REVISTA DE DIREITO INTERNACIONAL

BRAZILIAN JOURNAL OF INTERNATIONAL LAW

Editores responsáveis por essa edição:

Editores:

Nitish Monebhurrun

Marcelo Dias Varella

Ardyllis Alves Soares

Editor Assistente

Leonardo Vieira Arruda Achtschin

Editores convidados:

Lucas Carlos Lima

Loris Marotti

Paolo Palchetti.

ISSN 2237-1036

Revista de Direito Internacional Brazilian Journal of International Law	Brasília	v. 18	n. 1	p. 1-376	abr	2021

doi: 10.5102/rdi.v18i1.7129

The new brazilian anti-trafficking law: challenges and opportunities to cover the normative lack*

A nova Lei Brasileira de Combate ao Tráfico: desafios e oportunidades para suprir a lacuna normativa

Waldimeiry Correa da Silva**

Abstract

This study is based on the assumption that Brazilian counter-trafficking in persons law enforcement has given rise to a complex, deficient, confusing anti-trafficking system that presents legal obstacles. Derived from this lack of harmonization in the Brazilian context, there were different ways of interpreting what trafficking was, which has also generated a confusing framework regarding the interpretation of the concept itself. Hence, the new anti-trafficking law in Brazil (13.344/2016) was approved in order to cover this normative vacuum and to act as a useful and proactive instrument in tackling human trafficking in Brazil that would comply with the due diligence. The purpose of the article is to analyse whether the irrelevance of consent to crimes of trafficking in persons in the new anti-trafficking law in Brazil complies with the requirements of international law on the matter. For these purposes, we apply a descriptive qualitative methodology, consisting of the review and analysis of the legal regulations, jurisprudence, doctrine and legal bibliography. The procedure to access the information from secondary sources has been carried out through the following search engines and bibliographic databases: Web of Science, Scopus and Google Scholar. In turn, the various Brazilian and United Nations repositories, databases and specialized studies on the subject were used. The conclusions of this study contribute to the area in that they show that, to comply with the due diligence, it is necessary to meet the requirement of the international standard on the irrelevance of consent. Thus, favouring a multidirectional action that safeguards the human rights of victims-survivors.

Key Words: Trafficking in persons. Brazilian law enforcement. Dual Diligence. Human Rights. Irrelevance of consent.

Resumo

Este estudo se fundamenta no pressuposto de que o combate ao tráfico de pessoas no Brasil deu origem a um regime antitráfico complexo, deficiente, impreciso, e que apresenta obstáculos legais. Derivado dessa falta de harmonização com o normativo internacional havia diferentes formas de inter-

* Recebido em 14/09/2020
Aprovado em 19/06/2021

** Departamento de Estudios Internacionales. Área Relaciones Internacionales.
Email: wcorrea@uloyola.es

pretar o que era tráfico de pessoas no contexto brasileiro, o que também gerou um quadro ambíguo quanto à interpretação do próprio conceito. Assim, a nova lei antitráfico no Brasil (13.344/2016), foi aprovada com o objetivo de cobrir esse vazio normativo, atuar como um instrumento útil e proativo no enfrentamento ao tráfico de pessoas no Brasil e como consequência cumprir a devida diligência. O objetivo do artigo é analisar si a irrelevância do consentimento nos crimes de tráfico de pessoas na nova lei antitráfico no Brasil cumpre com as exigências do direito internacional sobre a matéria. A estes efeitos se utiliza uma metodologia qualitativa, que consiste na revisão e análise de normas jurídicas, jurisprudência, doutrina e literatura jurídica. O procedimento de acesso à informação de fontes secundárias foi realizado através dos seguintes motores de busca e bases de dados bibliográficas: *Web of Science, Scopus* e Google acadêmico. Por sua vez, foram utilizados os diversos repositórios e bases de dados brasileira e das Nações Unidas e estudos especializados sobre o tema. As conclusões deste estudo contribuem à área na medida em que mostram que para o cumprimento da devida diligência é necessário atender a exigência da norma internacional sobre a irrelevância do consentimento, para conduzir uma ação multidirecional e que resguarde os direitos humanos das vítimas-sobreviventes.

Palavras-chave: Tráfico de pessoas. Aplicação da lei brasileira. Devida diligência. Direitos Humanos. Irrelevância do consentimento.

1 The internalization of international law: The Multifaceted and Confused Brazilian Structure in the Confrontation of Human Trafficking

Trafficking in persons (TP) is internationally defined by the Palermo Protocol (2000[1]), which typifies it as a complex and dynamic crime derived from the conjunction of three interrelated constituent elements: an action; the media; and the purpose of direct or indirect exploitation of the person. This definition externalizes trafficking as a process that includes a movement of people in contexts of vulnerability for the purpose of exploitation. Human mobility generally occurs in contexts of migration (regular or irregular), thus leading to the confusion with other legal categories, such as irregular migration, human trafficking or international refugee[2].

The concept of human trafficking provided by the Palermo Protocol is not exempt from criticism, both for its complexity, derived from the understanding of trafficking as a process composed of three constituent and related elements, and its wide scope. The Palermo Protocol does not include the behaviors that constitute the modality of trafficking, leaving to the discretion of the States the delimitation and classification of internal behaviors that define trafficking. Even with its lights and shadows, the international legal benchmark has consolidated the structuring of a global regime to confront trafficking in persons that is related to different legal categories (irregular migration, refugee, asylum and trafficking), public and private actors and different approaches (public order / criminal policy, gender and human rights). The diversity of actors, types of regulations, institutions and different legal categories related to trafficking conform a complex international regime[3]. For these purposes, the United Nations recognize trafficking as a massive violation of Human Rights and its negative synergy with other forms of human rights violations (slavery, servitude, forced labor, violence against women, torture, treatment inhuman and degrading, international illicit and human trafficking).

The recognition of trafficking in persons as a violation of Human Rights generates a commitment to the states-parties of the Palermo Protocol to develop measures aimed at: preventing and educating about tra-

[1] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000. Article 3. Use of terms. For the purposes of this Protocol: "(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation".

[2] SILVA, W. C. da. *Regime Internacional de Enfrentamento ao Tráfico de Pessoas.* Avanços e desafios para a proteção dos direitos humanos. Rio de Janeiro: Lumen Juris, 2018.

[3] ALTER K. J.; RAUSTIALA, K. The Rise of International Regime Complexity. *Annual Review of Law and Social Science,* v. 14, n. 1, p. 329-349, 2018; GÓMEZ-MERA, Laura. Regime complexity and global governance: The case of trafficking in persons. *European Journal Of International Relations*, 2016.

fficking, protecting and assisting victims of trafficking, and repressing and prosecuting the crime and punish offenders (Article 2 of the Palermo Protocol). The due diligence of the States aims to protect the victims / survivors of trafficking from human rights abuses by private agents. In this direction, the States must undertake reasonable measures to modify the result and mitigate the damage. As stated by the Inter-American Court (2018)[4], the States have the obligation and responsibility to guarantee the victims the right to reparation and the exercise of due diligence. The Inter-American Court noted both the existence of due diligence regarding the situation of vulnerability of the trafficking victims[5] and argued that this special rule applies in the cases in which the integrity of the person is at stake. In this sense, this rule implies a positive obligation to investigate and penalize any act aimed at maintaining a situation analogous to slavery, servitude, forced labor as exploratory behaviors rooted in **t**rafficking in persons.

Brazil was one of the 178 countries that signed (2000) and ratified (2004) the United Nations Convention against Transnational Organized Crime (Palermo Convention)[6] and the Palermo Protocol.[7] Since that ratification, the country has been adapting its internal legislation and promoting public policies to address the objectives established in the regulations for the counter-trafficking. An example of this was the successive modifications to the 1940 Penal regarding human trafficking, 2005, 2009 and 2016 reforms. However, an analysis of the legislation has revealed the need for comprehensive modifications that provide effective legal measures to protect trafficking victims and accomplish the dual diligence about this issue. In particular, the ones referred to the protection of human rights and the achievement of human rights standards relevant to the activity of justice operators and procedural standards, as dictated by the ICIR (2016)[8] and ECHR (2005, 2010 y 2012)[9].

In Brazil, the meaning of human trafficking is rather ambiguous, and its understanding is quite heterogeneous. This is because the discussion was basically directed at trafficking for the purpose of sexual exploitation. But over the last fifteen years (2004-2018), different demands on the agenda of Human Rights in Brazil made them use the language of human trafficking. Until December of 2016, the multiplicity in the ways of understanding the HT is also due to the existence of two legal instruments that served as a framework, but that also generated ambiguity and disagreement among the different actors. The first instrument, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol, 2000) [10] and the second, the Brazilian Penal Code (BCP). Public debates and public awareness campaigns have shown the trafficking as a political-legal problem, following the Palermo Protocol. Nevertheless, the administrative practices that regulate the trafficking, in the country, follow the Brazilian Penal Code. Hence, the result is a heterogeneous understanding of the same process. This demonstrates both an "uncertain environment" and "institutional barriers"[11] in the counter trafficking in Brazil.

This structure has generated, on the one hand, a complex regime[12] of counter human trafficking. Its complexity stems from a diverse, interdependent structure that mixes both a disruptive, reactive and proactive approach counter to human trafficking[13]. On the other

[4] CORTE IHR. *Caso Trabajadores de la Hacienda Brasil Verde c. Brasil.* Case de 20 October 2016, párr. 364.

[5] EUROPEAN COURT OF HUMAN RIGHTS (ECHR): Siliadin vs. France, no. 73316/01. [TEDH, Section II], 26 de July de 2005; Rantsev vs. Cyprus and Russia, no. 25965/04. [ECHR, Section I], 7 January 2010; C.N. and V. vs. France, no. 67724/09. [ECHR, Section V], 11 October 2012; C.N. vs. United Kingdom, no. 4239/08. [ECHR, Section IV], 13 de November 2012.

[6] BRAZIL. Decree No. 5.015, dated March 12, 2004.

[7] BRAZIL. *Decree No. 5.017, dated March 12, 2004*. Retrivied from: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en

[8] CORTE IHR. *Caso Trabajadores de la Hacienda Brasil Verde c. Brasil.* Case de 20 October 2016

[9] European Court of Human Rights (ECHR): Siliadin vs. France, no. 73316/01, 26 de July de 2005; Rantsev vs. Cyprus and Russia, no. 25965/04, 7 January 2010; C.N. and V. vs. France, no. 67724/09, 11 October 2012; C.N. vs. United Kingdom, no. 4239/08, 13 November 2012.

[10] Decree No. 5.017, dated 03/12/2004.

[11] FARRELL, A.; OWENS, C.; MCDEVITT, J. New laws but few cases: Understanding the challenges to the investigation and prosecution of human trafficking cases. *Crime Law & Social Change*, p. 1–13, 2014; MATOS, M.; GONÇALVES, M. & MAIA, A. Understanding the criminal justice process in human trafficking cases in Portugal: factors associated with successful prosecutions. *Crime, Law and Social Change*. 2019. https://doi.org/10.1007/s10611-019-09834-9.

[12] ALTER K. J.; RAUSTIALA, K. The Rise of International Regime Complexity. *Annual Review of Law and Social Science,* v. 14, n. 1, p. 329-349, 2018. p. 331.

[13] VERHOEVEN, M.; BARBRA, G, Human trafficking and criminal investigation strategies in the Amsterdam Red Light District. *Trends in Organized Crime*. 14. 2011148-164. 10.1007/s12117-011-

hand, this institutional regime has created the aforementioned "uncertain legal environment" and "institutional barriers" that makes it difficult to advance on the subject. The new anti-trafficking law is important as a tool to overcome the different perceptions of what trafficking means, only if all actors are involved in specialized training courses from a common framework. The new law draws from a human rights approach to protect the trafficked victims. This measure also intends to overcome the negative attitudes in relation to trafficking victims. The last part of this article analyses the irrelevance of the victims' consent as a means to guarantee the protection of their rights under this new Brazilian anti-trafficking law.

The evolution of this complex understanding of human trafficking in Brazil has developed in six different stages between 2004 and 2016. The first step was the 2004 signing and ratification of the (Palermo Protocol), a process prompted more by external, supranational and international demands than by local ones.[14] The second phase began with the National Policy for Combatting Human Trafficking (the National Policy) in 2006,[15] guided by the triple objective of the Palermo Protocol. The National Policy establishes principles, guidelines and actions that seek to prevent and suppress human trafficking and care for victims to ensure compliance with international anti-trafficking policies based on instruments to protect and promote human rights. A third stage (2008 and 2013) began in 2008 with the approval of Parts I of the National Plan to Combat Human Trafficking (*Plano Nacional de Enfrentamento ao Tráfico de Pessoas - PNETP*)[16] and in February 2013, with the approval of PNETP II. And, in July 2018 approval of III PNETP[17]. The fourth stage comprised the formation of the National Network on Human Trafficking (*Rede Nacional de ETP*),[18] a process of public expression with the participation of different actors from civilian society established by the creation of 15 Centers to Combat Human Trafficking[19] and 9 Advance attention post[20]. A fifth stage was initiated by the creation of the National Committee to Combat Human Trafficking (*Comitê Nacional de Enfrentamento ao Tráfico de Pessoas - CONATRAP*),[21] which sought to monitor the National Policy and promote the involvement of public and private agencies and entities in the fight against human trafficking (*Enfrentamento ao Tráfico de Pessoas - ETP*). The sixth stage (2005, 2009 and 2016) refers to the legislative changes affecting Brazilian criminal law.

The focus of this article is on the sixth stage and the goal is to respond to that gap in the structure of the Brazilian regime to counter human trafficking. This breach compromises the Brazilian due diligence on the matter. The general purpose of the article is to show that a proactive confrontation to trafficking[22] demand a

9126-00; UNODC (2008). Toolk it to Combat Trafficking in Persons. New York/Geneva. https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_5-2.pdf

[14] The first impetus came from the United Nations Office on Drugs and Crime (UNODC), the Organization of American States (OAS), the International Labor Organization (ILO) and the United States government.

