robbing the victims of their basic rights - she was such a victim herself at one stage, yet she participated in the illegal and highly immoral scheme.<sup>512</sup>

<sup>506</sup> Alexandra Louise Anderson Baxter, *When the line between victimization and criminalization blurs: The victim-offender overlap observed in female offenders in cases of trafficking in persons for sexual exploitation in Australia*, *Journal of Human Trafficking*, 2019, p. 4, citing numerous references to discussions in the trafficking in persons literature on the “tendency to classify explicitly females involved in trafficking offences into one of two primary categories: victim or offender”.

<sup>507</sup> Philippines, *People v. Janet Java Onida*, Crim Case No-Q-08-151971, 2013, p. 6.

<sup>508</sup> See, e.g., South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016, p. 54; Argentina: *Dulcinea*, Causa nro. 91017032, p. 45, finding the victim-defendant more vulnerable than the victims she recruited; Argentina, *Sanfelippo*, Causa No. 15-554, 2014, p. 30; U.S., *People v. Cross*, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published), finding the victim-defendant “10 times” more vulnerable than the victims in the case.

<sup>509</sup> Australia: *Watcharaporn Nantahkuhm*, SSC No. 149, 2012, p. 10; *DS*, Court of Appeals, Victoria, [2005] VSCA 99; *Lay Foon Khoo*, Document Number M20171128\_1017000571\_WADC\_PERTH\_PART\_0003, 2017, p. 11; Belgium, First Instance Court Bruges, B637.L6.961-X7-DF, 2017, pp. 52, 54. See also, Alexandra Louise Anderson Baxter, *When the line between victimization and criminalization blurs: The victim-offender overlap observed in female offenders in cases of trafficking in persons for sexual exploitation in Australia*, *Journal of Human Trafficking*, 2019, p. 4, noting “she should have known” as a theme in Australian cases.

<sup>510</sup> Australia, *Watcharaporn Nantahkuhm*, SSC No. 149, 2012, p. 10.

<sup>511</sup> *Watcharaporn Nantahkuhm*, SSC No. 149, 2012, para 13.

<sup>512</sup> Australia, *DS*, Court of Appeals, Victoria, [2005] VSCA 99.

Although the decision acknowledged her previous victimisation, similar to those of the current victims, it was not taken into consideration for the purpose of sentencing.<sup>513</sup> In this way:

[t]he pattern of using their previous victimization in favour of intensifying their offender status raises concerns about the practice of discounting the levels of exploitation and victimization endured before the transition to offender was made, in favour of upholding the rights of the *current* victims and punishing the *current* offender.<sup>514</sup> (Emphasis in original).

In a few cases, while recognising past victimisation or exploitation, the court did not reduce, or only slightly reduced, the sentence of the female victim-defendant, with victim-defendants given equivalent sentences to the principal traffickers.<sup>515</sup>

In the case of *People v. Williams*, the female victim-defendants received lesser sentences than the principal traffickers (who were male) as the court found them less culpable. It did not take into account their prior victimization for the purpose of sentencing.<sup>516</sup> Similarly, in the *U.S. v. Willoughby* case, the female victim-defendants were sentenced to slightly lower terms of imprisonment than the principal trafficker for their role in transporting and training the victims in prostitution and collecting their earnings.<sup>517</sup> Significantly, many of the sentencing decisions in cases of victim-defendants in the U.S. involved plea agreements, including early pleas of guilt.<sup>518</sup>

In other cases, victim-defendant sentences were substantially reduced or made conditional, based on the prior victimisation. In the *Mabuza and Chauke* case in South Africa, for example, the principal trafficker was sentenced to the mandatory minimum of life imprisonment, and the young, female victim-defendant was sentenced to a suspended 20-year sentence, finding "substantial and compelling" reasons to deviate from the mandatory minimum in her case based on her prior experience as a trafficking victim.<sup>519</sup> In that case, the victim had been trafficked by her sister as a young girl to provide sexual services to the trafficker until her pre-adolescence, at which point she was considered as too old. She continued working on the trafficker's isolated plantation with her sister, providing food for the later victims and

<sup>513</sup> *DS*, Court of Appeals, Victoria, [2005] VSCA 99. The court did reduce her sentence based on her cooperation with law enforcement authorities "at considerable risk to her safety". This same approach was taken in the *Leech v The Queen* case, in which the victim-defendant's victimisation in being required to serve 650 clients while trafficked was mentioned but not considered for the purpose of sentencing. *Leech v The Queen* [2011] VSCA 344, para 29.

<sup>514</sup> Alexandra Louise Anderson Baxter, *When the line between victimization and criminalization blurs: The victim-offender overlap observed in female offenders in cases of trafficking in persons for sexual exploitation in Australia*, *Journal of Human Trafficking*, 2019, p. 3, further qualifying: "Rather than attending to the deteriorating social conditions and available opportunities that contribute to an environment in which crime is a desirable option, the experiences that lead people to commit crime are discounted".

<sup>515</sup> See, e.g., Philippines, *People v. Janet Java Onida*, Crim Case No-Q-08-151971, 2013, p. 6.

<sup>516</sup> See, e.g., U.S.: *People v. Williams*, 783 Fed.Appx. 269, 2019, p. 276.

<sup>517</sup> *U.S. v. Willoughby*, (E.D. Mich), 2007, pp. 5-6 and sentencing decision.

<sup>518</sup> U.S.: *U.S. v. Willoughby*, (E.D. Mich), 2007, victim-defendant entered into plea agreement; *People v. Williams*, 783 Fed.Appx. 269, 2019, victim-defendants pled guilty and cooperated with the prosecution; *U.S. v. Brown / Hollis*, US District Court, Eastern District of Michigan, 2:05-cr-80101-AJT-DAS Doc # 39, 2005, p. 2, victim-defendant entered plea agreement; *U.S. v. Britton*, 567 Fed.Appx. 158, 2014, victim-defendant pled guilty.

<sup>519</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, p. 54.

preparing them to have sex with the trafficker whenever her sister was absent. She was 24 years old at the time of sentencing.

In the Canadian case of *R. v. Robitaille*, the Court found that the victim-defendant's prior and current sexual exploitation placed her in a "very unique position", allowing the Court to consider "her potential and need for rehabilitation in conjunction with deterrence and denunciation".<sup>520</sup>

In a few cases involving transnational trafficking, the irregular migration status of the victim-defendant resulted in immediate deportation following the serving of the sentencing. For example, in the *Mabuza and Chauke* case, the victim-defendant was immediately deported to Mozambique after sentencing.<sup>521</sup>

## B. Aggravating circumstances

### 1. Prior experience as a trafficking victim

Courts in several jurisdictions have used the victim-defendant's prior experience as a victim of trafficking as a factor weighing against them for the purpose of sentencing. In a Belgian case involving a Nigerian trafficking ring, the Court observed with respect to one victim-defendant that she had "worked up" from a person in prostitution to becoming the romantic partner and associate of a male co-accused. In this way, she "ascending to the same inhumane practices," and "knowing well" what it is to be sexually exploited, which attested to her "very questionable attitude".<sup>522</sup>

### 2. Abuse of a position of vulnerability

In addition to constituting the means element of the crime of human trafficking, abuse of vulnerability was found to be an aggravating factor in several jurisdictions, including Argentina,<sup>523</sup> Belgium and Italy.<sup>524</sup> Notably, the recital to EU Trafficking Directive 2011/36/EU considers the following vulnerability factors in the context of penalties: "gender, pregnancy, state of health and disability".<sup>525</sup>

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<sup>520</sup> Canada: *R. v. Robitaille*, [2017] O.J. No. 5954.

<sup>521</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, p. 56; see also, Italy, *JE*, Case Number 1081/2019, ordering the couple's deportation. It should be noted that in this case, the deportation did not derive from the irregular migration status of the victim-defendant as such, but due to her sentencing to a more than two years imprisonment. Such deportation order is not immediate and remains discretionary for re-evaluation after the sentence is served.

