

# Trafficking in persons and forced detention

## A normative path from *habeas corpus* to ICTY case law

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**Abstract: Tratta di persone e detenzione forzata. Un itinerario normativo dall'*habeas corpus* alla giurisprudenza della ICTY** – This paper focuses on forced detention, conceived as a constitutive element of trafficking in persons as well as the common denominator between trafficking and slavery. After describing *habeas corpus* as a normative instrument “within” the State to grant protection against forced capture, the analysis will stress the relevance of international law tools “beyond” the State’s perimeters, such as the recent ICTY jurisprudence.

**Keywords:** Trafficking in Persons; Forced Detention; Slavery; Habeas Corpus; ICTY Case Law.

### 1. Introduction

According to the reference literature, trafficking in persons is a kind of «para-slavery»<sup>1</sup>, or a «new form»<sup>2</sup> of «contemporary slavery»<sup>3</sup>, which includes many

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<sup>1</sup> K. Kempadoo, *Trafficking and Prostitution Reconsidered. New Perspectives on Migration, Sex Work and Human Rights*, London, 2016; Y. Jin Shin, *A Transnational Human Rights Approach to Human Trafficking. Empowering the Powerless*, Leiden-Boston, 2018; and, in the Italian literature, F. Carchedi, G. Mottura, E. Pugliese (a cura di), *Il lavoro servile e le nuove schiavitù*, Milano, 2004.

<sup>2</sup> K. Bales, Z. Trodd, A. Kent Williamson, *Modern Slavery. The Secret World of 27 Million of People*, Oxford, 2009; M. van Reisen, M. Estefanos, C. Rijken (eds.), *The Human Trafficking Cycle: Sinai and Beyond*, Tilburg, 2014; L. Holmes (ed.), *Trafficking and Human Rights. European and Asia-Pacific Perspectives*, Cheltenham-Northampton, 2013; and, in the Italian literature, G. Satta (a cura di), *Schiavitù*, monographic issue of *Parolechiave*, n. 55, 2016; M. Simonazzi, Th. Casadei (a cura di), *Nuove e antiche forme di schiavitù*, Napoli, 2018.

<sup>3</sup> J. Allain, *Understanding Global Slavery. A Reader*, in *International Journal of Refugee Law*, n. 1, 2008, 228-232; Aa.Vv., *Schiavitù*, monographic issue of *Ragion pratica*, n. 2, 2010; Th. Casadei, “Human wastes”? *Contemporary forms of slavery and new abolitionism*, in *Soft power. Rivista euro-americana de teoría e historia de la política*, n. 2, 2016, 109-124; Id., *Sujetos vulnerables, trata y formas contemporáneas de esclavitud: el papel de las instituciones*, in Esteban Pérez Alonso (dir.) *El Derecho ante las formas contemporáneas de esclavitud*, Valencia, 2017, 101-116; Id., *I veli da squarciare: forme di schiavitù nel mondo contemporaneo*, in *Cosmopolis*, n. 2, 2016 [www.cosmopolisonline.it/articolo.php?numero=XIII22016&id=7](http://www.cosmopolisonline.it/articolo.php?numero=XIII22016&id=7); M. Fioravanti, *Schiavitù*, Roma, 2017; Th. Casadei, *Tratta/schiavitù*, in L. Barbari e F. De Vanna (a cura di), *Il diritto al viaggio. Abbecedario delle migrazioni*, Torino, 2018, 299-308. See also the monographic issue of *Journal of Modern Slavery. A Multidisciplinary Exploration of Human Trafficking Solutions*, n. 2, 2018 and the monographic issue of *Ragion pratica*, n. 1, 2019, forthcoming.

complex legal issues, starting with those related to its transnational nature<sup>4</sup>, the low effectiveness of repressive measures and high levels of impunity<sup>5</sup>, as well as the multiple infringements associated with it, such as organised crime networks, illicit purposes such as the exploitation of prostitution, forced labour or begging<sup>6</sup>, physical, sexual or psychological abuse, and extortion of money through threats and loyalty oaths which subjugate the most vulnerable subjects<sup>7</sup>.

The focus of this paper will be on a limited but crucial aspect of the issue, i.e. forced detention, a constitutive factor of a type of offence described as

<sup>4</sup> K. Bales, *Disposable People: New Slavery in the Global Economy*, Chapel Hill, NC, 1999; I. van Liempt, *Trafficking in Human Beings. Conceptual Dilemmas*, in C. v.d. Anker, J. Doomernik (eds.), *Trafficking and Women's Rights*, Basingstoke, 2006; F. Resta, *Vecchie e nuove schiavitù. Dalla tratta allo sfruttamento sessuale*, Milano, 2008; S. Angioi, *Schiavitù e tratta: antiche e nuove forme*, Napoli, 2010; A.T. Gallagher, *The International Law of Human Trafficking*, Cambridge, 2010; P. Scevi, *Nuove schiavitù e diritto penale*, Milano, 2014.