[15] BRASIL. "*Política Nacional de Enfrentamento ao Tráfico de Pessoas*": Decree No. 5.948, dated 10/26/2006.

[16] BRASIL. "*I Plano Nacional de Enfrentamento ao Tráfico de Pessoas.*" Approved by Decree No. 6.347, dated January 8, which established 100 (one hundred) goals aligned with several priorities. PNETP I sought to respond to the problem of human trafficking in three main areas: prevention, crime suppression and the accountability of its perpetrators, and comprehensive care for victims. According to the report by the Ministry of Justice (*Secretaria Nacional de Justicia/SNJ* [2012]), the PNETP I step enabled collaboration between civil society and various government agencies and international institutions (ILO, UNODC, IOM) for preventive action and helped in the attempt to provide comprehensive care for trafficking victims. This collaboration between civil society, international organizations and various governmental spheres enabled the development of PNETP II, with broad societal participation for defining its battle plans.

[17] BRASIL. Decree No. 7.901, dated February 4, 2013; Decree No. 9.440, DOU, dated July 03, 2018. Initiated the development of PNETP III (2018-2021).

[18] The group of institutions and organizations were named the National Network on Human Trafficking (*Rede Nacional de ETP - RETP*) and included representatives from the federal government and the Ministry of Justice responsible for the *Coordinated Combat against Human Trafficking* led by the Centers to Combat Human Trafficking and Specialized Centers. The RETP also included the participation of social support and assistance entities such as *CRAS* and *CREAS* and other bodies such as the Ministry of Justice and Public Security, the Ministry of Public Health, foreign embassies and non-governmental organizations (Brazil: SNJ, 2012).

[19] In portuguese: Núcleos de Enfrentamento ao Tráfico de Personas – NETP. Retrieved from https://www.justica.gov.br/sua-protecao/trafico-de-pessoas/redes-de-enfrentamento/nucleos-de-enfrentamento

[20] In portuguese: "Postos avançados de Atendimento Humanizado aos Migrantes". Retrieved from https://www.justica.gov.br/sua-protecao/trafico-de-pessoas/redes-de-enfrentamento/postos-avancad https://www.justica.gov.br/sua-protecao/trafico-de-pessoas/redes-de-enfrentamento/postos-avancadosos

[21] Decree No. 7.901, dated February 4, 2013 designated 26 members, 7 government representatives, 7 civilian representatives or human trafficking specialists, 1 representative from the NETP and Centers, 1 representative from state committees, and 1 representative from each of the 10 National Councils for Public Policy.

[22] FARRELL, A.; OWENS, C.; MCDEVITT, J. New laws but few cases: Understanding the challenges to the investigation and prosecution of human trafficking cases. *Crime Law & Social Change*, 2014.

multidirectional action: one that recognizes the problem, prevents it, trains and educates the responsible actors. This concentration should offer a system that recognizes the role of the victim in the process of trafficking, and from a Human Rights approach, that revalidates the irrelevance of their consent in the criminal proceedings. Thus, ensuring the protection of their rights and that is endowed with specific funds for these purposes.

Regarding the considerations above, this article presents the following key questions: how does this multifaceted vision impact the understanding of human trafficking in Brazil? In other words, how is trafficking in persons understood in the Brazilian context? How is the Brazilian counter trafficking persons regime structured? Does the Brazilian State comply with human rights standards relevant to the activity of justice operators to guarantee protection, reparation and assistance to trafficking victims? To reply these questions, this research is structured in four parts. The introduction to the Brazilian context against trafficking, followed by a second section that examines the lexical-normative structure of Law No. 13.344/2016, the most recent legal instrument addressing human trafficking. The third part offers a technical-legal analysis of the new anti-trafficking law (dated October 6, 2016), leading to the third section, which defends the hypothesis that consent arguments are irrelevant in Human Trafficking crimes. The final section examines the irrelevance of the consent argument in Human Trafficking crimes.

A thematic qualitative text analysis approach was adopted to identify and analyse the changes in the Brazilian system of counter-trafficking. Thereby, the methodology aims to identify actors involved within Brazilian ETP, as well as the content and meaning of the new Brazilian anti-trafficking law. In this sense, this paper is based on a traditional literature review of the results from a bibliographic, doctrinal revision, and a documentary survey of the laws dedicated to the subject.

2 Breach of Due Diligence: The Lack in the Normative Structure of Antitrafficking Law

Human trafficking has been codified in the Brazilian legal system since the 1890 Penal Code of the Republic, as follows: "To induce women to prostitution, whether by abusing their weakness or misery, or by intimidating or threatening them" (Article 278, 1890).[23] However, this article was modified by Law No. 2.992, dated September 25, 1915, which increased the prison sentence for this crime from 1 to 3 years and made an explicit statement on the issue of consent, considered unnecessary only for minors. In 1940, the current Penal Code was drafted, which incorporated the crime of human trafficking in Article 231 and which persisted until the enactment of Law No. 11.106 in 2005. As such, we can see that from 1890 to 1940, the Brazilian penal codes limited legal protection to the female sex.

Brazil was one of the 178 countries that signed (2000) and ratified (2004) the United Nations Convention against Transnational Organized Crime (Palermo Convention)[24] and the Palermo Protocol.[25] Since that ratification, the country has been adapting its internal legislation and promoting public policies to address the objectives established in the regulations for the fight against human trafficking. An example of this was the successive modifications to the 1940 Penal Code and the 2005, 2009 and 2016 reforms regarding human trafficking. However, an analysis of the legislation has revealed the need for comprehensive modifications that provide effective legal measures to protect trafficking victims and hold traffickers accountable.

2.1 The legal concept of trafficking in persons until 2016

Before October 2016, trafficking was defined in Article 231 of the Brazilian Penal Code as "promoting, brokering or facilitating the involvement of persons in prostitution within national borders or the departure of persons to practice prostitution in foreign countries."[26] Article 231 was amended by Law No. 11.106 in 2005, expanding the definition to all genders and ages, and Article 231-A was also added, which further defined domestic human trafficking. In this manner, the definition

[23] Chapter III – "Pimping," Article 278. BRAZIL. *Penal Code. Decree of Law No. 847*, dated October 11, 1890.

[24] BRASIL. Decree No. 5.015, dated March 12, 2004

[25] BRASIL. Decree No. 5.017, dated March 12, 2004

[26] Law No. 11.106, dated March 28, 2005: "that amends articles 148, 215, 216, 226, 227, 231 and adds article 231-A to Decree of Law No. 2.848 dated December 7, 1940 – Penal Code and includes other measures."

was expanded to cover all persons and areas but continued to be limited to the issue of sexual exploitation.[27]

A second amendment to the penal code was enacted by Law No. 12.015 in 2009,[28] which modified the wording of the definition of human trafficking by including the following purposes: "international human trafficking for the purpose of sexual exploitation" (Article 231) and "domestic human trafficking for the purpose of sexual exploitation" (Article 231-A). This was added in §1 and §2 of the previous Article 231 of the Penal Code:

> §1 The same penalty shall be imposed on the person who recruits, entices or buys the trafficked person, as well as having knowledge of that condition, transports, transfers or hosts the trafficked person.
>
> §2 The penalty shall be increased by half if:
>
> I. the victim is under 18 (eighteen) years of age;
>
> II. the victim, due to illness or mental disability, does not have the necessary discernment for the practice of the act;
>
> III. if the agent is a parent, stepfather, stepmother, brother, stepchild, spouse, companion, tutor or caretaker, teacher or employer of the victim, or assumed, by law or otherwise, an obligation of care, protection or surveillance of the victim; or
>
> IV. there is violence, serious threat or fraud.

Despite criticism of the failure to extend the protected legal right, since the definition of criminal conduct was limited to human trafficking for sexual exploitation purposes, it can be said that the inclusion of the above-mentioned paragraphs represented a small but nevertheless elementary step forward in the accountability of those involved in this type of trafficking. When the Penal Code equated the conduct of the agent, defrauder or buyer with that of the person who transports, transfers or provides housing to the victim, the severity of the criminal conduct increased as soon as the perpetrator became aware of the trafficking victim's condition. This provision holds all persons who in some way contributed to the perpetration of the crime criminally responsible, even as a participant. NUCCI[29] understood that there was a mistake in the definition of this crime because the act of *selling* the trafficked person was omitted, a situation that was foreseen in Article 231-A, §1. There was already a legal provision for applying financial penalties as well as incarceration for crimes of international and domestic trafficking committed for the purpose of sexual exploitation and motivated by profit or economic advantage.

Therefore, it is important to highlight some of the characteristics of this crime. The heading (*caput*) of Article 231 indicates two actions: *promote* or *facilitate* the entry or departure of someone who comes to practice prostitution or some other form of sexual exploitation within or outside of national borders. GRECO[30] alleged that the act of promotion is broadly defined and can even encompass facilitation. The idea of organization evolves from there in the sense of doing everything necessary for (a) a foreigner to enter Brazilian territory or for (b) a Brazilian citizen to enter foreign territory, both for sexual exploitation purposes. The agent, therefore, truly acts as an administrator of the business of sex, of prostitution, in charge of transportation, obtaining a passport visa, finding placement in brothels, in short, doing everything necessary for a victim to pass through the borders of the countries in which she or he will work as a prostitute or will be sexually exploited[31].

Concerning the consummation of the crime of international human trafficking for the purpose of sexual exploitation, there is a doctrinal controversy; some

[27] Other updates that are also relevant to combatting organized transnational crime are the update to the crime of money laundering (Law No. 12.683/2012), the concept of a criminal organization (Law No. 12.850/2013), the definition and suppression of terrorism (Law No. 13.260/2016), and expanding the modalities and protection of the Human Trafficking Crime (Law No. 13.344/2016).

[28] BRASIL. Law No. 12.015 dated August 7, 2009 "amends Title VI of the Special Section of Decree of Law No. 2.848, dated December 7, 1940 - Penal Code, and Article 1 of Law No. 8.072, dated July 25, 1990, which addresses heinous crimes under the terms of item XLIII of Article 5 of the Federal Constitution and repeals Law No. 2.252 dated July 1, 1954, which addresses the corruption of minors." This modification resulted from actions by a Joint Parliamentary Committee of Inquiry (JPCI) (JPCI on Sexual Exploitation) commissioned in 2003 and concluded in 2005. All of the information on the activities conducted by this JPCI was found in BRASIL: National Congress. Joint Parliamentary Commission of Inquiry created to investigate situations of violence and networks of sexual exploitation of children and adolescents in Brazil (*Comissão Parlamentar Mista de Inquérito criada com a finalidade de investigar as situações de violência e redes de exploração sexual de crianças e adolescentes no Brasil)*. 2005. Rapporteur: Representative Maria do Rosário. Available at: http://www2.senado.leg.br/bdsf/handle/id/84599.

[29] NUCCI, G. *Código Penal Comentado*. São Paulo: Forense, 2013. p.1022. Retrieved from http://www.guilhermenucci.com.br/livros/codigo-penal-comentado

[30] GRECO, R. *Código Penal Comentado*. Niterói. Retrieved from https://www.impetus.com.br/ produto/21754/codigo-penal-comentado---rogerio-greco---2019_rogerio-greco (p. 738).

[31] GRECO, R. *Código Penal Comentado*. Niterói. Retrieved from https://www.impetus.com.br/ produto/21754/codigo-penal-comentado---rogerio-greco---2019_rogerio-greco

authors, such as Luiz Regis PRADO[32] (2001, p. 292), contended that the crime is formal. In other words, the crime is consummated by the simple act of territorial entry or departure, regardless of whether sexual exploitation occurred. Rogério GRECO[33] and Guilherme NUCCI[34] took the opposite view, contending that the crime is material. This implies an indispensable and meticulous verification of events after entering or leaving the territory because the crime entails the effective exercise of prostitution or some other form of sexual exploitation. The position of the body of law on this is also controversial.

In view of the foregoing, it is notable that before October 2016, the legal concept of Human Trafficking that guided the Brazilian criminal justice system was associated exclusively with the intermediation or facilitation of international and domestic movement for the purpose of prostitution or other forms of prostitution or other forms of sexual exploitation (Articles 231 and 231-A of the Penal Code). Here, coercion does not define the crime[35].

2.1.1 Phatic-normative gaps and the need to adjust to international regulations

For a comparative interpretation of the international guidelines on the subject, we should refer to other types of crimes that we can deem corollaries or subsidiaries to human trafficking, in the sense that they are committed in parallel or as a means of achieving the ultimate goal of human trafficking and exploitation. We emphasize that trafficking is not a "medium" crime; it is an autonomous crime, and according to NUCCI[36],

> Common crime (can be perpetrated by anyone); material (requires a naturalistic result, consisting of the effective occurrence of prostitution or some other form of sexual exploitation); free form (can be committed in any manner); crime of commission (the verbs indicate actions); instantaneous (the moment of consummation happens at a specific moment in time) although there is an element of habitual action leading to consummation; single perpetrator (can be committed by a single person); multiple incidents (requires several acts). Does not admit intent because it is a conditional crime (depends on prostitution or exploitation).[37]

However, the 2009 modifications left at least four phatic-normative gaps that were foreseen in the Penal Code as corollary crimes: (i) conduct related to trafficking for the purpose of sexual exploitation; (ii) conduct related to the exploitation, organization and protection of work, especially work occurring in conditions analogous to slavery; (iii) conduct related to the exploitation of minors; and (iv) conduct linked to the removal of human organs and tissues.

In fact, the reforms instigated by Law 12.015/2009 did not consider all the exploitation hypotheses identified by the Palermo Protocol. Faced with the lack of such provisions in Articles 231 and 231-A of the Brazilian Penal Code (BPC), a comprehensive reading and a systematic interpretation of the BPC were necessary to identify other possible forms of exploitation pertaining to the crime of trafficking. For this, an extended reading should be made of other devices that allow framing this behavior within other crimes.[38] In this regard, we refer to the provisions regarding behaviors such as involvement in lascivious behaviors toward others (Article 227, BPC), practicing prostitution or other forms of sexual exploitation (Article 228, BPC), brothels (Article 229, BPC) and pimping (Article 230, BPC).