<sup>522</sup> Belgium, First Instance Court Bruges, B637.L6.961-X7-DF, 2017, pp. 52, 54.

<sup>523</sup> Argentina: *Bar California*, 40066/2013; *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.

<sup>524</sup> Italy, *JE*, Case Number 1081/2019.

<sup>525</sup> Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Recital 12.

Belgian anti-trafficking legislation consists only of acts and purpose. Abuse of a position of vulnerability constitutes an aggravating circumstance.<sup>526</sup> Consequently, abuse of a position of vulnerability constituted aggravating circumstances in several cases.<sup>527</sup> For example, in the *I.M.* case, the Court stated, with respect to the vulnerability of the victims, that:

[t]he girls' precarious residence permit social situation was abused and in reality, they had no other and acceptable choice than to agree to prostitute. The victims were illegal on the European and Belgian territory, had no valid residence or identity documents, did not know the language and were completely dependent of the defendant IM who, with the help of others, illegally removed them from their home country to Europe for sexual exploitation here. The victims did not have a family or social network in Belgium and were also financially dependent on Defendant IM and those who assisted her.<sup>528</sup>

## C. Mitigating circumstances

### 1. Prior experience as a trafficking victim

Courts that considered prior trafficking victimisation as a mitigating circumstance also tended to focus on the similarity of situations between victim-defendants and victims. As described above, prior experience as a trafficking victim constituted the basis for departure from mandatory minimum sentences in a few cases. In the South Africa case of *Mabuza and Chauke*, the Court found "substantial and compelling" reasons to deviate from the mandatory minimum of life imprisonment due to the victim-defendant's prior experience as a victim of trafficking by her sister when she was a very young girl, and because her participation in the crime was limited to providing shelter and food to the victims in her sister's absence and in sending them to be raped by the male accused.<sup>529</sup> The Court stated that "[q]uite clearly, you were a victim of the same circumstances which could make you believe that you and the children had no other choice but to abide with the arrangement".<sup>530</sup>

In a case involving a victim-defendant who had been sexually exploited from a young age for the co-accused, the Dutch Supreme Court found that her status as a victim was a mitigating circumstance. The Court noted that "working in prostitution for [the trafficker]

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<sup>526</sup> The legislative provision regarding abuse of vulnerability as an aggravating circumstance in Belgium reads:  
by abusing the (particularly) vulnerable situation in which a person is, because of their illegal or precarious administrative situation, their precarious social situation, a pregnancy, illness, a disability or physical or mental impairment, such that the person actually has no real and acceptable alternative but to submit to the abuse.

Criminal Code, Art. 433septies.

<sup>527</sup> Belgium: *E.G.*, Parquet system number 18G1175, 2018, p. 4; *I.M.*, First instance court Antwerp, Parquet system number 17RA16990, 2018, p. 3; First Instance Court Bruges, B637.L6.961-X7-DF, 2017.

<sup>528</sup> Belgium: *I.M.*, First instance court Antwerp, Parquet system number 17RA16990, 2018, pp. 8-9; First instance court Liège, 19th Chamber, 2016.

<sup>529</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, p. 54.

<sup>530</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016, p. 54.

has left its mark from a young age" and, further, "[i]n that sense, the suspect can also be regarded as a victim, although this is not in the sense of the non-punishment principle".<sup>531</sup>

A German court, however, did not mention the victim-defendant's contemporaneous trafficking experience as a mitigating circumstance. The decision detailed the recruitment and exploitation of the adolescent victim-defendant by the principal traffickers and acknowledged her claims that her participation in the crime through the weekly collection of victims' earnings and the transportation of one victim to a brothel were performed under the coercive instruction of the trafficker. Nonetheless, the Court considered only her youth and remorse, not the coercion nor her own contemporaneous exploitation, in its determination of her guilt and decision to suspend her sentence.<sup>532</sup>

## 2. Age

Several of the identified cases concerned minor and young victim-defendants. Age was taken into consideration as a mitigating circumstance for the purpose of sentencing. In the Canadian *Robataille* case, for instance, the judge placed considerable weight on the age of the victim-defendant at the time of the offence (she was 18 and a half), which was considered as a factor in terms of rehabilitation.<sup>533</sup>

The victim-defendant's age at the time of the commission of the crime, 19-years-old, seemed not to be considered in the Brazilian *L.B.N.* case, in which she was sentenced by the lower court to five years, one month and 20 days imprisonment.<sup>534</sup> As noted above, the young age of the victim-defendant in the South Africa case of *Mabuza and Chauke* was a factor considered for the purpose of sentencing.<sup>535</sup>

## 3. Parental and other familial obligations

Rule 57 of the Bangkok Rules calls for non-custodial sentencing options for primary carers. Although the Bangkok Rules were never specifically invoked, some courts offered diverse forms of legal recognition of the parental and familial responsibilities assumed by victim-defendants in attenuating their sentencing. In the Bosnian case of *Kučević*, the Court mitigated the victim-defendant's sentence in light of the fact that she was the mother of a minor child and cared for five children.<sup>536</sup>

Given the significant percentage (24%) of victim-defendants in the case law examined whose susceptibility to trafficking was grounded in their familial obligations and primary

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<sup>531</sup> Netherlands, Supreme Court, 17/03852, 2018, para 8.1.

<sup>532</sup> Germany, District Court Duisburg, 33 KLs 17/18, 2019.

<sup>533</sup> Canada: *R. v. Robatille*, [2017] O.J. No. 5954, paras 68-83.

<sup>534</sup> Brazil, *L.B.N.*, Processo n° 2001.83.00.007512-0, 2007, pp. 5, 9. On appeal, the sentence was reduced to three years and one month imprisonment, but not on account of the victim-defendant's age.

<sup>535</sup> South Africa, *Mabuza and Chauke*, SHG 9 / 13, 2016.

<sup>536</sup> Bosnia and Herzegovina, *Kučević*, X-KŽ-06/181, 2009, p. 67.

care-giving, care-giving should be recognised as a significant factor and considered more consistently for the purpose of sentencing, in line with Rule 57 of the Bangkok Rules.<sup>537</sup>

## VI. Judicial treatment of gender in victim-defendant perpetration

Recognition of human trafficking as a gendered phenomenon at the most basic level, as well as the identification of gendered understandings of relationships, the family, and the ideal victim was evident in many of the cases examined. The analysis throughout this report has drawn attention to numerous aspects in which gender plays out both in the dynamics of victim-defendant participation in human trafficking. This includes as an element of structural vulnerability and in the gendered roles assumed by victim-defendants, as well as the fact that they are often have intimate or familial relationships with the traffickers. This section details the extent to which gendered approaches were included in the judicial response, discriminatory judicial bias in decision-making, and the overall omission of addressing what were indications of potential violation of sexual and reproductive health rights.

### 1. Recognizing the gendered nature of the crime of trafficking

At the outset, it is important to highlight the complex factors that determine women's pathways into crime. The gendered nature of structural discrimination and violence are an important part of understanding female victim-defendant perpetration in sex trafficking. Moreover, poverty featured highly in the lives of victim-defendants in the cases examined; they tended to have a history of unmet basic needs. They had also often experienced sexual and physical violence, poor physical and mental health, and lack of access to housing, income, and employment. Substance abuse and childcare responsibilities often compounded these problems.

Despite significant global advances in gender equality over the last 25 years, it is important to note the findings of the 2020 Global Gender Report by the World Economic Forum, entitled *Mind the 100 Year Gap*, which found that gender parity across a range of sectors, including economic opportunities and labour participation, will not be achieved for another 99.5 years.<sup>538</sup> As observed by the U.S. State Department, the confluence of discrimination and violence results in increased and structural vulnerability:

The low status of women in some societies, insufficient access to education, limitations on legal rights, and other forms of discrimination are recognized as “push

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<sup>537</sup> Rule 57 provides in pertinent part: “Gender-specific options for diversionary measures and pretrial and sentencing alternatives shall be developed within Member States’ legal systems, taking account of the history of victimization of many women offenders and their caretaking responsibilities.”