A second omission was the failure to foresee the second most well-known form of trafficking, the exploitation of labor,[39] which in Brazil is related to forced and/or slave labor. The Brazilian legal system considers the crime of subjugation to be analogous to slavery, which, according to the provisions of Article 149 of the BPC, comprises

[32] PRADO, L. R. *Curso de Direito Penal Brasileiro*: parte especial. São Paulo: RT, 2011. p. 292. Retrieved from https://www.saraiva.com.br/curso-de-direito-penal-brasileiro-vol-3-parte-especial-arts-250-a-359-h--7-ed-3380805.html.

[33] GRECO, R. *Código Penal Comentado*. Niterói. Retrieved from https://www.impetus.com.br/ produto/21754/codigo-penal-comentado---rogerio-greco---2019_rogerio-greco.

[34] NUCCI, G. *Código Penal Comentado*. São Paulo: Forense, 2013. p. 1021.

[35] "Tribunal Regional Federal da 1ª. Região - Criminal Appeal N° 2005.35.00.023131-6 – GO; "5ª Vara da Seção Judiciária do Estado de Goiás": Case 2009.35.00018434-2.

[36] NUCCI, G. *Código Penal Comentado*. São Paulo: Forense, 2013. p. 1021.

[37] Free translation.

[38] Brazilian legislation related to/associated with the crime of Human Trafficking (see the Palermo definition and note the types of crime not explicitly recognized but implicitly present): (1) aiding and abetting sexual exploitation, (2) work-related, (3) related to illegal adoption – minors, (4) removal of human organs and tissues.

[39] There is a possibility of significant overlap between the behaviors described in Article 149 and that of article 231 of the BPC because the former crime would be consummated by the movement of the victim and the latter crime by the effective use of the victim for the for-profit exploitation of their work.

> […] reducing someone to a condition analogous to slavery, either by subjecting him to forced labor, or an exhaustive work day, or to degrading work conditions, or restricting, by any means, his mobility due to debt owed to the employer or imposed.[40]

This modality has been fleshed out by the inclusion of crimes related to labor organizations, such as recruitment for emigration purposes (Article 206, BPC); preparing workers in one location to work in another within the country (Article 207, BPC); deprivation of rights ensured by labor law (209, *caput*, BPC); and attacking the freedom to work (Article 197, I, BPC).

The third area of neglect is related to the purposes of the exploitation of children and adolescents, which can occur for the purpose of illegal adoption in two cases: first, the crime of giving over a minor child to unsavory people (Article 245, BPC) and, second, the crime of sending a child or adolescent abroad for the purpose of obtaining profit or without complying with legal requirements (Article 239, Statute on Children and Adolescence). Likewise, criminal conduct related to the sexual exploitation of minors, as passive subjects, is covered in the ECA section on subjecting children or adolescents to sexual exploitation (Article 244 -A, ECA).

The fourth area of neglect by the legislature in 2009 is related to the criminal act of the removal of organs, tissues or parts of the human body for the following purposes: (1) to receive payment or for another terrible reason (Article 14, §1, Law No. 9.434/1997); (2) purchase or sale of tissues, organs or human body parts (Article 15, Law No. 9.434/1997) and (3) act of collecting, transporting, storing or distributing tissues, organs or human body parts knowing that they have been obtained illegally (Article 17, Law No. 9.434/1997).

2.1.2 The parliamentary contribution for the normative reviewing of trafficking in persons the Brazilian context

In view of the aforementioned areas of neglect hindering a comprehensive attack on human trafficking in Brazil, in 2011, the Congress of Representatives requested a Parliamentary Investigative Commission (PIC, RCP No. 3/2011) with the objective of "investigating human trafficking in Brazil, its causes, consequences and those responsible from 2002 to 2011."[41] The PIC of the Congressional Representatives confirmed that Brazilian laws do not effectively address the triple objective defined by the Palermo Protocol (Article 2): the prevention of crime, protection of and assistance to victims, and the detention and punishment of offenders. In addition, the law was remiss in limiting the purposes of trafficking to sexual exploitation only. The Parliamentary Investigative Commission also noted that Brazil should review its legislation and define the base form of the crime of trafficking, with subtypes that vary according to the purpose of the exploitation and not according to the type of victim, thus conforming to the Palermo Protocol (proposed Law No. 6.934/2013).

The Federal Senate also presented an Institutional Requirement (RQS, No. 226/2011) to establish a CPI-TRAFPE to investigate domestic and international human trafficking in Brazil.[42] In December 2012, after twenty months of work, the final report of the Senate Parliamentary Investigative Commission was approved, which highlighted the different forms of trafficking within Brazilian borders and the international trafficking of Brazilians. This led to the conclusion that changes were needed in legislation addressing criminal human trafficking to meet, at a minimum, the modalities in Article 3 of the Palermo Protocol. The final report also included proposed Law No. 7.370/2014,[43] which modified the Brazilian Penal Code by revoking Articles 231 and 231-A and creating a new article defining all of the forms of the crime of human trafficking.[44]

[40] Free translation of the text of Article 149 of Law No. 10.803 dated December 11, 2003.

[41] Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=849397&filename=RCP+3/2011

[42] The PCI on "Domestic and International Human Trafficking in Brazil" (CPITRAFPE, its acronym in Portuguese) undertook the investigation of allegations of human trafficking as well as further research on the subject and in the end, presented recommendations for reducing the incidence of this crime. See BRASIL. Senado Federal. *Comissão Parlamentar de Inquérito destinada a investigar o tráfico nacional e internacional de pessoas no Brasil, suas causas, consequências, rotas e responsáveis, no período de 2003 e 2011*, *compreendido na vigência da Convenção de Palermo: relatório final*. Available at: http://www12.senado.gov.br/noticias/materias/infograficos/2012/12/info-trafico-de-pessoas.

[43] BRASIL. Senado Federal. *Projeto de Lei n. 7.370 (Draft of Law No. 7.370)*, dated April 4, 2014. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1242133&filename=PL+7370/20 14.

[44] BRASIL. Câmara dos Deputados. *Projeto de Lei n. 6.934 (Draft of Law No. 6.934)*, dated December 11, 2013. Available at: http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1208864&filename=PL+6934/20 13.

According to the rapporteur of the draft Parliamentary Investigative Commission, the classification of the crime would be equivalent to drug and arms trafficking. In addition, human trafficking would be considered a crime against the dignity of a person, not just against sexual dignity.

The draft legislation resulting from the respective reports of the Parliamentary Investigative Commission of the Congressional Representatives (No. 6,934/2013) and the Federal Senate (No. 7,370/2014) were processed jointly to comprise proposed legislation for stricter anti-trafficking laws in Brazil. This lexical-normative update, which also affects Brazilian criminal law, goes hand-in-hand with Law 13.344/2016, dated October 6, 2016, which presented at least six innovative points: (1) added an article to the Brazilian Penal Code to include human trafficking modalities classified by purpose of exploitation, as suggested by Article 3 of the Palermo Protocol; (2) conferred more power to judiciary police and the Ministry of Justice, enabling them to obtain information from victims or suspects from public entities or private companies; (3) created a comprehensive policy of protection for victims, Brazilian or foreign, with legal, social, labor, employment and health care assistance; (4) allowed the granting of a visa for foreign victims to stay in the country, with the possibility of extension for the entire family; (5) created a national database with unified data collection procedures; and (6) allowed for the advance seizure of assets belonging to the defendant or accused.

The publication of Law No. 13.344, dated October 6, 2016 (effective as of November 21, 2016) extended criminal coverage by prescribing penalties for the different forms of human trafficking (such as organ removal, modern slavery, irregular adoption, and forced marriage) and by modifying the Penal Code's Criminal Procedure Regulation within the Statute on Foreigners, aimed at supporting the combat of human trafficking through the internal legal system and meeting the international commitments that Brazil assumed with the signing and ratification of the Palermo Convention and its additional protocols.

3 Analysis of New Brazilian Antitrafficking Law trough the Palermo Protocol

Following the guidelines provided by the Palermo Protocol (Article 2), Law No. 13.344, dated October 6, 2016, incorporated both the demands of civilian society (based on the monitoring and evaluation of the national ETP policy) and Brazil's international obligations on the matter. Thus, the law was structured around the following axis points: (I) Principles of Human Rights, (II) Prevention of Trafficking, (III) Suppression of the Crime, (IV) Protection of and Assistance to Victims, (V) Procedural Regulations and (VI) Measures to Raise Awareness of ETP (Chapters I to VI). The law established new and important principles for public policies such as the mainstreaming of gender, sexual orientation, ethnic or social origin, place of origin, race, age group, and no discrimination for any reason.

Articles 231 and 231-A of the BPC were explicitly repealed by Article 16 of Law No. 13.344, and their content was incorporated into a new article, 149-A, thus avoiding the retroactive vacating of any prior convictions (*abolito criminis*). This is an incidence of the principle of normative-typical continuity because the behavior remains defined as a crime although there was a feature change in the type of crime.

The new legal instrument innovates in at least four ways: first, it expands the modalities of criminal behavior to conform to the Palermo Protocol guidelines but at the same time limits these to five specific types; second, it confirms the scope of application to all events, regardless of location; third, it acknowledges all victims regardless of nationality[45]; and fourth, it includes the needs of civilian society by providing in Article 6 for various forms of protection, personal attention and assistance (legal, social, labor and employment, and health care).[46]

[45] Recognition of the foreigner's rights to a large part of the protections that the Brazilian state confers on its citizens to guarantee the principle of human dignity.

[46] "Article 6 Protection and care for the direct or indirect victim of human trafficking includes:
I. legal, social, work and employment and health care assistance; II. shelter and temporary shelter; III. attention to their personal needs, especially regarding gender, sexual orientation, ethnic or social origin, place of origin, nationality, race, religion, age group, immigration status, professional activity, cultural diversity, language, social and family ties or other status; IV. protection of privacy and identity;

The new legislation (*novatio legis*) added the new Article 149-A to the BPC that defined a unique and specific type of crime covered by the penal code regarding human trafficking and included the following:

> Article 149A. Perpetrate, attract, recruit, transport, transfer, procure, house or shelter a person, through serious threat, violence, coercion, fraud or abuse, to:
>
> I. remove organs, tissues or body parts; II. force people to work in conditions comparable to slavery; III. force people into any type of servitude; IV. illegal adoption; or V. sexual exploitation.
>
> Penalty- imprisonment, from 4 (four) to 8 (eight) years, and a fine.
>
> §1 – The penalty is increased by one-third up to one-half when:
>
> I. The crime is committed by a public official while performing his functions or under the pretext of performing these functions;
>
> II. or the crime is committed against a child, adolescent or elderly person or person with a disability;
>
> III. The perpetrator is in a position of authority due to family, domestic arrangements, cohabitation, hospitality, and economic dependence relationships, or authority or hierarchical superiority inherent to the exercise of employment, position or function; or
>
> IV. The victim of human trafficking is removed from Brazilian territory.
>
> §2. The penalty is reduced by one- to two-thirds if the perpetrator is a first-time offender and is not part of a criminal organization.[47]

As seen, the article presents a mix of alternatives. A crime with multiple counts of different types can be perpetrated by any of the above-cited acts performed in a single crime. However, there are acts that indicate duration, such as the acts of "transfer and shelter," which may be perpetrated over a prolonged period. The subjective guiding element of the core behaviors for this type of crime is deception, as observed in the free will to perform any of them and in the knowledge that the trafficking victim has of the purposes presented in the five paragraphs that accompany the *caput* for Article 149-A.

a) Typical conducts identified

To provide more descriptive detail of the crime, the typical type of trafficking crimes perpetrated can be defined from eight different conducts[48]. The definitions of the trafficking acts are as follows: a) to *perpetrate* connotes representing or doing business on behalf of another, serving as a connection; b) to *prepare* means attracting or seducing, obtaining the person to participate unwittingly in a criminal endeavor; c) to *recruit* is to gather, select, or summon people for a specific purpose; d) to *transport* is to take or drive people from one place to another; e) to *transfer* connotes displacing a person, moving from a place or domicile; f) to *procure* means buying, bribing or corrupting someone arduously; g) to *house* means offering to the people who will be alleged victims accommodation, shelter or installation in a certain location; and h) to *shelter* connotes offering hospitality, protection or physical comfort.

Trafficking is a crime shaped by linked elements. The different ways to commit the crime of trafficking exhibit the means used to achieve its purpose, classified as fraudulent or coercive. That is, the perpetrator must commit the crime using serious threat, violence, coercion, fraud or abuse (Article 149-A). In effect, the victim does not act voluntarily once she is subjected to the perpetrators' means of committing the crime. There are several normative elements of the typical crime: a) the *threat* must be serious enough to eliminate the victim's capacity to want (desire). This threat can be directed at the victim (direct threat) or at a person connected by family ties, friendship or love (indirect threat). b) *Violence* is the physical act against the victim to overcome his or her resistance (*vis absoluta*, absolute force). Violence may be direct or immediate when used against the owner of the protected legal asset or indirect or eventual when used against third parties linked to the victim. This type of violence against a person connected to the victim by family ties or friendship can be considered a serious threat. c) *Coercion* is compelling or forcing the victim to do something against his or her will and eliminates or diminishes the coerced person's freedom of choice. Coercion is generally performed using violence (physical) or serious threat (mental).[49] d) *Fraud* is the incentive,

V. prevention against re-victimization while in custody and during investigative and judicial procedures; VI. humanized care; VII. information on administrative and judicial procedures."

[47] Article 149-A of the Brazilian Penal Code was translated by the author from Portuguese to English.

[48] CUNHA consider that the basic text of "any form of coercion" should have been used. See note 46. CUNHA, R. S.; BATISTA PINTO, R. Tráfico de Pessoas - Lei 13.344/16 comentada por artigos. Salvador: Juspodivm, 2016.

[49] BITENCOURT, C. R. A Nova E Equivocada Tipificação Do

attraction, decoy, or trap in which the victim is defrauded or cheated. Generally, fraud is the method used by the perpetrator to deceive the victim so that the latter acts based on a false reality. In this sense, it is essential that the fraudulent behavior lead to the deception of the victim and consequently lead the victim to do something he or she would not otherwise do in the absence of the fraud.[50] e) *Abuse* is the inappropriate, excessive or illegitimate use of power that, in the absence of other specifications, may occur in public or private life. For example, abuse may come from the police or a person with family authority over the victim. The perpetrator takes advantage of fear or respect for authority to force the victim to do or stop doing something against his or her will. One must remember that the absence of these behaviors prevents their categorization. In addition, as Cezar Bitencourt stated, "The aforementioned forms or modes of committing the crime are categorical and do not permit an analogical or broad interpretation because this would violate the principles of legal typification and reservation"[51]

b) The specific purposes

The subjective element (the specific purposes) of the human trafficking crime is the element of deception in the willing participation in any of the acts included in the definition of the crime and using the aforementioned means (serious threat, violence, coercion, fraud or abuse). Still required is a specific subjective element (purpose) that is manifested in the crime's various modalities: "I) removal of their organs, tissues or body parts[52]; II) forcible labor in conditions analogous to slavery[53]; III) forcible servitude of any kind[54]; IV) irregular adoption[55]; or V) sexual exploitation"[56] (Art. 149-A).

Crime De Tráfico De Pessoas. *Revista Paradigma*, v. 25, p. 2–26, 2016. Retrieved from http://revistas.unaerp.br/paradigma/article/view/2-26: argued that "this method or form of committing the crime is absolutely unnecessary, innocuous and redundant, since it is already incorporated by the violence and by the threat, already provided for in the legal text.". In this vein, CUNHA consider that the basic text of "any form of coercion" should have been used. See note 46. CUNHA, R. S.; BATISTA PINTO, R. Tráfico de Pessoas - Lei 13.344/16 comentada por artigos. Salvador: Juspodivm, 2016. p. 144.

[50] In this sense, fraud can be perpetrated through artifice (material means such as barter or concealment), ruse (mental means, such as cunning and trickery), silence by someone responsible for alerting or testifying so that the victim is not coerced or detained in error.

[51] BITENCOURT, C. R. A Nova E Equivocada Tipificação Do Crime De Tráfico De Pessoas. *Revista Paradigma*, v. 25, p. 11, 2016.

[52] Law No. 9.434/1997 is the standard that regulates the modality "provides for the removal of organs, tissues, and parts of the human body for transplantation, treatment and other measures." This legal document provides for the removal of organs in some scenarios, such as for *post-mortems*, for transplant or treatment, and also in cases of *brain death*. For further information on this type of trafficking in the Brazilian legal system see , W. Correa da.; SOUZA, C. H. Ferreira de. O Tráfico de órgãos no brasil e a lei Nº 9.434/97. In: SANTIAGO, N.E.A.; BORGES, P.C.C; SOUZA, C.M. *Direito penal, processo penal e constituição*. Florianópolis; FUNJAP, 2014. v. 1. p. 262-291.

[53] Considered to be a *de facto* situation and not a legal one. The objective of the perpetrator is to subject the will of the victim to the *de facto* power of another person who can subordinate, dominate and exercise power over the victim. These are the attributes of property rights over another person, or *de facto* slavery. This act is internally codified by Article 149 of the BPC. For more information, see SILVA, W. C. da; GÓES, K. Proteção Contra As Formas Contemporâneas De Escravidão: Uma Garantia Constitucional. *Brasiliana- Journal for Brazilian Studies*, v. 2, n. 2, p. 289–312, 2013. https://doi.org/10.25160/v2.i2/d12. According to Cezar BITENCOURT, C.R. *Tratado de Direito Penal:* Parte Geral. 22. ed. São Paulo: Saraiva, 2016. P. 16-17, in this form of trafficking, "Another, connected crime is generated, where there are strict parameters as to the modes of commission, which are connected (and not to the means, which remain independent in article 149 and therefore, limited to the crime of human trafficking." This attorney warned that "there will be much debate on the doctrine and jurisprudence regarding the modes or means of human trafficking and whether its purpose is forcible labor similar to slavery." Therefore, he believed that "the provisions of Article 149-A and references to the preceding article present many pitfalls, and in the end, will this article be equally linked to the means of commission foreseen in the previous article, or will it allow independence from the means of commission, thus violating the principle of legal typicality?"

[54] When the victim is forced to work for someone but does not become a situation comparable to slavery.

[55] It is a blank criminal norm because the adoption of minors is regulated by the Statute on Children and Adolescents (ECA). Regulated by Law No. 8.069, dated July 13, 1990 (especially Article 39). Available at: http://www.planalto.gov.br/Ccivil_03/leis/L8069.htm>. Furthermore, the adoption of people above the age of majority depends on the effective assistance of the civil law and pertinent legal decisions (Article 1619 of the Brazilian Civil Code) and only secondarily applying the ECA regulations. The ECA protects the freedom and the integrity of minors and penalizes two types of crime that do not have the same legal name as this type of crime. Article 238 of the ECA criminalizes the act of "Promise or effect the delivery of a child or student to a third party, for payment or reward: Penalty - imprisonment from 1 (one) to 4 (four) years and fine." Article 239 typifies this as a *common crime* and states "Promote or assist the performance of an act intended to send children or adolescents abroad without complying with legal formalities for the profit-making purposes."

[56] As previously explained, sexual exploitation comprises acts foreseen in Articles 231 and 231-A of the BPC (repealed by Law No. 13.344/2016). It is understood that sexual exploitation is an activity in which the perpetrator seeks profit by the use of sexuality. It refers to the selling of one's own body by a man or woman. From a criminal policy perspective, prostitution, in itself, is an atypical *de facto* practice. Nevertheless, the law punishes anyone who subjects, induces, attracts or facilitates prostitution as well as anyone who prevents or hinders someone from leaving prostitution. For Cezar Bitencourt (2016, p. 21), Law No. 13.344/2016 "has been terse in

These five paragraphs included in Article 149-A are the elements of the type of crime addressing the specific purpose or deceitful intent. Therefore, the crime of human trafficking will only be considered consummated if the perpetrator has any of the legally foreseen purposes, regardless of whether the crime was in fact committed (Article 20, *caput*, BPC). Likewise, and mostly in cases of illegal adoption, the issue of unavoidable error may arise (Article 21, *caput*, BPC)[57] from the fact that the perpetrator acted as if the act were allowed, thus obviating awareness of the illegality and, consequently, the guilt of the perpetrator.

According to Cezar Bitencourt, "the structure of the present crime type creates difficulty in interpreting how it is typified, insofar as it transforms the essence of legal prohibition, which should be the core of the type, into the special purpose that is represented in its five paragraphs"[58]. He added that these purposes "constitute blank criminal norms, requiring one to resort to other legal provisions"[59] for the prosecution of the crime of trafficking. The previously discussed corollary crimes do not, in this case, absorb one type of crime in place of another although there is overlapping content.

c) Protected legal assets

The legal right protected by the crime of trafficking becomes a rule that protects individual freedom, which consists of free will to do something or not to do something. The legal right thus shifts from sexual dignity (in the repealed Article 231 of the BPC) to individual freedom, understood both in its ethical-social aspect, which harms the principle of human dignity, and in the freedom of movement, the integrity of being. No special conditions are required of the active and passive parties, that is, of the perpetrator and the victim of the crime; and the crime may be committed by a man or a woman, regardless of any personal condition. This indicates that the trafficking can be for the perpetrator himself or for a third party, who will be a participant in the crime. It may be that the trafficker himself is going to sexually exploit the victim or subject him to forced labor, or he may be trafficking on behalf of another person, who participates in the crime as his leader, facilitator, or financer, among other forms of participation.

d) Doctrinal arrangement

As stated, human trafficking is a crime type with mixed alternatives and multiple acts that can be committed with any of the corresponding behaviors. This indicates, for example, that if the perpetrator deceives, attracts and also transfers the victim for exploitation, acts performed in the same phatic context, there is only one crime. These acts touch upon the same legal right - individual freedom. Although human trafficking encroaches on more than one legal right of the victim, there is only one crime. In this case, only individual freedom is violated. There remains no violation of another legal right, which will depend on committing the crime for which the victim was (later) trafficked. In effect, even if the victim is trafficked using any of the five modalities, there is only one instance of the crime of human trafficking.

However, once the subsequent (corollary) offenses are effectively committed, there will be content overlap between them (Article 69 of the BPC). The offenses are diverse behaviors that address various legal rights of the victim. For these purposes, the subsequent crime against the victim will also be imputed to the trafficker (Article 69 of the BPC). Thus, in the event that a person has been a victim of forced sex, the trafficker will also be liable for the crime of statutory rape (Article 213 of the BPC). Similarly, the same will occur when the victim is forced to work in degrading conditions, characterizing the crime of degradation as analogous to that of slavery (Article 149 BPC).

The application of overlapping norms between human trafficking and subsequent imputed crimes is justified given the independence of the crimes; they are committed in different factual situations and committed more than once. The crime of human trafficking is formal and is consummated when the act is committed, regardless of any subsequent results. In the event that it in fact occurs, the crime is not vacated, but rather a new

invoking the element of 'sexual exploration,' adopting the definition provided by Article 229 of the BPC, which includes all and any kind of sexual exploitation, including prostitution and pedophilia." For more information on the modalities of sexual exploitation in Brazil, see SILVA, W. C. da. "O impacto do enfrentamento internacional contra o tráfico de pessoas na legislação brasileira"; In: QUINTAO, M.S.; CARDOSO de Souza, M. (org.) *A interface dos direitos humanos com o direito internacional*. Belo Horizonte: FORUM, 2015. Tomo I. v. 1. p. 369-396.

[57] Article 21, BPC: "Mistake of fact"

[58] BITENCOURT, C. R. A Nova E Equivocada Tipificação Do Do Crime De Tráfico De Pessoas. *Revista Paradigma*, v. 25, p. 2–26, 2016. p. 10.

[59] BITENCOURT, C. R. A Nova E Equivocada Tipificação Do Do Crime De Tráfico De Pessoas. *Revista Paradigma*, v. 25, p. 2–26, 2016. p. 14.

violation of legal rights occurs, resulting in the material accumulation of penalties.

Even if the trafficking victim is a third party, the offender will be held responsible for the subsequent crime. From the moment the crime of trafficking is committed with the intent of achieving a certain result, a psychological link ensues that is necessary to assign responsibility (Article 29 of the BPC). Therefore, the perpetrator, applying serious threat, could transport a person for the removal of one of his or her kidneys. Following the removal of this organ from the victim, the trafficker will be assigned responsibility for the subsequent crime (bodily injury[60]), being considered a participant. Furthermore, if the presence of the psychological link for the commission of the subsequent crime has not been demonstrated, responsibility cannot be assigned because it lacks the essential element.

For the perfect use of typification verbs, these verbs should be used in connection with the crime modalities and considering the purposes established in the regulation. According to the principle of legality, if some of the elements are missing, the factor is atypical. As Cezar Bitencourt argued,

> The special purpose of the act that is included in certain definitions of crimes, conditions or substantiates the illegality of the act, thus constituting a subjective element of the type of crime, autonomously and independently of the deception. Therefore, the correct term is a special subjective element of the crime type or a special subjective element of the injustice, which are equivalent because they belong to the illegal condition and its corresponding crime type[61].

These acts can be committed for the purpose of domestic trafficking (in national territory) or international trafficking (for exit from, transit through or entry into Brazilian territory). In this sense, the crime type is omitted,[62] and the theory of ubiquity is applied as directed by Article 6 of the BPC[63]. For example, it will be considered a crime when the victim is captured abroad using fraudulent means and then transported to Brazilian territory to be exploited (for example, in a textile industry). It is also a crime when the recruitment by threat occurs in Brazil and the victim is transferred abroad for the purpose of sexual exploitation.

Thus, there are various types of crime involved in trafficking. A *common* crime is one that can be committed by anyone. A *multi-count* crime is generally committed in multiple acts. A crime of *commission* is the result of the unlawful conduct of "perpetration," "attraction," "recruitment," "transportation," "procurement," "housing" and "sheltering." A crime *committed by omission*, although rare, is when the crime should have been prevented by the guardians (Article 13, §2, of the BPC). A crime committed in a *linked manner* was committed using the means foreseen in the crime type definition: serious threat, violence, coercion, deception or abuse. A *formal* crime is consummated without producing the most natural result, comprising the effective removal of organs from the victim or any other outcome resulting from the purposes identified in the crime type. An *instantaneous* crime is finished once it is consummated; the consummation is not prolonged. A *singular* crime can be committed by a single perpetrator. In a crime of *deception*, there is no advance recognition of a crime. A *transitory* crime is committed in a manner that leaves no traces and with no mandatory requirement for expert evidence.

e) Causes for penalty increases

Regarding the causes of penalty increases, the new legislation made the penalties stricter (4 to 8 years). In the context of *lex gravior* (the law most prejudicial to the defendant), retroactivity of the law cannot be applied to harm the defendant. Section 1 anticipates certain aggravating circumstances of the offense.

> §1. The penalty is increased by one-third up to one-half when:
>
> I. The crime is committed by a public official while performing his functions or under the pretext of performing these functions;
>
> II. or the crime is committed against a child, adolescent or elderly person or person with a disability;
>
> III. The perpetrator is in a position of authority due to family, domestic arrangements, cohabitation, hospitality, and economic dependence relationships, or authority or hierarchical superiority inherent to the exercise of employment, position or function; or

[60] Bodily injury, according to the terms of Article 129 of the BPC, means "Offending the bodily integrity or health of others."

[61] BITENCOURT, C.R. *Tratado de Direito Penal* : Parte Geral. 22. ed. São Paulo: Saraiva, 2016. v. 1, p. 365.

[62] The previous wording of Article 231 of the BPC did mention the facilitation of entry or exit from the country.