<sup>538</sup> World Economic Forum, *Mind the 100 Year Gap*, 2019, available at: <https://www.weforum.org/reports/gender-gap-2020-report-100-years-pay-equality>, last checked 3 September 2020.

factors” that combine with other situational problems such as conflict, civil instability, or an economic crisis to prompt young women to leave their communities. In many communities and cultures, violence against women is all too common, and laws intended to protect women are inadequate or not enforced.<sup>539</sup>

Nonetheless, based on the decisions examined, few courts appeared to recognise the structural determinants of the crimes committed, such as gender-based violence, single motherhood and women’s family caretaking responsibilities.<sup>540</sup>

The analyses of sexual exploitation and structural vulnerability in the case law from Argentina maintained gender as a centre piece of the discussion. Of equal significance, the courts in Argentina maintained human trafficking as a crime violating the victim’s right to self-determination, functioning as a critical aspect of judicial dicta. For example, in the *Dulcinea* case, the Court characterized the emphasis on the victims’ physical freedom of movement as “derived from a strong male-centric conception of freedom,” clarifying that self-determination was at issue, not ambulatory movement.<sup>541</sup> This distinction was also made in the *Landriel, Daniel y Otros* case, in which the Court emphasised the fact that human trafficking constituted a crime against individual liberty, not simply freedom of movement, “but also the capacity to decide freely and with full intention and will. This is to say, the freedom of the individual’s self-determination”.<sup>542</sup>

## 2. Gender in family and intimate partner relationships

The relationship between the victim and the trafficker appears to be the most significant determinant for victims becoming perpetrators, as detailed extensively above. The gendered aspects of the relationships between victim-defendants and male traffickers have important implications as a vulnerability factor, and with respect to the voluntariness of their acts of perpetration. Although underlying concepts of family are deeply informed by gendered social and cultural norms, in the examined decisions Courts did not delve into the utilisation of family ties in human trafficking, neither when trafficking constituted the family business, nor when traffickers exploited their own family members.

In this way, the concept of “home” can become “naturalized and therefore depoliticized as a site where harm and risk are part of women’s everyday lives”.<sup>543</sup> This *de facto* approach

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<sup>539</sup> U.S. State Department, *Trafficking in Persons Report*, 2009, p. 41.

<sup>540</sup> Australia, *Watcharaporn Nantakuhm*, SSC No. 149, 2012, p. 6; Argentina: *Dezorzi, Valeria Soledad s/ recurso de casación*, Causa n° FCB 53200033/2012/T01/CFC1, 2017, p. 11, noting that the victim-defendant was the sole provider for her daughter, who lived in another province and whose father was incarcerated, and that her vulnerability resulted in her sexual exploitation; *Justino Horacio Abel y otra*, Causa No. FGR 81000828/2012//CFC1, 2017, pp. 30-31, finding that the victim-defendant had a daughter in Paraguay for whom she was providing by being sexually exploited.

<sup>541</sup> Argentina: *Dulcinea*, Causa nro. 91017032, pp. 81, 94.

<sup>542</sup> Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018, p. 191.

<sup>543</sup> Sine Plambech, *Between “Victims” and “Criminals”: Rescue, Deportation, and Everyday Violence among Nigerian Migrants*, Social Politics. Vol 24. No. 3, 2014, p. 396.

should be called into question in light of the large percentage of cases (approximately 25%) in which the decision explicitly referred to the victim-defendant's experience of prior and contemporaneous victimisation by family members and intimate partners. It should be underscored that the overall phenomenon of under-reporting of gender-based violence suggests that this factor may have been present in a larger percentage of the cases.

The *Justino Horacio Abel y otra* case from Argentina constitutes an important exception. In that case, the lower court had rejected the application of the non-punishment provision due to the victim-defendant's participation in recruiting and transporting victims from Paraguay. The lower court specifically found that when the victim-defendant went to Paraguay to recruit women, she could have sought the assistance and safety of her family.<sup>544</sup> The Cassation Court called into question the lower court's conception of the "safety of her family environment" as the place where she could free herself from being trafficked, and underscored the "desperate economic need" of the victims in Paraguay that had vitiated their consent in coming to Argentina.<sup>545</sup>

As described above, it was often through initiating romantic relationships with victims, whether real or feigned, that traffickers involved them in perpetration. In several of the cases examined above, the traffickers were able to control the victims and victim-defendants by engaging in romantic relationships with them.<sup>546</sup> Establishing intimate relations appears to be a key element of the "means" used by traffickers. It was used in the cases examined to sexually exploit the victims, as well as to coerce them to assume the functions of a perpetrator. In one Serbian case, both female victim-defendants were or had been romantically involved with the male traffickers and were sexually exploited by them. While the Court observed that one victim-defendant was subjected to physical violence and the threat of physical violence by the male trafficker, it made findings only in relation to the threat of violence perpetrated by the trafficker against the victims in the case.<sup>547</sup>

Concurrent intimate partner relationships have the effect of blurring the boundaries between human trafficking and intimate partner violence. This was most clearly illustrated in two cases in which the defence claimed that the violence at issue constituted domestic violence and not the "means" element of the crime. In the U.S. case of *Hicks v. Rackley*, the perpetrator claimed that the violence exerted against the victim stemmed out of tensions and jealousy from their romantic relationship, and was not used as a form of control for the purpose of exploiting her.<sup>548</sup> In that case, the Court found that: "[t]here was ample evidence that, while defendant may have had some type of romantic relationship with [the victim-defendant], his acts of violence towards her were done with the intent to keep her working for him".<sup>549</sup>

<sup>544</sup> Argentina, *Justino Horacio Abel y otra*, Causa No. FGR 81000828/2012//CFC1, 2017, p. 29.

<sup>545</sup> Argentina, *Justino Horacio Abel y otra*, Causa No. FGR 81000828/2012//CFC1, 2017, p. 30.

<sup>546</sup> U.S., *U.S. v. Bell*, 761 F.3d 900, (8th Cir 2014), pp. 903-905, 908; Bosnia and Herzegovina, Court of BiH, K-71/05, 2006; Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, pp. 60, 61; Serbia, K-133/11, High Court in Novi Sad, 2012, pp. 4, 5, 18, 19.

<sup>547</sup> Serbia, K-133/11, High Court in Novi Sad, 2012, pp. 18, 19.

<sup>548</sup> U.S., *Hicks v. Rackley*, Case No. 16-03270 BLF (PR), (NDCA 2018), p. 6.

<sup>549</sup> U.S., *Hicks v. Rackley*, Case No. 16-03270 BLF (PR), (NDCA 2018), p. 4.

Similarly, in the *Landriel, Daniel y Otros* case from Argentina, which involved an entire “matrix” of family trafficking: a husband trafficking his wife and daughter, and their sons trafficking their girlfriends, the defense argued that the violence in question related to “domestic violence,” and a series of “stormy romantic and family relations” not human trafficking.<sup>550</sup>

Courts in Argentina have taken diverse approaches to interpreting the “norms” of intimate partner relationships. This was clearly seen in conflicting interpretations between the lower court’s and Cassation Court’s reading of the romantic relationship at issue in the *C. M. S. y Otros* case, in which the trafficker had met the victim-defendant as a client when she was exploited. The lower court in that case had found that the economic, social and cultural differences (for example, the victim-defendant seeing him as superior) should not be evaluated outside “the normal canons of a romantic relationship”.<sup>551</sup> The Cassation Court characterised the lower court’s description of romantic relationships as “stereotypical”. It found that the lower court had put the exploiter (male) and the exploited (female) in the same position due to their romantic relationship, based on a stereotypical understanding of relationships as entailing equality and partnership. It rejected that approach in the case as the victim-defendant was subjected to violence and sexual exploitation in the course of the relationship.<sup>552</sup>

In the *Cáceres*, the Cassation Court noted the defence’s argument that the victim-defendant, in her intimate partner relationship with the primary trafficker, had essentially become the trafficker’s “private prostitute.” In this role she was required to satisfy his sexual demands all day long. It observed that the lower court had qualified this defence argument as “sexist,” finding that she enjoyed the sex, as evident from the films and the letters she had written him.<sup>553</sup> This case was characterised by conflicting definitions of what constitutes a “sexist” gendered stereotype in judicial readings of intimate partner relationships.