[63] The crime is considered to be committed in the place in which the action or omission occurred, in whole or in part, as well as where the result was or should be produced (BRASIL, Law No. 7.209, 7/11/1984).

IV. The victim of human trafficking is removed from Brazilian territory.

The penalty also increases if the perpetrator committed the crime against a family member such as a descendant, sibling or spouse; generic aggravating circumstances cannot be applied to the same victims (Article 61, II.e, BPC) so as not to apply the same charge twice to the offender because the act is already considered to be a special cause of sentence increase.

No special quality or condition is required for defining the perpetrator. However, if it is a public official[64] committing the act while performing official duties, this could be considered a crime of abuse of authority (Law No. 4.898/1965).[65] That is, the public official is performing his function or is using the function as a pretext. In the first case, the perpetrator is effectively performing a public function; in the second, the perpetrator does not exercise the function. In the latter case, the crime becomes more serious when it is committed by someone deviating from his functions. This is because there is an existing situation analogous to a "master" and "slave" relationship, a situation dominated by the "lord" and lost freedom.

When the trafficking victim is taken out of Brazil (§1-IV, Article 149-A), the act is even more serious because it makes it even more difficult for the Brazilian state to protect the victim. In this case, the corresponding penalty is increased. These aggravating factors require mandatory penalty increases, and it is not up to the judge to decide whether to apply a penalty increase. The legal mandate is rigorous. This warrants a criticism because international human trafficking, instead of constituting a crime in itself, is treated as an aggravating circumstance resulting in heavier sentencing. The problem is that the legislation only considers the removal of the victim from the country as an aggravating circumstance, disregarding the victim's placement in national territory.[66]

According to Cezar BITENCOURT[67] the new superior punishment is illusory because it has left out the special aggravating provisions contained in Paragraphs III and IV of Article 234-A, which increased the penalty only for repeated infractions of VI Title of the Special Part of the BPC. "The omission of all those special causes of increases (both those in the repealed articles as well as those in the general provisions), not anticipated by Law No. 13.344/2016, in the end makes the *new* criminal offense less serious compared to the repealed instruments. The reduced punishment results not only from the 'oversight' of these aggravating factors but also from the adoption of aggravating factors with lighter penalties, and from the inclusion of the mitigating paragraph §2, which allows for reduced penalties for first-time offenders that are not members of criminal organizations"[68].

Considering the above, one can see a move to harsher sentences (4-8 years). Conversely, by repealing Articles 231 and 231-A, the legislation is wrong in omitting the causes of penalty increases contained in paragraph §2 of the previously repealed norm, which were applied when (I) the victim is under eighteen years of age; (II) the victim, due to illness or mental disability, does not have the necessary discernment to perform the act; and (III) if the perpetrator is a parent, stepfather, stepmother, brother, stepchild, spouse, companion, guardian or caretaker, teacher or employer of the victim or has legally or otherwise assumed an obligation to care, protect or watch over the victim.[69]

f) Causes for sentence reductions

In addition to the causes of sentence increases that are mandatory when identified, paragraph §2 also provides causes for sentence reductions, again mandatory when identified, that reduce the penalty by one-third when the perpetrator is a first-time offender[70] and

[64] The concept of a public official is defined in Article 327 of the BPC.

[65] Law No. 4.898, dated December 9, 1965. "Regula o Direito de Representação e o processo de Responsabilidade Administrativa Civil e Penal, nos casos de abuso de autoridade". See Articles 3 and 4.

[66] Rogerio Sanchez criticized the legislation considering that "the Law punishes in a major way the removal of the trafficking victim from our territory, but not the entry of the victim for the same purpose, obviously provided that the behavior of the perpetrator adheres to one of the core verbs, with respect to the principle of legality" CUNHA, R. S.; PINTO, R. B., *Tráfico de pessoas — Lei 13.344/16 comentada por artigos*. Salvador: JusPodivm, 2016. pp.235-236.

[67] BITENCOURT, C. R. A Nova E Equivocada Tipificação Do Crime De Tráfico De Pessoas. *Revista Paradigma*, Ribeirão Preto-SP, a. XXI, v. 25, n. 1, p. 2-26, jan./jun. 2016. p. 5.

[68] BITENCOURT, C. R. A Nova E Equivocada Tipificação Do Crime De Tráfico De Pessoas. *Revista Paradigma*, Ribeirão Preto-SP, a. XXI, v. 25, n. 1, p. 2-26, jan./jun. 2016. p. 6.

[69] Literal translation of repealed Article 231, paragraph §2 of Law No. 12.015, dated August 7, 2009

[70] A first-time offender is one who is not a repeat offender. Repeat offenses are considered in Articles 63 and 64 of the BPC.

does not belong to a criminal organization.[71] These are cumulative requirements; that is, they must be first-time offenders and not belong to a criminal organization (Article 149, §2).

Thus, there is a punitive softening: if the acts described in Article 149-A of the BPC were not performed using one of the means indicated in the crime type (serious threat, violence, coercion, deception or abuse), the deed is atypical of the crime. If, on the one hand, there is a sentence reduction related to the crime type, the opposite occurs in relation to the secondary precept (penalty). In its simple form and without considering the causes of sentence increases, the penalty is 4 to 8 years of incarceration.

A curious fact about the crime type in Article 149-A is that the national legislature opted not to consider it a heinous crime, as did the Senate and Congressional Representatives in the 2012 final PIC report that equates it to drug or arms trafficking. Classifying human trafficking as a heinous crime would have numerous effects, such as breaking up the normal case processing sequence by assigning it processing priority. The legislature chose to limit itself to applying the requirement that 2/3 of the sentence must be served prior to conditional release.

g) Criminal prosecution and criminal investigation

As a point of reference for the prosecution of crimes in Brazil, if the criminal proceeding is completely public, the presentation of charges to initiate the criminal proceeding is not reliant on any condition or derivation. By law, jurisdiction belongs to the state courts, and the "Civil Police" (judicial police) are responsible for investigation, unless there are inter-state or international repercussions (Article 144, paragraph §1 of the federal constitution), in which case the investigation will be assigned to the federal police. Because by law, jurisdiction belongs to the state courts, the crime must have international characteristics (Article 109, Section V of the federal constitution) for the federal authorities to intervene. If the crime is international and there is an international treaty governing its punishment,[72] any signatory country involved can apply its own laws under the principle of universal jurisdiction.[73] In addition, when the criminal acts occur in one country and the consequences occur in another, the Federal Justice system assumes responsibility for legal proceedings (Article 109, Section V of the federal constitution).

The Brazilian legislation that typifies international human trafficking can in no way confer the protected object, in the field of protection, less value than that conferred in the international scope of the ratified norm. The exegesis would result in a reductionist activity in the State's field of action, which is undesirable in the area of human rights[74]. The interpretation of the expression "abuse", understanding it according to the Palermo Protocol ratified by Brazil, is not a new obligation, but a figure that comes to clarify an already existing obligation providing the content and specificity[75].

In the same vein, there have been significant changes in criminal proceedings that allow the judge to determine bail bonds or financial collateral related to assets, rights or financial securities belonging to the defendant or accused that are instruments for, proceeds from or benefits of the crime of human trafficking (Article 8 of Brazil's Criminal Procedure Code - CPC).[76] Information systems based on research procedures have also been authorized to enable data collection and management for suppressing human trafficking.

This change in Brazil's Criminal Procedure Code (CPC) strengthens and facilitates the criminal investigation by extending the legal requisitioning power of police inspectors, allowing the latter and the Ministry of Justice to use two new instruments: Articles 13-A and 13-B. Those entities now have the power to require

[71] Law No. 12.850/2013 defines a criminal organization in Article 1, Paragraph §1: "A criminal organization is an association of four (4) or more persons structurally organized and characterized by a division of labor, albeit informally, to obtain, directly or indirectly, an advantage of any kind, through the commission of criminal offenses with maximum penalties greater than four (4) years, or that are transnational in nature."

[72] Like the Palermo Convention (note 13), ratified by Brazil in 2004.

[73] The jurisdictional terminology used here is based on the decision-making capacity of a state with regard to addressing conflicts presented to its judicial bodies and hand down valid decisions on these. CRYER, CRYER, R., FRIMAN, H., ROBINSON, D., & WILMSHURST, E. *An Introduction to International Criminal Law and Procedure*. Cambridge University Press. 2014, pp. 37-38.

[74] CEIA, E. M.. A Jurisprudência da Corte Interamericana de Direitos Humanos e o Desenvolvimento da Proteção dos Direitos Humanos no Brasil. *Rev EMERJ*, Rio de Janeiro, v. 16, n. 61, p. 113-152, jan./fev./mar. 2013

[75] ICHR. "*Caso Trabajadores da Fazenda Brasil Verde vs Brasil*". 20 octubre de 2016. Retrivied from: https://www.corteidh.or.cr/docs/casos/articulos/resumen_318_esp.pdf

[76] Chapter V: Procedural provisions in Articles 8 to 13 in Law 13,344, dated October 6, 2016.

telecommunication and/or telematics service providers to make available the appropriate technical means for accessing telephone or telematics data to locate victims and/or suspects of the crime.[77]

Another measure established was to give members of the Public Prosecutor's Office and Judicial Police Inspectors the power to require any public or private entity to deliver within 24 hours any data and demographic information[78] on victims and suspects (Article 13-A[79]). This enables the provision of data to information systems, the development of an investigative network and its availability for use in future investigations.

The new Article 13-B of the Code of Criminal Procedure allows investigative bodies to request telecommunication and telematics service providers, through court order or prior notification in the event of court inertia, to immediately make available appropriate technical measures for locating victims and suspects (Article 13-B, §1). As provided in paragraph §4 of Article 13-B, "There being no court action within a period of 12 (twelve) hours, the appropriate authority shall requisition the telecommunication/telematics service companies to immediately provide the appropriate technical means - signals, information and other - that enable the location of the victim or suspects of the current crime, with immediate communication to the judge." It is a temporary jurisdiction reserve clause because the measure is initially posited to the court, and only in the case of a failure by the court to act quickly is the request for information sent directly to the telephony operator.

Another fact that draws attention to the procedural provisions of Law No. 13.344/2016 is Article 9,[80] which allows the subsidiary use of the provisions of Law No. 12.850/2013 for human trafficking cases. This indicates the possibility of using the normative provisions of one law in another in cases of unintended gaps in the law, that is, when one provision has been omitted and another is compatible. Thus, it can be intuited that procedural rules pertaining to the Law on Organized Crime is used, including for extraordinary methods of obtaining evidence.[81] This practice facilitates criminal investigations by relying on the support of the most agile legal mechanisms.

If a criminal organization is involved (Article 1, §1 of Law 12.850/2013),[82] the use of new mechanisms for obtaining evidence is essential to render investigations feasible and even to enable addressing the structure of the criminal network[83]. The use of methods for obtaining evidence, as provided in Article 9, has caused controversy by revealing a nationwide lack of basis, structure and/or instruction. In this regard, it is essential to remember that because not all cases of trafficking occur

[77] This change has caused certain legal controversy related to the unconstitutionality of the flexibility of such an institute because the surrender of telematics or telephone data to locate crime victims or suspects contravenes a person's right to privacy and the privacy of personal information. Therefore, Law 13.344 is currently subject to a Direct Action of Unconstitutionality (ADI No. 5642, dated January 17, 2017), which has been filed by the National Association of Mobile Operators-ACEL (its acronym in Portuguese) and because of its impact, has been provoking debates on the inviolability of the secrecy of and access to demographic data of users of all types of communication media.

[78] Of note is that obtaining demographic data related to investigations already has legal support through the provisions of Article 15 of the "Law on Organized Crime" (Law 12.850/2013) and through Article 17-A of Law 9.613/1998, "Law on Money Laundering."

[79] According to Article 13-A , "In the crimes foreseen in Articles 148, 149 and 149-A, in Paragraph 3 of Article 158 and in Article 159 of Decree of Law No. 2.848, dated December 7, 1940 (Criminal Code), and in Article 239 of Law No. 8.069, dated July 13, 1990 (Statute on Children and Adolescents), a member of the Public Prosecutor's Office or the chief police officer may request from any public or private entity data and information on the victim or suspects (Law No. 13.344/2016, sole paragraph). The request, which will be answered within 24 (twenty-four) hours, will contain: I. the name of the requesting authority; II. the number of the police case; and III. identification of the police unit responsible for the investigation."

[80] Article 9: "The provisions of Law No. 12.850, dated August 2, 2013, shall apply in subsidiary form, as applicable."

[81] Law No. 12.850, dated August 2, 2013 (defines a criminal organization and includes provisions on criminal investigations, the means of obtaining evidence, corollary criminal offenses and criminal procedure). Article 3: "At any stage of the criminal prosecution, the following means of obtaining evidence will be allowed, without prejudice to others already provided for by law: I. judicial collaboration; II. environmental capture of electromagnetic, optical or acoustic signals; III. controlled action; IV. access to telephone and telematics records, to demographic data contained in public or private databases and to electoral or commercial information; V. interception of telephone and telematics communications, in accordance with specific legislation; VI. suspension of financial, banking and fiscal secrecy, in accordance with specific legislation; VII. infiltration by police for investigations, as permitted by Article 11; VIII. cooperation between federal, district, state and municipal institutions and agencies in the search for evidence and information of interest in criminal investigations or procedures."

[82] Article 11 see footnote on page 46.

[83] Therefore, the need to also develop all the necessary mechanisms for the implementation of international cooperation on the matter as one of the commitments of the States. See: MACHADO, Bruno Amaral; VIEIRA, Priscilla Brito Silva. "O controle penal do tráfico de pessoas: construção jurídica, interações organizacionais e cooperação internacional". *Revista de Direito Internacional*, Brasília, v. 13, n. 3, p. 484-503, 2016.

through a "criminal organization," one cannot always employ the same methods of obtaining evidence. That could lead to the elimination of the fundamental rights of the alleged criminal.

4 Overcoming the Legal Barrier of the Relevance of Consent and Moving Towards the Protection of Victims

The notion of vulnerability is expressed in different international human rights instruments.[84] The concept of vulnerability is directly related to the position of the victims and has been central to the development of the Palermo Protocol[85], in which the "situation of vulnerability" becomes one of the resources used by the perpetrators to obtain consent[86]. This is the direction provided by Article 9.4 of the Palermo Protocol, indicating some factors that render people particularly vulnerable to trafficking, such as poverty, underdevelopment and unequal opportunity. Along the same lines, the 2019 UN Rapporteur on Trafficking in Persons[87] highlights that trafficking is the opposite of social exclusion, which pushes possible victims of trafficking into contexts of vulnerability. Therefore, the UN Rapporteur insisted that it is part of the obligations of the States to act proactive and promote innovative and transformative solutions.

The structure of Law No. 13.344, dated October 6, 2016, demonstrates that Brazil seeks to comply with international treaties by enacting laws that safeguard people, particularly those in vulnerable situations. In this sense, Articles 6 and 7 of Law 13.344/2016 provide guidance on measures to protect and assist victims and mention the need to provide humanized assistance to these people, such as accompanying the victims and offering specialized and skilled assistance to the multiple dimensions of human trafficking and the different contexts in which it occurs.

4.1 Recognized categories in the context of vulnerability

The crime-related legislation considers at least three categories or situations in which victims may find themselves vulnerable[88]: individuals under the age of 18, adults over the age of 60, and disabled persons. As established by the Statute on Children and Adolescents (ECA, Article 2), a child is a person under twelve years of age, and adolescents are between twelve and eighteen years old. As established by the "Statute on the Elderly,"[89] these are adults over the age of 60. A person with a disability is considered to be a person with a long-term physical, mental, intellectual or sensory disability, which, when interacting with one or more obstacles, may impede their full and effective participation in

[84] The first document that clearly expressed this concept was the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on June 25, 1993. Paragraph 24 of this document stated, "Great importance must be given to the promotion and protection of the human rights of persons belonging to groups which have been rendered vulnerable, including migrant workers, the elimination of all forms of discrimination against them, and the strengthening and more effective implementation of existing human rights instruments. States have an obligation to create and maintain adequate measures at the national level, in particular in the fields of education, health and social support, for the promotion and protection of the rights of persons in vulnerable sectors of their populations and to ensure the participation of those among them who are interested in finding a solution to their own problems." Available at: http://www.ohchr.org/Documents/Events/OHCHR20/VDPA_booklet_Spanish.pdf

[85] UNODC. *An Introduction to Human Trafficking*: Vulnerability, Impact and Action. UNITED NATIONS New York, 2008. Retrieved from: https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf

[86] UNODC. *Issue paper:* The International Legal Definition of Trafficking in Persons*: Consolidation of research findings and reflection on issues raised.* Viena, 2018, p. 10; UNODC. *An Introduction to Human Trafficking*. UN. New York. 2014, p. 23; UNODC. *An Introduction to Human Trafficking: Vulnerability, Impact and Action*. UNITED NATIONS New York, 2008.

[87] HUMAN RIGHTS COUNCIL. A/ HRC /41/46, April 23, 2019. Trafficking in persons, especially women and children Report of the Special Rapporteur on trafficking in persons, especially women and children. Retrieved from: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/112/06/PDF/G1911206.pdf?OpenElement.

[88] Although we agree with the use of the expression "people in vulnerable circumstances," the Brazilian Penal Code defines "vulnerable persons" as "exploitation of prostitution or other type of sexual exploitation of children, adolescents or vulnerable people (wording provided in Law No. 12.978/2014, Article 218-B). Submitting, inducing or attracting to prostitution or any other form of sexual exploitation any minor under 18 (eighteen) years old, or any person who, due to infirmity or mental disability, does not have necessary judgment to the performance of the act, facilitating it or hindering or preventing from its abandonment: (Included by Law No. 12.015/2009) Penalty - imprisonment from 4 (four) to 10 (ten) years."

[89] Intended to regulate the assured rights of people 60 (sixty) years old or older. As provided for in Article 1 of Law No. 10.741, dated October 1, 2003.

society as much as other people in the same conditions" (Article 2 of Law No. 13.146, dated July 6, 2015[90]).

Immigrants with irregular administrative situations must be added to the three categories of vulnerability. To this end, Law 13.344/2016 includes an unusual feature, the modification of the Statute on the Foreigner (Law No. 6.815 dated 08/19/1980[91]). This feature introduces the granting of indefinite stay or residence rights to trafficking victims and their relatives (Article18--A, §1) who do not remain subject to any conditions of the immigration process and exempts them from any administrative fee (Article 18-A).[92] However, a certain degree of discretion is proffered when the Ministry of Justice is given the capacity to procedurally grant indefinite stays or residence to victims and their relatives without requiring legal proceedings (Article 18-B[93]). The objective was to provide legal support so that foreigners are not deported (Article 42-A).[94]

However, the question of the victim's status and her vulnerability merits some discussion regarding consent. It should be remembered that the final Parliamentary Inquired report (2012) decided not to consider consent relevant, following the guidance of the Palermo Protocol. This reasoning was based on the understanding that consent stemming from the concept of vulnerability is irrelevant[95] because there can be no consent by the victim in any trafficking situation, thus proposing that all conceptual constructs and all efforts to combat this crime should be focused on victim assistance and protection of rights. In this regard, Elliott argues that:

> "In stating that consent to exploitation is irrelevant where the 'means' have been employed, the wording of the definition clearly recognizes the potential for consensual exploitation to take place. […] an individual can consent to being exploited, and essentially argues that the 'lack of consent' requirement creates a false dichotomy between consent and coercion and that this, along with the effect of economic coercion, creates a grey area category of persons who fall somewhere on the spectrum between trafficked and smuggled."[96]

Human Trafficking always occurs in the context of human mobility, hence the need to view trafficking as a process, in which abuse and exploitation often occur. The irrelevance of consent (Palermo Protocol) has a pivotal role to determine who is or who is not a victim of human trafficking. Consequently, the States are obliged to defend the victims' rights and their protection. In this context, the new Brazilian legislation does not observe the flexibility of the concept of consent and the multiple forms that can be manifested in a context of vulnerability.

4.2 Consent in Brazilian legal practice

Law No. 13.344/2016 has been remiss in this case because it does not directly refer to victim consent, which may have a negative effect on the suppression of this crime consistent with victim protection. Given this omission, one should consider the provisions of Decree No. 5.017 (2004) ratifying the Palermo Protocol: "the consent of the offended party is irrelevant to the composition of the crime because the protected legal right is missing and linked to the community as a whole." Therefore, the perspective that places the victim in a leading role must be incorporated. Such a perspective views the victim as a person to be heard and respected and the focus of measures to minimize harm. This view also has conditions for reducing the effects of primary victimization, thus avoiding relegating the victim to a "peripheral position"[97].

Based on this approach, some scholars advocate for the exclusion of the typicity of the act in cases in which the perpetrator did not act with violence or deception, acknowledging once again the victim's condition of

[90] "Brazilian Law on the Inclusion of Persons with Disabilities": Law No. 13.146, dated July 6, 2015. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13146.htm>

[91] Repealed by Law No. 13.445, dated May 24, 2017

[92] Article 18A of Law No. 13.344/2016. "Permanent residency will be granted to victims of human trafficking in the national territory, regardless of their immigration situation or their collaboration in administrative, police or judicial proceedings."

[93] Article 18B of Law No. 13.344/2016: "Act of the Minister for Justice and Citizenship shall establish the procedures for granting permanent residence referred to in Article 18A."

[94] Article 42-A of Law No. 13.344/2016: "The foreigner shall maintain legitimate status in the country while pursuing a request of immigration normalization."

[95] UNODC. *Issue paper: The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised.* Viena, 2018. p. 9.

[96] ELLIOTT, J. *The Role of Consent in Human Trafficking*. London/New York: Routledge, 2015.

[97] CASTILHO, E. W. V. de. "A criminalização do tráfico de mulheres: proteção das mulheres ou reforço da violência de gênero?". *Cadernos Pagu*, v. 31, p. 101–123, 2008. https://doi.org/10.1590/S0104-83332008000200006

having rights[98]. Thus, the need to analyze the behavior of the victim in the alleged criminal act is established because in cases of people who freely and spontaneously agree with their trafficking, the valid consent of the offended will prevent the *de facto* inclusion of the crime type discussed here. However, Renato SILVEIRA[99] contended that consent is considered valid as long as it does not exceed the parameters of criminal protection based on the principle of human dignity. It is understood that the victim's consent does not nullify the responsibility of the perpetrator because the protected legal right - individual freedom as an element of human dignity - is missing.

As seen, the new law contains some ambiguity[100]. A question that may arise is whether the crime type can be applied to cases in which there is consent by the alleged victim. The Brazilian legal system adopted the thesis that consent is valid if there is no serious threat, violence, coercion, deception, or abuse of authority.[101] Nor is the consent valid if the offended party who consents is vulnerable or if this act is performed for some form of remuneration. Another uncertainty arises regarding the interpretation of vulnerability, which increases the risk of becoming a trafficking victim, although the lessons learned in combatting trafficking support strengthening the concept of vulnerable subjects in this type of crime. This situation recalls Article 5 of the Brazilian Constitution, which establishes that "the penal code will not retreat except to benefit the accused" (Federal Constitution, 1988). In this domain, any leeway regarding consent proffered by Law No. 13.344/2016 benefits the accused, rendering it advantageous to reverse course to fulfill past events.

Law No. 13.344/2016 omits vacating the issue as one of the hypotheses for invalidating consent. This may cause diverging interpretations and become a point of weakness for the new legal instrument by not directly recognizing the condition of vulnerability of the offended and by granting the state the right to challenge the issue in an authoritarian manner, thus criminalizing the victims themselves. Consequently, consent incapacitates people in trafficking situations, denying them the right to citizenship in addition to promoting a lack of harmony between official institutions and civilian society.

It is true that the interpretation of the concept "situation of vulnerability" can be somewhat complex because of the potential elasticity of the term. However, it is argued that we cannot consent to actions that violate human dignity. Consent could be effective for excluding typicity only for those crimes in which the legal right involved is available to its owner[102]. The crime of human trafficking cannot be one of these crimes because the protected legal right here is personal freedom. Trafficking is a qualified violation because it specifically affects human dignity, which in a trafficking situation is reduced to an object or instrument. Freedom, in its the fullest sense, is choosing a life plan in which the person continues to be a consideration and sanctioning actions that lead to exploitation and/or situations analogous to slavery. In this context, it cannot mean an option that abolishes one's freedom or limits it to extents not tolerated by the Rule of Law[103].

This is the understanding of UNODC's Human Trafficking and Migrant Smuggling Section (2014). In 2010, UNODC initiated a series of "thematic documents" to clarify some problematic concepts ("abuse of a situation of vulnerability," "consent," "exploitation") regarding the definition of "trafficking" in the Trafficking in Persons Protocol, which may elicit broad or limited concepts. In this regard, the UNODC (2014) determined that the Trafficking in Persons Protocol stipulated that consent given by the trafficking victim for a planned exploitation will not be considered when obtaining

[98] See: DOEZEMA, J. "Who gets to choose? Coercion, consent and the UN Trafficking Protocol". *Gender and Development*, v. 10, n. 1, 2002; ABRAMSON. K. "Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol". *Harvard International Law Journal,* p. 44-473, 2003; BALOS. B. "The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation". *Harvard Women's Law Journal*, p. 27-137, 2004.

[99] SILVEIRA, R. de M. et al. *Crimes sexuais: bases* críticas para a reforma do direito penal sexual. Rio de Janeiro: Quartier Latin, 2008. p. 224.

[100] See: Habeas Corpus nº 0005382-97.2015.4.04.0000/RS; Apelação Criminal nº 5004784-67.2016.4.04.7002/PR.

[101] In this regard, SILVEIRA explained that in the event that the alleged victim acquiesces to the act of the aggressor, the act becomes acceptable and tolerable and outside of the ambit of criminal law. It is thus an atypical behavior. As such, consent must be demonstrated or be part of the type structure, or the type must mention the need for consent or dissent SILVEIRA, R. de M. et al. *Crimes sexuais:* bases críticas para a reforma do direito penal sexual. Rio de Janeiro: Quartier Latin, 2008. p. 223-227.

[102] JESCHECK, H.; WEIGEND, E. *Tratado de Derecho Penal: Parte General. 2003* Retrieved from http://hdl.handle.net/11858/00-001M-0000-002E-4DE5-C. p. 337-338.

[103] DECAUX, E. *Les formes contemporaines de l'esclavage.* Collected courses of The Hague Academy of International Law. (Tome 336). Leiden/Boston: Martinus Nijhoff Publishers, 2009.

such consent involves any of the stated "means." The UNODC therefore definitively declared the irrelevance of consent when any of these means have been used:

> The Trafficking in Persons Protocol statement is clear: consent is always irrelevant to determining whether the crime of human trafficking has occurred. In the case of adult trafficking, consent is irrelevant, whether means like force or abduction are used, or whether more subtle means such as "abuse of a position of vulnerability" are used. In the case of children, consent is irrelevant regardless of whether any means were used. However, in practice, considerations regarding consent can nevertheless assume a role, as seen in the country surveys conducted.
>
> […] The Trafficking in Persons Protocol unequivocally rejects the relevance of consent to the offence of trafficking in children. Trafficking in children is established by the fact of an "act" and exploitative "purpose," without "means" required as an element of the offense[104].

Despite the hermeneutical fissures of the various local jurisdictions consulted by the UNODC (2014), the interpretation of the consent argument within the framework of the Trafficking in Persons Protocol and within the Brazilian context must be based on two assertions that comprise the hypothesis for its irrelevance. (1) The consent argument in cases of adult trafficking is irrelevant when "means" are used. In other words, the argument is irrelevant if that acquiescence was obtained and continues as soon as there was threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, a situation of vulnerability or submission, receipt of payment or benefits to obtain the consent of a person who has authority over another. (2) Consent is always irrelevant in cases of child trafficking. This hypothesis must be adopted because of the legal scope of the Palermo Protocol, which in the Brazilian constitutional system has a supralegal and infra-constitutional nature.