In most of the cases, however, the courts tended to simply note the existence of the relationship between the co-accused without inquiring into the nature or dynamics of that relationship. It is in this context that reference to coercive control may be useful in linking forms of intimate partner violence with the coercive aspect of the “means” element, as applied to victim perpetration as a form of forced criminality. As explained by EIGE:

Understanding the dynamics of violence against women, including the elements of power and control, the gradual impairment of the violent situation and the complexity of the aspects causing vulnerability to exploitation and violence, may assist the criminal justice practitioners to apply and interpret the definition of human trafficking and achieve convictions.<sup>554</sup>

### 3. Gender-discrimination and judicial bias

<sup>550</sup> Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa nº 2.559, nº, CFP 7677/2014/TO1, 2018, pp. 130-131.

<sup>551</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 48.

<sup>552</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 50.

<sup>553</sup> Argentina, *C. M. S. y Otros*, Causa NG CFP 23D/2011/TO1/CFC1, 2018, p. 47.

<sup>554</sup> EIGE, *Gender-specific measures in anti-trafficking actions*, 2018, p. 16.

As observed by the NGO Shared Hope International, U.S. based courts repeatedly make reference to the term "bottom" to describe the role that trusted victims of sexual exploitation play in assuming responsibilities in the trafficking enterprise.<sup>555</sup> While recognition of the term and its meaning in the dynamics of pimping-prostitution relationships and human trafficking is essential, the ongoing repetition of this derogatory language in many of the judicial decisions in the U.S. reinforces terminology that has been "created and perpetuated by the traffickers who exploit victim-offenders".<sup>556</sup>

The examined cases demonstrated the use of gendered stereotypes in determining who is a "good" victim deserving of protection. For example, in the South African case of *State vs. Veeran Palan and Edwina Norris*, the Court referred to stereotypical notions regarding the behaviour of the victims. It stated: "[t]he most material shortcoming in their evidence was their inability to explain satisfactorily why they did not make use of the first opportunities to seek help from members of the public."<sup>557</sup> Another example of the way these stereotypes operate in human trafficking cases includes the "should have known" finding for the purpose of sentencing, as demonstrated above. Importantly, some decisions also engaged in critical recognition of the employment of such stereotypes.<sup>558</sup>

#### 4. Sexual and reproductive rights

Human trafficking for the purpose of sexual exploitation has significant implications for the sexual and reproductive health and rights of victims. As noted by EIGE, "[a] study by the European Commission found that many of the harms arising from trafficking for sexual exploitation are gender-specific, including vaginal injuries, increased risk of sexually transmitted diseases and HIV and unwanted pregnancies".<sup>559</sup>

Nonetheless, those rights were not referenced in any of the examined decisions, with only two exceptions. In a German case, a violation of the victims' right to sexual self-determination was recognized by their forced engagement in prostitution.<sup>560</sup> In the Italian IC case, forced clandestine abortion arranged by one of the victim-defendants was considered an aggravating circumstance.<sup>561</sup> While it is possible that cases addressing sexual and reproductive rights violations could have been brought in separate actions, the absence of relevant consideration in any of the cases examined should be noted.

Several cases made reference to pregnancy and the need for victims and victim-defendants to obtain abortions, the use of forced abortions, and incidences of miscarriages that occurred during their sexual exploitation, or as a result of their intimate relationships with

<sup>555</sup> U.S., *U.S. v. Britton*, 567 Fed.Appx. 158, 2014, p. 159.

<sup>556</sup> Shared Hope International, *Responding to Sex Trafficking: Victim-Offender Intersectionality*, 2020, p. iii. Shared Hope International thus uses the term "victim-offender" or "victim-offender intersectionality".

<sup>557</sup> South Africa, *State vs. Veeran Palan and Edwina Norris*, Case No: RCD 13/14, 2014, p. 22.

<sup>558</sup> Argentina: *Dulcinea*, Causa nro. 91017032, pp. 55, 56.

<sup>559</sup> EIGE, *Gender-specific measures in anti-trafficking actions*, 2018, pp. 14, 15 citing European Commission, *Study on the Gender Dimension of Trafficking in Human Beings*, Luxembourg, 2016.

<sup>560</sup> Germany, District Court Duisburg, 33 Kls 17/18, 2019, p. 8.

<sup>561</sup> Italy, IC, Catania, 2019, pp. 28, 73, 78.

traffickers.<sup>562</sup> In the cases examined, victim-defendants were both subject to, and perpetrators of, such reproductive rights violations. Health control regulations for persons in prostitution were also found to facilitate the coercion and exploitation of the victims. Threats regarding reproductive health were also a subject of the “means” element of the crime in a case involving Nigerian trafficking networks, in which the trafficker used a voodoo ritual to threaten the victim with an unending menstrual cycle.<sup>563</sup>

It is interesting to note that there has been some documentation of the issue of clandestine abortion and barriers to access to health care among migrant women from sub-Saharan Africa in transit countries on their way to Europe. The report titled *Migrant women in hiding: Clandestine abortion in Morocco* documents barriers to reproductive health and reproductive rights violations in Morocco, including: migrants’ lack of documentation and financial resources, their possible arrest and deportation (including in and from medical facilities), inadequate care, the illegality of abortion in Morocco, language barriers and their lack of freedom of movement due to restrictions placed on them by traffickers.<sup>564</sup>

Given the vulnerability of victims of trafficking to sexual violence during transit and in the country of destination, sexual and reproductive rights should be routinely addressed. This is an integral part of a gender-specific, victim-centred, human rights-based approach to trafficking.

#### a. Illegal and/or forced abortion

As noted above, numerous cases referred to the pregnancy of victims of sexual exploitation and resulting abortions<sup>565</sup> and miscarriages.<sup>566</sup> Several cases involving Nigerian trafficking networks noted that victims were required to obtain abortions, which were often arranged by the victim-defendant.<sup>567</sup> In the Italian *IC* case, forced clandestine abortion arranged by one of the victim-defendants constituted one of the elements of the aggravating circumstance of abuse of vulnerability, for “not infrequently making them abort clandestinely when they are pregnant”.<sup>568</sup> In more than one case, the court observed that victims were forced to immediately return to work even if they experienced severe bleeding.<sup>569</sup>

<sup>562</sup> See, e.g., Italy, *IC*, Catania, 2019; Costa Rica, Resolución N° 00930 – 2002; Philippines, *People v. Janet Java Onida*, Crim Case No-Q-08-151971, 2013, p. 3; Belgium, *T.*, Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018, p. 13; Argentina, *Landriel, Daniel y Otros*, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018, p. 72

<sup>563</sup> Belgium, First Instance Court Bruges, B637.L6.961-X7-DF, 2017, p. 28.

<sup>564</sup> Women’s Link Worldwide, *Migrant women in hiding: Clandestine abortion in Morocco*, 2009.

<sup>565</sup> Argentina, *Bar California*, 40066/2013, pp. 21, 47, 53, noting numerous pregnancies; U.S., *People v. Aarica S.*, 223 Cal. App. 4th 1480, 2014, pp. 1483, 1484; Germany, District Court Duisburg, 33 Kls 17/18, 2019, p. 13; Italy, *IC*, Catania, 2019; Belgium, First Instance Court Bruges, B637.L6.961-X7-DF, 2017, pp. 20, 21 28;

<sup>566</sup> Costa Rica, Resolución N° 00930 – 2002, p. 3; the Philippines, *People v. Janet Java Onida*, Crim Case No-Q-08-151971, 2013, p. 3.