According to the Supreme Federal Court, because it is an International Treaty on Human Rights and therefore subordinate to the Constitution but superior to domestic legislation, the infra-constitutional legislation that adjoins the Palermo Protocol is inapplicable, either before or after its accession by Brazil.[105] In the Brazilian context, there are two divergent positions in the Federal Supreme Court (STF) regarding the Treaties as a formal source of non-Brazilian criminal law. On the one hand, the favorable position of international conventions as an immediate formal source of criminal law[106]. On the other, the opposite position to consider the Treaties as an immediate formal source[107]. Since the predominant position is the second, the Treaties cannot be immediate formal sources of law. Thus, the need for the norm to be reproduced in the text of the law, in the case of the anti-trafficking law, as a sanctioning norm endowed with a secondary precept.

The anti-trafficking law of 2016 clarifies the international obligation in matters of trafficking and provides content and specificity. In addition, it cannot confer less protection on the protected object than that provided in the Palermo Protocol and convention. On the contrary, it would imply a reductionist behavior and would be subject to conventionality control. In this line of interpretation of the new Article 149-A of the CPB, the term "abuse" should be understood in a broad sense in order to avoid any possibility of reducing the protection of the victim. Any interpretation that does not consider the "abuse of vulnerability" in a broad sense, can be seen as suppressing valid consent. In this regard, the TRF 1ª Região ruled on considering that the initial consent given by the victim does not exclude the guilt of the exploiter[108].

Until October 2016, the law did not contain an express element on the consent of the victim for the clas-

[104] UNODC. *Issue Paper: The Role Of 'Consent'in The Trafficking In Persons Protocol*. UN. Viena. 2014.

[105] RE 466.343, rel. min. Cezar Peluso, *voto do min*. Gilmar Mendes, j. 3-12-2008, P, DJE de 5-6-2009: "[...] since the unconditional ratification by Brazil in 1992 of the International Covenant on Civil and Political Rights (Article 11) and the American Convention on Human Rights - Pact of San José, Costa Rica (Article 7, p.7), there is no longer any legal basis for civil arrest of the negligent bailee, since the special nature of these international human rights instruments enjoy a specific place in the legal system, being subordinate to the Constitution, but superior to domestic legislation. The supralegal normative status of the international human rights treaties ratified by Brazil, in this way, renders inapplicable any conflicting infra-constitutional legislation, be it before or after the act of ratification." This occurred with Article 1.287 of the 1916 CC and DL 911/1969, as well as Article 652 of the new CC (Law No. 10.406/2002).

[106] STF, Inq. 2786, RJ. Relator Min. RICARDO LEWANDOWSKI. 9 de Junho de 2011. DJe-113 Divulgaçao 13/06/2011, publicação 14/06/2011.

[107] STF – HC: 96007 SP, Relator: Min. Marco Aurélio, Data de Julgamento: 12/06/2012, Primeira Turma: ACÓRDÃO ELETRÔNICO DJe-027 DIVULG 07-02-2013 Publicaçao 08-02-2013.

[108] Tribunal Regional Federal (TRF) 1ª. Região, Apelação Criminal n° 2005.35.00.023131-6 – GO. Julgamento 3 de Abril de 2007. 25/04/2007 DJ p.17. https://trf-1.jusbrasil.com.br/jurisprudencia/2211542/apelacao-criminal-acr-23131-go-20053500023131-6/inteiro-teor-100720107?ref=juris-tabs

sification of the crime. In other words, to configure the crime, it was enough to carry out the actions with the purpose of exploitation (sexual until 2009). The vice of consent did not influence the classification of the crime, it was considered an aggravating cause of the penalty. In this sense, until the anti-trafficking law (Law N. 13.344 / 2016), the consent of the victim was not sought. As of the entry into force of the Anti-trafficking Law, located in the CPB Title "Crimes against individual liberty", Section I "Crimes against Personal liberty", the aspect of individual liberty and the individual's capacity for self-determination prevails over more subjective aspects. What is inferred in the new law is that the consent of the victim is considered relevant, and thus, it withdraws from the sphere of the Criminal Law the conducts with the described purposes, provided that they are the result of a valid choice, not flawed[109].

However, for the figures that punish the direct explorer, the consent of the victim remains irrelevant, as in the crimes of ruffianism (art. 230 CPB), in favor of prostitution or another form of sexual exploitation (Art. 228 CPB), and in the case of reduction to a condition analogous to slavery (Art. 149). Therefore, there is a fundamental contradiction in the set of provisions of the Brazilian law, in that it admits that the explored individual consists of the practice of prohibited figures for the explorer, and that, on the other hand, punishes the explorer for promoting activities that are said to be legal[110].

The law No. 13.334 / 2016 circumscribed the important elements "fraud, coercion, threat or abuse" that implies the necessary criminal investigation to determine consent and characterize the typicality of the conduct. The legal controversy arises because the new law excludes the crime in the hypotheses in which a valid consent of the passive subject is verified. Based on this understanding, the wording of the international standard, the Palermo Protocol, is reduced. And therefore, it can lead to a breach of due diligence in matters of human rights. In addition to may constitute a barrier to safeguarding the rights of victims and an obstacle to effective prosecutions against the crime and traffickers.

However, this legislative reform should be accompanied by measures, such as the training and education of the actors involved in the ETP, since the "negative attitudes" towards the victim credibility[111] are still a reality, as shown by the last diagnostic on HT in Brazil (2017), which shows that the system is prejudiced against the victim.

5 Closing remarks

Given the above, progress on anti-trafficking in Brazil is clear. The internalization (Decree No. 5.017 dated 12/03/2004) of the Palermo Protocol initiated a normative deployment on the matter, with important political, legal and social consequences. All this has led to the structuring of a national counter-trafficking regimen through the development of a National ETP Policy (2006), the three National counter-trafficking Plans (2008, 2013 and 2018), the creation of a National Counter-trafficking Committee (2014) and the structuring of a National Counter-trafficking Network comprising complex regimen with public and private institutions. This organization has rendered it possible to advance in the fight against trafficking, creating public policies and promoting a series of coordinated actions aimed at preventing the crime, protecting and assisting victims, and prosecuting and punishing criminals.

For the harmonization of criminal law with the Palermo Protocol, the Brazilian State has made various attempts at internally recognizing the crime of human trafficking. Upon facing internal demands and to live up to its international commitments, more extensive changes have been observed, both regarding the modalities (purposes of trafficking, *caput* 149-A) and regarding the legal rights pertaining to individual freedom that are protected. In typifying these behaviors, the intention of the legislature has been to protect the freedom of self-determination - the exercise, the will and the right to freely come and go with the intention of ensuring the full manifestation of the right to freedom. In this sense,

[109] TRIBUNAL REGIONAL FEDERAL (TRF) 1ª. Região, Apelação Criminal n° 2005.35.00.023131-6 – GO. Julgamento 3 de Abril de 2007. 25/04/2007 DJ p.17.

[110] TRIBUNAL REGIONAL FEDERAL (TRF) 3ª Regiao, São Paulo - Criminal, SP. (GUARDIA, M. A. Operação Garina). Processo nº 0003031-36.2013.4.03.6181. 8ª Vara Federal Criminal de São Paulo. Sentença, 15 jan. 2018.

[111] FARRELL, A., OWENS, C., and MCDEVITT, J. New laws but few cases: Understanding the challenges to the investigation and prosecution of human trafficking cases. *Crime Law & Social Change*, p.159, 2014.

it is considered that novel anti trafficking law promoted significant progress in the treatment of crime. However, it compromises the protection of the victims' human rights when considering the relevance of consent.

These advances open the possibility of overcoming a great challenge for Brazil: the harmonization of the definition of human trafficking for the different actors involved in the Counter-trafficking. As explained, actors in the criminal justice institutions apply the concepts of the Penal Code while the society's civic institutions that assist and protect victims follow the concepts of the National Policy (which are identical to those in the Palermo Protocol). Furthermore, inspectors from the Ministry of Labor use a definition of work analogous to slavery (Article 149) even though many cases are of trafficking for the purpose of labor exploitation. In this regard, it is essential to conduct training on the new legal framework that modified the definition of trafficking and expanded the forms of exploitation and procedural provisions.

Trafficking in persons affects freedom, integrity and dignity, but it also emerges from a context of vulnerability generated by social exclusion. Hence, the Palermo Protocol starts from the concern of a minimum that is to consider the consent irrelevant, which takes into consideration the context of vulnerability. In this regard, the new Brazilian law does not correspond with the international standard. The article has exposed the legal controversy of the changes in the Brazilian context, the advances and shortcomings, in order to offer a legal type that complies with international obligations on the matter.

Despite the progress and progressive signs of the new anti-trafficking law, it also presents challenges. The first of them is directly related to the context of its entry into force: a moment of crisis (political, economic, social and legal) that connects it in a political context of fiscal and economic adjustment, followed by a dismantling of public policies[112]. This leads to a second obstacle to compliance with public policies oriented to the objectives of the anti-trafficking law, which directly impacts two objectives of the Law: crime prevention and comprehensive care for victims (art. 4º). The absence of material provisions, including budgetary and institutional, also prevents the new law enforcement. Likewise, the application of the anti-trafficking law suggests a mobilization of criminal control that tends to generate selective actions that affect the guarantee of protection of the rights of people in the context of trafficking. For this reason, the political reality is far from the precepts of both the PNETP and the internationally assumed commitments on the matter.[113]

Following the argument set forth by UNODC's (2014), the interpretation of consent within the Trafficking in Persons Protocol must be based on two principles that establish the irrelevancy of the argument of consent. (1) The consent argument in cases of adult trafficking will be irrelevant when "means" are used. In other words, the argument is irrelevant if that acquiescence was obtained and continued as soon as there was threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, a situation of vulnerability or submission, or receipt of payments or benefits to obtain the consent of a person who has authority over another. This is because use of such means negates the consent of the person or suspends their autonomy. (2) Consent is always irrelevant in cases of child trafficking. This hypothesis must be adopted because of the legal scope of the Palermo Protocol, which in the Brazilian constitutional system has a supra-legal and infra-constitutional nature.

Thereby, the contributions of the new anti-trafficking law have not been followed with policy measures. Since the adoption of this new framework (October/2016), Brazil has been suffering a step backwards in terms of Human Rights and other social rights, with the reduction of budget allocation and other cuts that affect the development of the measures foreseen in the framework of the III PNETP[114] (2018). Based on the analysis presented in this paper, we conclude that to safeguard the values of justice and equality, in the context of Brazil's new Anti-Trafficking Law, it is essential to protect the moral imperative of respecting human dignity to allow people to determine their own course

[112] Adoption of: 1. EMENDA CONSTITUCIONAL Nº 95, de 15 de dezembro de 2016. Retrieved from: http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc95.htm); DECRETO Nº 9.759, de 11 de abril de 2019. Retrieved from http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Decreto/D9759.htm; and systematic clipping in public education, including research (56% in 4 years).

[113] Article 7 of Decree 9.440, 3 july 2018, which establishes the III National Plan to Combat Trafficking in Persons.

[114] BRAZIL. Política Nacional de Enfrentamento ao Tráfico de Pessoas (PNETP). Decree 9.440, 3 july 2018.

without compromising the comprehensive respect for their dignity.

References

ALRABE, K. *et al. Building Trust:* Perspectives on a Victim-Centered approach to Human Trafficking investigations in Los Angeles County. UC Berkeley, 2017. Available in: https://humanrights.berkeley.edu/publications/building-trust-perspectives-victim-centered-approach-human-trafficking-investigations.

ALTER K. J.; RAUSTIALA, K. The Rise of International Regime Complexity. *Annual Review of Law and Social Science,* v. 14, n. 1, p. 329-349, 2018.

ANJOS, et al. *Tráfico de Pessoas.* Uma abordagem para os direitos humanos. Brasília: SNJ, 2013.