<sup>567</sup> See, Belgium, First Instance Court Bruges, B637.L6.961-X7-DF, 2017, pp. 21, 40, 44; Germany, District Court Duisburg, 33 Kls 17/18, 2019, p. 13; Italy, *IC*, Catania, 2019, pp. 28.

<sup>568</sup> Italy, *IC*, Catania, 2019, pp. 28, 73, 78.

<sup>569</sup> See, e.g., Germany, District Court Duisburg, 33 Kls 17/18, 2019, p. 13.

These events occurred in countries where access to legal and safe abortion services are either limited or inexistent. For example, the case of *People v. Janet Java Onida* involved the trafficking of persons to Singapore, where the victim got pregnant and had a miscarriage.<sup>570</sup> Abortion services are legal for: citizens of Singapore, those with legal residency for at least four months, and women whose life is in danger. If a pregnant woman does not meet any of the above-mentioned criteria and goes through with an abortion procedure, she can be fined of up to \$ 3,000, and/or face up to 3 years' jail.<sup>571</sup>

Clandestine abortions can have serious, lifetime health consequences. Some courts noted that the victims were required to pay for the abortion, and there was no indication in any of the decisions as to whether the abortion was voluntary.<sup>572</sup> In sum, despite the clear evidence of reproductive rights violations both by and of victim-defendants, recognition of this very gendered consequences of trafficking for the purpose of sexual exploitation was omitted from most of the examined decisions. As noted, however, separate actions may have been instituted in this regard. This is an issue that requires a more sustained examination.

### ***b. Use of sanitary booklets / gynaecological exams as a form of exploitation***

One case from Argentina involved charges not only against the human traffickers, but also the municipal authorities for their complicity in the crime through the implementation of a regulatory framework that served to further exploit victims of trafficking. In the *Justino Horacio Abel y otra* case, the Court found that the victim-defendant had taken over managing the brothel, including the health booklets, upon entering into a romantic relationship with the brothel owner and principal trafficker. The Cassation Court underscored the role of the municipality in creating a costly and circuitous method of approval for medical booklets. They expired every two months, requiring victims to go through an expensive process which they paid for out-of-pocket in order to work. It described a "ruffian and pandering State" and found that the municipality's controls and inspections only served to reinforce the trafficker's authority over the victims.<sup>573</sup>

Similarly, a concurring opinion in the *Sanfelippo* case found that diverse State agencies, including medical functionaries, had been providing cover for the illicit behaviour through routine controls, surrounding the business "with apparent legality".<sup>574</sup>

<sup>570</sup> The Philippines, *People v. Janet Java Onida*, Crim Case No-Q-08-151971, 2013, p. 3.

<sup>571</sup> See, Singapore Legal Advice, available at: <https://singaporelegaladvice.com/law-articles/what-are-singapores-laws-on-abortion/>.

<sup>572</sup> See, e.g., Italy, *IC*, Catania, 2019; Germany,

<sup>573</sup> Argentina, *Justino Horacio Abel y otra*, Causa No. FGR 81000828/2012//CFC1, 2017, pp. 25-27.

<sup>574</sup> Argentina, *Sanfelippo*, Causa No. 15-554, 2014, p. 38.

## VII. Conclusion

As detailed throughout this report,

[t]he particular realities of trafficking in persons and the impact of this crime on victims require responses that are sensitive to the needs and circumstances of those bearing that impact. Victim-centred and gender-transformative responses are critical. A victim-centred approach prioritizes the needs and priorities of victims, and a gender-specific approach takes into account the specificities of each gender in experiencing such realities.<sup>575</sup>

The case analysis in this report, which was conducted through a victim-centred, gender-sensitive lens, illustrates the complex issues surrounding the phenomena of victim-defendants trafficked for the purpose of sexual exploitation.

Failures to identify victims of trafficking for the purpose of sexual exploitation among defendants in many of the cases examined indicates that victim-centred approaches are not sufficiently implemented during investigation, prosecution and final adjudication. This has deleterious consequences for victims and impacts on their ability to obtain needed assistance, as well as their right to a fair trial. There are, in addition, potentially negative immigration outcomes that attach to a failure to identify victim status. These include denied access to appropriate reflection periods and forms of temporary or permanent residence, as well as the possibility of immediate removal from the countries they have been trafficked to.

Victims of trafficking often have numerous and intersecting vulnerabilities and suffer a range of violations of their human rights. As recognised in some of the cases, prosecution, conviction and punishment can further traumatise victims of trafficking and may be construed as institutionalised violence against them. Criminal convictions, and even conditional or suspended sentences can impede victim-defendants from rebuilding their lives and reintegration into society. It may prevent them, for instance, from accessing educational and employment opportunities.

Victim-defendants' relationship with perpetrators, particularly as family members and intimate partners, together with the gendered nature of the roles played by female victim-defendants (their subordinate status and their close contact with the victims, on the "bottom," closest to the exploitation), are two significant aspects of the phenomena.

While the relationships of victim-defendants and their gendered roles are often recognised in the facts of court decisions and in dicta, these two factors were rarely given adequate

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<sup>575</sup> UNODC, Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked, CTOC/COP/WG.4/2020/2, paras 9-11 and reference therein to Inter-Agency Coordination Group against Trafficking in Persons, "Non-punishment of victims of trafficking", issue brief No. 8 (2020). Further stating:

The non-punishment principle for victims of trafficking in persons provides a focus, on how the circumstances of victims of trafficking should be considered and, when implemented, helps to guide appropriate justice system responses, with the most fundamental and practical consequences. It is an important component of effective anti-trafficking responses.

attention by courts in relation to offending by victim-defendants. This potentially functions as a barrier to their equal treatment before the law. The number of cases involving familial and/or romantic relationships between victim-defendants and traffickers calls for further and deeper analysis, particularly into the use of coercive control as the means of transforming the victim into a criminal participant.

A few cases recognised the victim-defendants' proximity to the exploitation as an explicit tactic employed by traffickers to avoid criminalization. Some cases also recognised that prosecuting such victims is likely a consequence of their status as "low-hanging fruit", potentially resulting in their over-representation among those arrested.<sup>576</sup> This is in contrast to traffickers working in removed and higher positions within the criminal hierarchy, who are less often apprehended. These dynamics show that the criminal prosecution and conviction of victim-defendants is, first, beneficial to traffickers and, second, a violation of international standards related to the protection of victims of trafficking.

Increased recognition of abuse of vulnerability as the "means" element of the crime, and as a factor in sentencing determinations, enabled courts to recognise the structural discrimination and violence that result in the over-representation of women and girls as victims of trafficking. At the same time, omissions and overt disregard of prior and concurrent forms of victimisation of victim-defendants by courts, as well as a lack of consideration of their sexual and reproductive health and rights, produced outcomes that continue to deny meaningful access to justice for women.

The diverse approaches taken by states to the non-punishment principle impede its effective application to victim-defendants of trafficking for the purpose of sexual exploitation. Restrictive definitions of coercion that focus on the use and threat of force, as well as statutory exceptions to the crimes covered by non-punishment and expunction legislation, are just some of the ways in which the non-punishment principle is limited. It is often not applied to victim-defendants; a state of affairs reflective of the broader lack of recognition of the circumstances experienced by the majority of female victim-defendants in the cases examined for this report.

## VIII. Recommendations

This section includes a non-exhaustive list of preliminary recommendations reached in the course of completing this study. Several recommendations would require more in-depth examination and elaboration:

- Provide training to law enforcement officers and justice sector professionals (including legal aid lawyers) on proactive victim identification and measures to protect and support victims of trafficking at an early stage among defendants;

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<sup>576</sup> A high proportion of participation by female sex trafficking victim-defendants in other forms of forced criminality, including "trick rolls" was also observed in the U.S. See, Arizona State University (ASU) Office of Sex Trafficking Intervention Research, *Trick Roll Study: Forced Criminality in Sex Trafficking Situations*, January 2020.

- Expand legal standards to recognise trafficking for the purpose of the exploitation for criminality/forced criminality within the context of trafficking for the purpose of sexual exploitation;
- Develop guidance for courts and prosecution services on the roles typically played by victim-defendants engaged in acts of perpetration in the context of trafficking for the purpose of sexual exploitation;
- Promote the use of “approaching interviews” with female victim-defendants at early stages of proceedings (including in lieu of obtaining early guilty pleas) by specially trained law enforcement to foster judicial cooperation, and protect victim-defendants from being incriminated for their confessions as part of their collaboration with authorities;
- Facilitate protected confessions to enable victim-defendants to signal their participation in elements of the crime of trafficking as compelled by their trafficker or as a direct consequence of their situation as a trafficked person;
- Increase training and specialisation for defense lawyers on the gender-based violence dimensions of human trafficking;
- Foster broad recognition of the gendered dimensions of human trafficking and place it legally into a human rights-based discourse in order to consolidate and promote gender specific responses;
- Foster increased cross-border criminal investigations in order to interrupt the replication of the chains of human-trafficking networks by shedding more light into the modus operandi of traffickers;
- Re-examine statutory exceptions to non-punishment provisions in order to ensure that crimes frequently committed by victims as a result of being trafficked are not excluded from the application of the principle;
- Promote the use and application of gender-responsive non-custodial measures, including diversionary measures and pretrial and sentencing alternatives that are specifically tailored to the needs of trafficked victim-defendants;
- Inquire into the dynamics and nature of the relationship in cases in which the victim-defendant had an intimate or familial relationship with the trafficker to assess for elements of violence or coercive control;
- Increase judicial recognition of the impact of trauma, disability and mental illness on victim-defendants, especially as applied to plea agreements, and guidance on in-court measures to facilitate their participation and to prevent revictimization;
- Expand statutory definitions of coercion to recognise the tactics of coercive control;
- Address reproductive rights violations occurring in the context of cases involving trafficking for the purpose of sexual exploitation;
- Consider both the means used in trafficking the victim-defendant in addition to the means used in instigating her engagement in criminal activity when assessing the application of the non-punishment principle;
- Ensure that prosecutors and courts take account of the history of victimization of women defendants in decision-making at the pre-trial and sentencing stages (e.g., charging, pretrial detention, judgements and orders, sentencing, etc.);
- Develop guidelines for how past gender-based victimisation should be considered in the sentencing phase to reduce sentences for female victim-defendants, including on its temporal scope;

- Increase awareness among criminal justice sector actors of the continuum of gender-based violence;
- Increase attention to and examination of the role of abuse of a position of vulnerability as the “means” in order to recognise the structural aspects of the crime and coercive control;
- Take into consideration changes in the *modus operandi* utilised by traffickers from obvious to more subtle coercive tactics in assessments of the “means” employed.

# Annex I - List of cases

## Argentina

[Dulcinea, Causa No. 91017032, Mar de Plata, 2014.](#)

[Ledesma, Sentencia No. 457, Tribunal Oral en lo Criminal Federal de San Luis \[no date\]](#)

[Sanfelippo, Cassation, Causa No. 15-554, 2014.](#)

[Cáceres y Guillement, Causa No. CFP 23D/2011/TO1/CFC1, Federal Cassation, 2018.](#)

[Blanco José Constantin y otros, Juzgado Federal de Necochea, 2014.](#)

[C. M. S. y Otros, Federal Cassation, Causa NG CFP 23D/2011/TO1/CFC1, 2018.](#)

[Montoya, Pedro Eduardo y Otras, Federal Cassation, Causa N° FCR 52019312/2012/T01/18/CFC2, 2018](#)

[Justino, Horacio Abel y otra s/ recurso de casación, reg. n9 23/17, Causa n° FGR 81000828/2012/CFC1, rta. 13/2/2017](#)

[Bar California, Tribunal Oral en lo Criminal de Tucuman, 40066/2013](#)

[Landriel, Daniel y Otros, Tribunal Oral en lo Criminal Federal No. 1, Causa n° 2.559, n°, CFP 7677/2014/TO1, 2018.](#)

## Australia

[Lay Foon Khoo, Document Number M20171128\\_1017000571\\_WADC\\_PERTH\\_PART\\_0003, District Court of Western Australia, 2017](#)

[Watcharaporn Nantakuhm, SSC No. 149, Supreme Court of Capital Territory, 2012](#)

[DS, Court of Appeals, Victoria, \[2005\] VSCA 99](#)

[Leech v The Queen \[2011\] VSCA 344](#)

## Belgium

[First instance court Bruges, B637.L6.961-X7-DF, 2017](#)

[First instance court Liège, 19<sup>th</sup> Chamber, 2016](#)

[Appeals Court Liège, 18<sup>th</sup> Chamber, 2017](#)

[Correction facility Antwerp, 2015](#)

[IM, First instance court Antwerp, Parquet system number 17RA16990, 2018](#)

[EG, Parquet system number 18G1175, 2018](#)

[T., Tribunal de Première Instance Francophone de Liège, 19<sup>ème</sup> Chambre, Parquet n° LI37.LA.99538-09, 2018](#)

## Bosnia and Herzegovina

[Tasim Kučević, Court of BiH, X-KŽ-06/181, 2009](#)

[Court of BiH, K-71/05, 2006.](#)

## Brazil

[L.B.N., Processo n° 2001.83.00.007512-0, 2012.](#)

[L.B.N., Processo n° 2001.83.00.007512-0, 2007.](#)

## Canada

[R. v. Robitaille, O.J. No. 5954 \(2017\)](#)

[R. v. Majdalani 2017 ONCJ 145](#)

## Colombia

[Case 1 - Roldán Giraldo y Hernández Tabares](#)

## **Germany**

[Duisburg - 33 KLS 17/18 \(2019\)](#)

## **Italy**

[JE, Court of Catania, 1081/2019](#)

[IC, 2019](#)

## **Netherlands**

[Appeal Court of Amsterdam 23-000272-14, 2017](#)

[Supreme Court Case 17/03852, 2018](#)

[First Instance Court of The Hague, 09/754126-08, 2010](#)

## **The Philippines**

[People vs. Ruth Dela Rosa y Likinon, aka "Sally", Criminal Cases Nos 13-9820 and 13-9821, 2013](#)

[People v. Janet Java Onida, Crim Case No-Q-08-151971, 2013](#)

## **South Africa**

[Mabuza and Chauke, SHG 9 / 13, Regional Court for the Regional Division of Mpumalanga, Graskop State vs. Veeran Palan and Edwina Norris, Case No: RCD 13/14, 2014](#)

## **U.K.**

[R. v. M.K. / R. v. Persida Gega \(aka Anna Maione\) \(2018\)](#)

[R.v. LM, MB, DG, Betti Tabot and Yutunde Tijani, \[2010\] EWCA Crim 2327, Court of Appeal \(Criminal Division\) High Court of Justice, 2010](#)

## **USA**

Hicks v. Rackley, US District Court N.D.C.A., 2018.

MG v. State of Florida, 260 So.3d 1094, 2018.

People v. Deshay, Court of Appeals of California, 2011.

[U.S. v. Brown / Hollis, US District Court, Eastern District of Michigan, 2:05-cr-80101-AJT-DAS Doc # 39, 2005](#)

U.S. v. Bell, 2013 WL 12086759, 2013.

People v. Cross, Court of Appeal, 4th District CA, 2019 WL 1306324 (Not Officially Published).

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[U.S. v. Willoughby, US District Court, Eastern District of Michigan, 2007](#)

People vs. M.D., 231 Cal. App. 4th 993, 2014.

People v. Aarica S., 223 Cal. App. 4th 1480, 2014.