BITENCOURT, C. R. A Nova E Equivocada Tipificação Do Crime De Tráfico De Pessoas. *Revista Paradigma*, v. 25, p. 2–26, 2016. Retrieved from http://revistas.unaerp.br/paradigma/article/view/2-26

BITENCOURT, C.R. *Tratado de Direito Penal:* Parte Geral. 22. ed. São Paulo: Saraiva, 2016. v. 1

BRASIL. *ADI 5642 (2017)*. Retrieved from http://portal.stf.jus.br/processos/detalhe.asp?incidente=5117846

BRASIL. Câmara dos Deputados. (2011). *Requerimento de Comissão Parlamentar n. 03*. Retrieved from https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=849397&filename=RCP+3/2011

BRASIL. Câmara dos Deputados. *Projeto de Lei N. 6943/2013 (2013)*. Brasil. Retrieved from https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra;jsessionid=386F7AF4CC602D52D48497A7BB14A9D8.proposicoesWebExterno1?codteor=1208864&filename=PL+6934/2013

BRASIL. Comissão Parlamentar de Inquérito destinada a investigar o tráfico de pessoas no Brasil, suas causas, consequências e responsáveis no período de 2003 a 2011, compreendido na vigência da C. de P. PL 6934/2013 (2013). *PL 6934/2013*. Retrieved from https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=604107

BRASIL. Congresso Nacional, & Comissão Parlamentar Mista de Inquérito criada com a finalidade de investigar as situações de violência e redes de exploração sexual de crianças e adolescentes no Brasil. *Relatório Final da Comissão Parlamentar Mista de Inquérito "com a finalidade investigar as situações de violência e redes de exploração sexual de crianças e adolescentes no Brasil."* Brasília: Câmara dos Deputados, Coordenação de Serviços Gráficos. Retrieved from https://www2.senado.leg.br/bdsf/handle/id/84599

BRASIL. *Decree Nº 9.440, DOU, dated July 03, 2018*. Retrieved from http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/Decreto/D9440.htm

BRASIL. *Decree Nº 2.848, dated December 7, 1940 (1940)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848.htm

BRASIL. *Decree Nº 5.015, dated March 12, 2004 (2004)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/decreto/d5015.htm

BRASIL. *Decree Nº 5.017, dated March 12, 2004 (2004)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Decreto/D5017.htm

BRASIL. *Decree Nº 7.903, dated february, 2013. (2013)*. Retrieved from http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Decreto/D7901.htm

BRASIL. *Lei n. 10.406, de 10 de janeiro de 2002 (2002)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/leis/2002/l10406.htm

BRASIL. *Lei n. 10.803, de 11 de dezembro de 2003 (2003)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/LEIS/2003/L10.803.htm

BRASIL. *Lei n. 11.106, de 28 de março de 2005 (2005)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2005/Lei/L11106.htm

BRASIL. *Lei n. 12.016, de 7 de agosto de 2009 (2009)*. Retrieved from http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l12015.htm

BRASIL. *Lei n. 12.683, de 9 de julho de 2012 (2012)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/l12683.htm

BRASIL. *Lei n. 12.850, de 2 de agosto de 2013 (2013)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12850.htm

BRASIL. *Lei n. 13.146, de 6 de julho de 2015 (2015)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13146.htm

BRASIL. *Lei n. 13.260, de 16 de março de 2016 (2016)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/l13260.htm

BRASIL. *Lei n. 13.344, de 6 de outubro de 2016 (2016)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13344.htm

BRASIL. *Lei n. 13.445, de 24 de maio de 2017 (2017)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/l13445.htm

BRASIL. *Lei n. 2.252, de 1º de julho de 1954 (1954)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/LEIS/1950-1969/L2252.htm

BRASIL. *Lei n. 4.898, de 9 de dezembro de 1965. (1998)*. Retrieved from http://www.planalto.gov.br/ccivil_03/leis/l4898.htm

BRASIL. *Lei n. 7.209, de 11 de julho de 1984 (1984). Brasil*. Retrieved from http://www.planalto.gov.br/ccivil_03/leis/1980-1988/l7209.htm

BRASIL. *Lei n. 8.069, de 13 de julho de 1990 (1990)*. Brasil. Retrieved from http://www.planalto.gov.br/Ccivil_03/leis/L8069.htm

BRASIL. *Lei n. 8.072, de 25 de julho de 1990 (1990)*. Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/Leis/L8072.htm

BRASIL. *Lei n. 9.613, de 3 de março de 1998 (1998*). Brasil. Retrieved from http://www.planalto.gov.br/ccivil_03/LEIS/L9613compilado.htm

BRASIL. *Relatório Nacional Sobre O Tráfico De Pessoas*: Dados 2014 A 2016. Brasilia, dezembro de 2017.

BRASIL. Senado Federal. *Projeto de Lei 7370/2014 (2014)*. Retrieved from https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1242133&filename=PL+7370/2014

BRASIL. Supremo Tribunal Federal. *HC: 96007 SP*. Relator: Min. Marco Aurélio, Data de Julgamento: 12/06/2012, Primeira Turma: ACÓRDÃO ELETRÔNICO DJe-027 DIVULG 07-02-2013 Publicação 08-02-2013.

BRASIL. Supremo Tribunal Federal. *Inq. 2786, RJ*. Relator Min. RICARDO LEWANDOWSKI. 9 de Junho de 2011. DJe-113 Divulgaçao 13/06/2011, publicação 14/06/2011

BRASIL. Supremo Tribunal Federal. *RE 466343 (2008)*. Retrieved from http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444

CASTILHO, E. W. V. de. "A criminalização do tráfico de mulheres: proteção das mulheres ou reforço da violência de gênero?". *Cadernos Pagu*, v. 31, p. 101–123, 2008. https://doi.org/10.1590/S0104-83332008000200006

CEIA, E. M. A Jurisprudência da Corte Interamericana de Direitos Humanos e o Desenvolvimento da Proteção dos Direitos Humanos no Brasil. *Rev. EMERJ*, Rio de Janeiro, v. 16, n. 61, p. 113-152, 2013. Retrieved from: https://www.emerj.tjrj.jus.br/revistaemerj_online/edicoes/revista61/revista61_113.pdf

CRYER, R.; FRIMAN, H.; ROBINSON, D.; WILMSHURST, E. *An Introduction to International Criminal Law and Procedure*. Cambridge: University Press, 2014. Retrieved from https://doi.org/10.1017/CBO9781107588707

CUNHA, R. S.; BATISTA PINTO, R. *Tráfico de Pessoas - Lei 13.344/16 comentada por artigos*. Salvador: Juspodivm. 2016. Retrieved from https://www.editorajuspodivm.com.br/trafico-de-pessoas-lei-1334416-comentada-por-artigos-2018

DAVID, F. Prosecuting trafficking in persons: Known issues, emerging responses. *Trends & Issues in Crime and Criminal Justice*, v. 358, p. 1–6, 2008.

DECAUX, E. *Les formes contemporaines de l'esclavage*. Collected courses of The Hague Academy of International Law (Tome 336). Leiden/Boston: Martinus Nijhoff Publishers, 2009.

ELLIOTT, J. *The Role of Consent in Human Trafficking*. London/New York: Routledge, 2015.

EUROPEAN COURT OF HUMAN RIGHTS (ECHR*). Siliadin vs. France*, Nº. 73316/01, 26 de July de 2005.

EUROPEAN COURT OF HUMAN RIGHTS (ECHR). *C.N. and V. vs. France*, Nº. 67724/09, 11 October 2012.

EUROPEAN COURT OF HUMAN RIGHTS (ECHR). *C.N. vs. United Kingdom*, Nº. 4239/08, 13 November 2012.

EUROPEAN COURT OF HUMAN RIGHTS (ECHR). *Rantsev vs. Cyprus and Russia*, Nº. 25965/04, 7 January 2010.

FARRELL, A.; OWENS, C.; MCDEVITT, J. New laws but few cases: Understanding the challenges to the investigation and prosecution of human trafficking cases. *Crime Law & Social Change*, p. 1–13, 2014.

GALLAGHER, A.; HOLMES, P. Developing an effective criminal justice response to human trafficking lessons from the front line. *International criminal justice review*, v. 18, n. 3, p. 318–343, 2008.

GÓMEZ-MERA, Laura. Regime complexity and global governance: The case of trafficking in persons. *European Journal Of International Relations*, 2016.

GRECO, A. O. P. "Delegacia da mulher, vitimodogmática, autocolocação da vítima em risco e consentimento do ofendido". In: REALE JÚNIOR, M.; PASCHOAL, J. (coord.). *Mulher e direito penal*. Rio de Janeiro: Forense, 2007.

GRECO, R. *Código Penal Comentado*. Niterói, 2012. Retrieved from https://www.impetus.com.br/produto/21754/codigo-penal-comentado---rogerio-greco---2019_rogerio-greco

HUMAN RIGHTS COUNCIL. *A/ HRC /41/46*, April 23, 2019. Trafficking in persons, especially women and children Report of the Special Rapporteur on trafficking in persons, especially women and children. Retrieved from: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/112/06/PDF/G1911206.pdf?OpenElement

ICHR. *Caso Tralhadores da Fazenda Brasil Verde vs Brasil*. Sentencia de 20 octubre de 2016.

JESCHECK, H.; WEIGEND, E. *Tratado de Derecho Penal: Parte General. 2003* Retrieved from http://hdl.handle.net/11858/00-001M-0000-002E-4DE5-C

MACHADO, B. A.; VIEIRA, P.B.S. "O controle penal do tráfico de pessoas: construção jurídica, interações organizacionais e cooperação internacional". *Revista de Direito Internacional*, Brasília, v. 13, n. 3, p. 484-503, 2016.

MATOS, M.; GONÇALVES, M.; MAIA, A. Understanding the criminal justice process in human trafficking cases in Portugal: factors associated with successful prosecutions. *Crime, Law and Social Change,* 2019. Retrieved from: https://doi.org/10.1007/s10611-019-09834-9

MIRABETE, J. F.; FABBRINI, R. N. *Manual de Direito Penal*. Parte Geral. 1998. Retrieved from https://bdjur.stj.jus.br/jspui/bitstream/2011/23551/manual_direito_ penal_mirabete_31.ed.pdf

NICHOLS, A. J.; HEIL, E. C. Challenges to identifying and prosecuting sex trafficking cases in the Midwest United States. *Feminist Criminology*, v. 10, n. 1, p. 1–29, 2014.

NUCCI, G. de S. *Crimes contra a dignidade sexual:* comentários à lei 12.015, de 7 de agosto de 2009. 2019

NUCCI, G. de S. *Código Penal Comentado*. São Paulo: Forense. 2013. Retrieved from http://www.guilhermenucci.com.br/livros/codigo-penal-comentado

OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR). Declaración y Programa de Acción de Viena (extractos*). Revista Internacional de La Cruz Roja*, v. 18, n. 118, 201, p. 351. https://doi.org/10.1017/s0250569x00017015

OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR). *Recommended principles and guidelines on human rights and human trafficking*. 2010. Available in: https://doi.org/10.18356/fb81f1a6-en

PALERMO, D.; ARNALDO JORDY, D. (n.d.). **CD142455375347* CÂMARA DOS DEPUTADOS CPI-TRÁFICO DE PESSOAS NO BRASIL COMISSÃO PARLAMENTAR DE INQUÉRITO DESTINADA A INVESTIGAR O TRÁFICO DE PESSOAS NO BRASIL, SUAS CAUSAS, CONSEQUÊNCIAS E RESPONSÁVEIS NO PERÍODO DE 2003 A 2011, COMPREENDIDO NA VIGÊNCIA D*. Retrieved from https://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-temporarias/parlamentar-de-inquerito/54a-legislatura/cpi-trafico-de-pessoas-no-brasil/relatorio-final-aprovado-e-parecer-da-comissao/relatorio-final-aprovado-e-parecer-da-comissao

PRADO, L. R. *Curso de Direito Penal Brasileiro*: parte especial. São Paulo: RT, 2011. Retrieved from https://www.saraiva.com.br/curso-de-direito-penal-brasileiro-vol-3-parte-especial-arts-250-a-359-h--7-ed-3380805.html

SECRETARIA NACIONAL DE JUSTIÇA. *Tráfico de Pessoas Uma Abordagem Para Os Direitos Humanos*. Brasília: Ministério da Justiça. 2013. Retrieved from https://www.justica.gov.br/sua-protecao/traficodepessoas/

publicacoes/anexos/cartilha_ traficodepessoas_uma_ abordadem_direitos_humanos.pdf

SILVA, W. C. da. "O Impacto do Enfrentamento Internacional Contra o Tráfico de Pessoas na Legislação Brasileira". 2015. p. 369–396. Retrieved from http://hdl.handle.net/20.500.12412/425

SILVA, W. C. da. *Regime Internacional de Enfrentamento ao Tráfico de Pessoas*. Avanços e desafios para a proteção dos direitos humanos. Rio de Janeiro: Lumen Juris, 2018.

SILVA, W. C. da; GÓES, K. Proteção Contra As Formas Contemporâneas De Escravidão: Uma Garantia Constitucional. *Brasiliana- Journal for Brazilian Studies*, v. 2, n. 2, p. 289–312, 2013. https://doi.org/10.25160/v2.i2/d12

SILVA, W. Correa da.; SOUZA, C. H. Ferreira de. "O Tráfico De Órgãos No Brasil E A Lei n. 9.434/97". Retrieved from http://www.publicadireito.com.br/artigos/?cod=0064f599ed0adb58

SILVEIRA, R. de M. et al. *Crimes sexuais:* bases críticas para a reforma do direito penal sexual. Rio de Janeiro: Quartier Latin, 2008.

SPOHN, C. "The non-prosecution of human trafficking cases: An illustration of the challenges of implementing legal reforms". *Crime Law & Social Change*, v. 61, p. 169–178, 2014.

TRIBUNAL REGIONAL FEDERAL (TRF) 1ª. Região, *Apelação Criminal n° 2005.35.00.023131-6 – GO*. Julgamento 3 de Abril de 2007. 25/04/2007 DJ p.17. Retrieved from: https://trf-1.jusbrasil.com.br/jurisprudencia/2211542/apelacao-criminal-acr-23131-go-20053500023131-6/inteiro-teor-100720107?ref=juris-tabs

TRIBUNAL REGIONAL FEDERAL (TRF) 3ª Regiao, São Paulo - Criminal, SP. (GUARDIA, M. A. Operação Garina). *Processo nº 0003031-36.2013.4.03.6181*. 8ª Vara Federal Criminal de São Paulo. Sentença, 15 jan. 2018. Retrieved from: https://www.jusbrasil.com.br/processos/54895377/processo-n-0007109-3920144036181-do-trf-3

UNODC. *An Introduction to Human Trafficking*. UN. New York. 2014. Retrieved from: https://www.unodc.org/documents/humantrafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf

UNODC. *An Introduction to Human Trafficking: Vulnerability, Impact and Action*. UNITED NATIONS New York, 2008. Retrieved from: https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf

UNODC. *Issue paper: The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised*. Viena, 2018. Retrieved from https://www.unodc.org/documents/humantrafficking/2018/Issue_Paper_International_ Definition_ TIP.pdf

UNODC. *Issue Paper: The Role Of 'Consent' in The Trafficking In Persons Protocol*. UN. Viena, 2014. retrieved from https://www.unodc.org/documents/human-trafficking/2014/ UNODC_2014_Issue_Paper_Consent.pdf

UNODC. *Toolk it to Combat Trafficking in Persons*. New York/Geneva, 2008. https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_5-2.pdf

USA/OVCTTAC. H*uman Trafficking Task Force e-Guide. Strengthening Collaborative Responses*. 2011. retrieved from: https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/52-taking-a-proactive-approach/

VERHOEVEN, M. and BARBRA, G, Human trafficking and criminal investigation strategies in the Amsterdam Red Light District. *Trends in Organized Crime*. 14. 2011148-164. 10.1007/s12117-011-9126-0.