## **European Court of Human Rights**

[S.M. v. Croatia, Application No. 60561/14, 2020](#)

Balsan v. Romania, Application No. 49645/09, 2017

Opuz v. Turkey, Application No. 33401/02 2009

## Annex II – Selected case summaries

### R. v. Robitaille, [2017] O.J. No. 5954 – Canada

**Summary of the facts:** The victim-defendant, who was 18-years-old at the time of the events, was charged along with the principal trafficker with offences relating to the forced prostitution of two minor girls, aged 14 and 16. The victim-defendant had instructed one of the victims on how to dress and what to do with clients. With respect to the other victim, the victim-defendant had taken away her cell phone in order to prevent her escape.

At the time of the offences, the victim-defendant was also being sexually exploited by the trafficker, with whom she believed herself in love. The court accepted that she was under the trafficker's control at the time of the offences. The co-accused, her trafficker, was charged with human trafficking and sentenced to four years imprisonment.

The court accepted the majority of the evidence submitted by the defence related to the trauma suffered by the victim-defendant as a young person, "and to her own victimisation as a child sex worker". The court noted that she had run away from home on several occasions and suffered numerous acts of sexual abuse in her childhood. It noted that she was sexually exploited starting at the age of 16, and physically abused by the pimps. During these years, she developed a substance abuse problem. The court further observed that upon her release from custody, the victim-defendant experienced depression, suicidal ideations, anxiety, substance abuse and post-traumatic stress disorder, among other diagnoses.

#### Legal disposition:

In its determination of the sentence, the court focused "primarily on the objectives of deterrence and denunciation," while at the same time finding the victim-defendant's prior sexual victimization as a "highly relevant factor," as well as her need for rehabilitation. It found the fact she was "sexually exploited as a young person and while at the time of these offences she was an adult, she was still being sexually exploited" placed the victim-defendant in a "very unique position" that allowed the court to consider "her potential and need for rehabilitation in conjunction with deterrence and denunciation".

In determining the sentence, the court considered as aggravating circumstances, inter alia: the degree of coercion that she exercised (intimidation); the age and number of the victims and their vulnerability (one lived in a group home); duration of the exploitative conduct (6 days; 2 days) and the effect on the victims (huge). As mitigating circumstances, the court considered, inter alia, the fact that she: was a youthful first offender; was a victim of sexual abuse, and had been sexually exploited as a child; continued to be sexually exploited; was physically and emotionally abused by the trafficker; and, suffered from post-traumatic stress disorder.

The court sentenced the victim-defendant to eight months incarceration.

### Case number 33 KLS 17/18 District Court Duisburg, 2019 – Germany

Factual summary: In a case involving a Nigerian human trafficking-migrant smuggling network, the court described the principal trafficker, B., as having engaged in a series of relationships, among them with a Belgian national "Barrister J" and with co-defendant C., a German citizen of Nigerian origin. A daughter was born to B. and C. in 2017, after having lost twins prior to their birth. The court noted that B. ceased working in prostitution in 2015 and was receiving state benefits.

The court found that all of the victims in the case (I., E., G., F., H. and the victim-defendant) came from precarious economic circumstances in Nigeria, some of them without a fixed residence. They came to Europe seeking increased income, financial security and to send money to family back home. It observed the existing high-priced structures (smuggling networks) that enable Nigerian women to enter into Europe irregularly.

The court found that the victims were all required to undergo a juju ritual, involving giving a piece of hair and under-clothes to the priest, as well as drinking the blood of a chicken or eating its heart. Two of the victims had their tongues stabbed. It found that B. used these rituals as a means of threatening the victims with (mental or physical) illness or death during their trafficking experience. The rituals served to hedge the victims' cash obligations, although they did not understand that they were to be sexually exploited to pay off these obligations. Upon their arrival, B. confiscated the victims' cash, identity documents, mobile phones and luggage. She repeatedly reminded them of their irregular migration status, and threatened to tell their family members that they were engaged in prostitution.

The victim-defendant was brought to Germany by B. when she was 17.

The victim-defendant was temporarily arrested at a brothel and referred to a youth services agency. B. contacted her brother and the juju priest in Nigeria to pressure the victim-defendant to leave the agency and continue working in prostitution. The victim-defendant complied.

The victim-defendant was sexually exploited for a few years, and then started collecting money from the other victims for several months to hand over to B. directly or to C. The victim-defendant trained victim G. in prostitution (erotic moves), picked her up from a hotel and brought her to a brothel on behalf of B. The court noted that the victim-defendant engaged in this role out of forced obedience to B. It also found that she was aware of the victim's situation. The victim-defendant was again arrested in the brothel where she worked as an irregular migrant, and was charged with aiding forced prostitution.

The court observed that during the period of sexual exploitation, the victim-defendant had obtained an abortion, which resulted in severe bleeding. Yet, she was required to commence work again the next day. It noted that B. also procured a medicinal abortion for victim I., and forced her to return to work the next day. Victim H. had also been pregnant and had a miscarriage.

The court noted the victims' vulnerability: the poverty of their backgrounds, their lower levels of education, their irregular migration status, not knowing the language or customs of Germany, the legality of prostitution in Germany, and the fact that they had no contact with people who could assist them. It posited this vulnerability as a severe limitation on their decision-making options. The court found that the sexual exploitation constituted an attack on the victims' right to sexual self-determination.

The decision repeated several times the finding that B.'s motive was a "ruthless pursuit of profit". The court found that B. exploited the victims' economic predicament and helplessness in a foreign country to force them into prostitution. It underscored the distress caused by their economic hardship, resulting in their inability to resist the forced sexual exploitation because they had no vocational training, carried a huge debt to their smugglers, and were in a foreign country in which they did not speak the language. At the same time, B. had confiscated their identity documents, cash, cell phones and luggage. The juju rituals had required obedience to B., and the victims feared that she would reveal to their families their work in prostitution. B. also threatened to send them back to the poor conditions in Nigeria.

The court found that B. had "swung herself up" to become a madame, and was using her knowledge to exploit other women. With respect to mitigating circumstances, it noted the impact of the pre-trial detention on her given the separation from her two-year-old daughter. Regarding aggravating circumstances, it noted among other factors her "ruthless pursuit of profit". It sentenced her to five years imprisonment.

With respect to the victim-defendant, the court found that she had helped B. vis-à-vis victims G. and H. In addition to registering G. in a brothel, she collected money from both of them. The court found that she was aware of their helpless predicament, and had assisted B. consciously.

Sentencing: The court found that the victim-defendant was aged 18 at the time the crimes were committed. It noted her youth in terms of her moral and intellectual development, and the fact that her psycho-social development was impaired as she left Nigeria at aged 17 without the necessary support from her family. It noted her financial exploitation by B., that she spent almost one year in pre-trial detention, and that she committed the acts in obedience to B., "without expecting any benefits". It found her acts of obedience required "significant educational intervention". The victim-defendant was placed on probation for two years.

**Landriel, Daniel y otros, Tribunal Oral en lo Criminal Federal N° 1, Causa No 2.559  
(7.677/2014/TO1), 2018 – Argentina**

Factual summary: The Landriel family was charged with human trafficking involving the sexual exploitation of two minor girls. One of the girls was pregnant during the period of her sexual exploitation; the other was mentally disabled. Both victims were from troubled families, and one had experienced childhood sexual abuse. For the second victim, the family obtained a falsified national identification document representing her as an adult under a fictitious name with the

last name Landriel. Daniel Landriel was charged with trafficking, as was his father, mother and sister. His brother was convicted of human trafficking in a separate case.

Landriel engaged in romantic relationships with both girls prior to sexually exploiting them. He and his father arranged the transport of one victim to live with them, and his mother pressured her into prostitution. When the victim declined, Landriel beat and threatened to kill her. His mother and sister were simultaneously sexually exploited by his father. The court found that his mother trained the first victim to work in prostitution, teaching her how to dress and how to treat the clients. Under the threat of a knife, the victims relinquished all of their earnings to Daniel and his father, neither of whom worked.

Landriel was also charged with kidnapping his 22-month old daughter and preventing the victim (the child's mother) from seeing her for 10 months, until she was captured in a police raid. Landriel threatened that the victim would not see her daughter unless she returned to the family. The victim filed a police complaint in order to get her daughter returned to her, which resulted in the investigation.

Legal dispositions: Finding that Landriel's mother was previously and concurrently sexually exploited by his father, the Prosecution dropped the charges against her as a secondary participant based on the non-punishment clause in Argentina's anti-trafficking law. The prosecutor argued that given that her participation was a direct result of her being a victim of sexual exploitation, her self-determination was called into question. Charges were also dropped against Landriel's sister and the second victim's mother. The court thus ordered the release of all three women.

The court found that Landriel as principal trafficker, and his father as a secondary participant, trafficked both girls by the "means" of threats and use of force, deception and abuse of a position of vulnerability. These involved "systematic" beatings, death threats, promises of a better life that never materialized, abuse of romance and the victims' vulnerability as minors: one was pregnant, the other disabled and was provided with drugs. Both victims described having been in love with the principal trafficker.

The court found that the father transported the victims, accommodated them in his home and in the hotel rooms with his family, monitored their prostitution and financially benefitted from their exploitation. Also known as "the shark," the father was known to have been involved in human trafficking.

Dicta: The defense argued and the court observed the normalisation of sexual exploitation and violence within the family. Although the defense claimed that the violence and exploitation should be characterised as a dysfunction of a marginalised family and domestic violence, rather

than as the “means” of human trafficking, the court disagreed. While recognising the level of marginalisation of the family, including drug addiction, it found that this did not mean that they could not be found criminally responsible. It described the family as conscious of the criminality of their behaviour and working like a “matrix”. In response to defense claims that the victims maintained their freedom of movement, the court underscored that beyond freedom of movement, trafficking violated the victim’s capacity for self-determination. Landriel and his father were sentenced to 11 and 5 years imprisonment, respectively.

Notably, the Office of Domestic Violence submitted a report finding one of the victims, the mother of Landriel’s child, to be a victim of economic, physical, psychological and sexual domestic violence, and at an extreme risk, as the violence had escalated in intensity and frequency. The report noted the following risk factors: jealousy, control, uncontrollable violent impulses, alcohol and drug consumption, domestic violence antecedents, access to arms and manipulation. The report further described the victim as presenting with social and emotional vulnerability, namely: submissiveness, normalization, minimization and justification of the violence, entrapment in the cycle, lack of appreciation of the risk, deteriorated self-esteem and undervaluing herself. In addition to the documentation of physical injuries and scars, it indicated that the victim suffered from anxiety, fear, insomnia, pain and trauma, provoking a state of over-adaptation and significant emotional disassociation that affected her psychological development.

With respect to the victim that was mentally disabled, expert reports and testimony indicated that she had bruises on her face when identified, she thought she was married to the trafficker, and was unable to appreciate the situation even after it had been explained to her numerous times. The court found that she was emotionally unstable and psychologically dependent upon Landriel and his family. She denied being a victim of trafficking, and tried to escape from the court, requiring a psychiatric intervention to subdue her. Notably, both victims became pregnant during the course of the exploitation, one as the result of the trafficker, the other unknown.

The court grounded its decision in the Belém do Pará Convention and CEDAW’s General Recommendation No. 19 on violence against women.

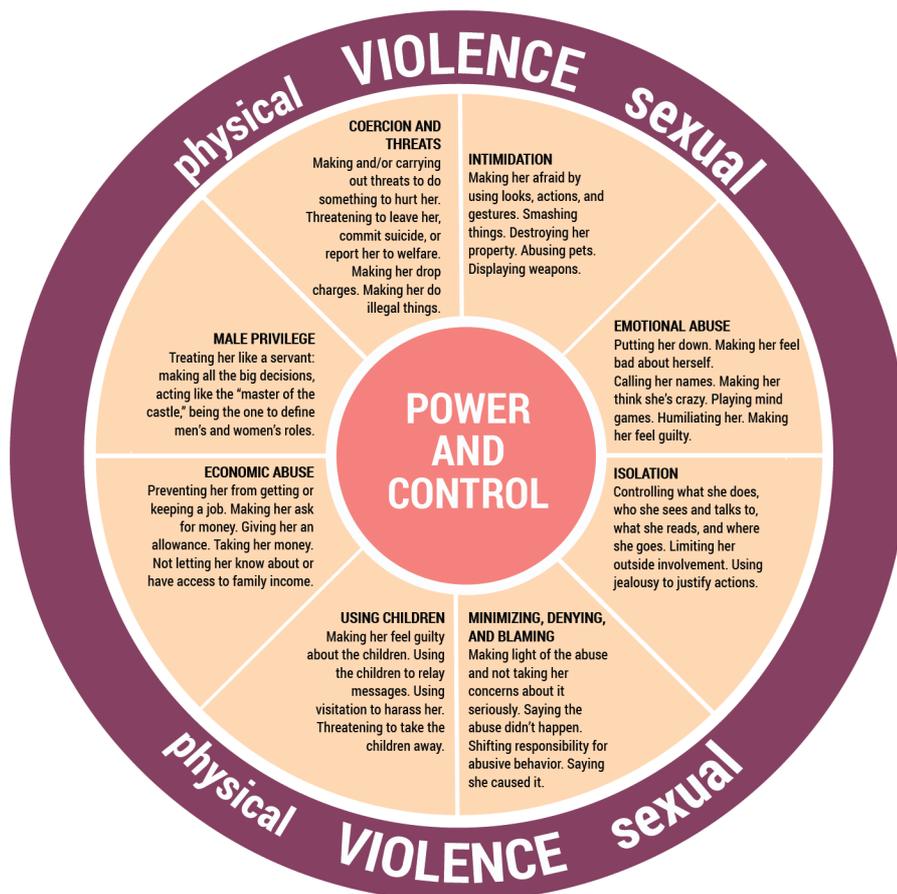
# Annex III – Power and Control Wheel

The similarities between the trafficking and domestic violence power and control wheels can be useful in adapting to a more gender-sensitive approach to recognising and effectively combating human trafficking.

## POWER AND CONTROL WHEEL

Physical and sexual assaults, or threats to commit them, are the most apparent forms of domestic violence and are usually the actions that allow others to become aware of the problem. However, regular use of other abusive behaviors by the batterer, when reinforced by one or more acts of physical violence, make up a larger system of abuse. Although physical assaults may occur only once or occasionally, they instill threat of future violent attacks and allow the abuser to take control of the woman's life and circumstances.

The Power & Control diagram is a particularly helpful tool in understanding the overall pattern of abusive and violent behaviors, which are used by a batterer to establish and maintain control over his partner. Very often, one or more violent incidents are accompanied by an array of these other types of abuse. They are less easily identified, yet firmly establish a pattern of intimidation and control in the relationship.



Polaris Project adaptation of the Power and Control Wheel<sup>577</sup>

<sup>577</sup> Available at: <https://www.unicefusa.org/stories/domestic-violence-and-human-trafficking/33601>.

# POWER AND CONTROL WHEEL



This wheel was adapted from the Domestic Abuse Intervention Project's Duluth Model Power and Control Wheel, available at [www.theduluthmodel.org](http://www.theduluthmodel.org)

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## Annex IV – Cycle of violence

In this schema developed by Lenore Walker, the "cycle of violence" reflects a period of tension build-up (minor abuse) followed by an "explosion" (severe episodes of abuse) and then by "loving contrition" when the batterer shows remorse.<sup>578</sup>



<sup>578</sup> Lenore E. Walker, *The Battered Woman*, 1979, pp. 55-70, n. 6; Lenore E. Walker, *The Battered Woman Syndrome*, 1984, pp. 95-97, n.6.

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