<sup>5</sup> See United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons*, 2018: [www.unodc.org/unodc/data-and-analysis/glotip.html](http://www.unodc.org/unodc/data-and-analysis/glotip.html), 23-24; Group of Experts on Action against Trafficking in Human Beings – GRETA, *Seventh General Report on GRETA's Activities*, 2018, [rm.coe.int/greta-2018-1-7gr-en/16807af20e](http://rm.coe.int/greta-2018-1-7gr-en/16807af20e), 65-66. See also A. Pozzi, *Mercanti di schiavi. Tratta e sfruttamento nel XXI secolo*, Milano, 2016, 13-20.

<sup>6</sup> Lower percentages of victims are involved in other illicit activities, such as trade in organs, criminal activities, illegal adoptions, forced marriages and pornography: United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons*, cit., 25-34. For insight into this topic, see also Decision no. 557 OCSE action plan to combat trafficking in human beings: [www.osce.org/actionplan?download=true](http://www.osce.org/actionplan?download=true) and the TransCrime Report: [www.transcrime.it/wp-content/uploads/2013/11/07\\_Tratta\\_e\\_Traffico1.pdf](http://www.transcrime.it/wp-content/uploads/2013/11/07_Tratta_e_Traffico1.pdf). See also C.P. Blengino, *Formazione dal basso, approccio interdisciplinare, impegno civile: fondamenti teorici dell'esperienza clinica legale con detenuti e vittime di tratta*, in A. Maestroni, P. Brambilla, M. Carrer (a cura di), *Teorie e pratiche nelle cliniche legali*, Torino, 2018, 233-269.

On an overall enforcement level, see the Save the Children 2018 Report entitled “Young invisible enslaved”: [www.savethechildren.net/sites/default/files/libraries/young%20invisible%20enslaved%204%20low.pdf](http://www.savethechildren.net/sites/default/files/libraries/young%20invisible%20enslaved%204%20low.pdf), Cooperazione Internazionale Sud: [www.cissong.org/it/cosa-facciamo/in-italia-1/io-non-tratto-root-azioni-integrate-1/e-ora-trattiamo-di-tratta](http://www.cissong.org/it/cosa-facciamo/in-italia-1/io-non-tratto-root-azioni-integrate-1/e-ora-trattiamo-di-tratta), and ECPAT Italia: [www.ecpat.it/](http://www.ecpat.it/). As regards these topics, see M. Tagliani, *Matrimoni precoci e forzati. Un fenomeno di portata globale*, in *Jura Gentium. Rivista di filosofia del diritto internazionale e della politica globale*, 2017, [www.juragentium.org/forum/infanzia/it/tagliani.html](http://www.juragentium.org/forum/infanzia/it/tagliani.html); Ead., *Nuove forme di schiavitù: i matrimoni precoci e forzati*, in *Cosmopolis*, 2017, [www.cosmopolisonline.it/articolo.php?numero=XIII2016&id=5](http://www.cosmopolisonline.it/articolo.php?numero=XIII2016&id=5); B.G. Bello, *Il contrasto dei matrimoni forzati nelle società multiculturali: riflessioni a partire dalla Convenzione di Istanbul*, in *Notizie di Politeia*, n. 124, 2016, 95-109.

<sup>7</sup> As highlighted by Elena Consiglio, from a regulatory point of view, the “purchase” of sexual relationships with trafficked or alleged trafficked people is often undervalued (E. Consiglio, *Looking for the Vulnerable Subject*, in *Rivista di filosofia del diritto*, n. 1, 2019, forthcoming).

To learn more about the phenomenon of trafficking in Italy, see the Report written within the FAMI 2014-2020 Project by OIM Italia (International Organization for Migration): [italy.iom.int/sites/default/files/news-documents/RAPPORTO\\_OIM\\_Vittime\\_di\\_tratta\\_0.pdf](http://italy.iom.int/sites/default/files/news-documents/RAPPORTO_OIM_Vittime_di_tratta_0.pdf).

The Data Protection Authority's Report focuses on the protection of data relating to trafficked persons: [www.garanteprivacy.it/documents/10160/0/Vittime+della+tratta+di+esseri+umani+-+Rapporto+Europol](http://www.garanteprivacy.it/documents/10160/0/Vittime+della+tratta+di+esseri+umani+-+Rapporto+Europol).

The pastoral reflections on the fight against trafficking belong to another sphere: migrants-refugees.va/wp-content/uploads/2019/01/A4-IT-M\_R-I-Handbook-on-Human-Trafficking-V3-EMAIL.pdf.

To draw attention to the phenomenon, the UN established the International Day against Trafficking in Human Beings on 30 July: [www.onuitalia.it/30-luglio-giornata-internazionale-contro-la-tratta-di-esseri-umani/](http://www.onuitalia.it/30-luglio-giornata-internazionale-contro-la-tratta-di-esseri-umani/).

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs<sup>8</sup>.

In this regard, besides some explanatory observations of the subject in question (§ 2), special attention will be paid to *habeas corpus* (§ 3), the legal tool developed as a form of protection within a State's perimeters, as well as to the evolution of anti-trafficking measures and the latest international case law which has been shaped beyond national boundaries (§ 4), before formulating some final remarks (§ 5).

## 2. Forced detention. A common denominator between slavery and trafficking

Hereinafter the expression “forced detention” shall not refer, in a strict sense, to a prison sentence handed down by a legitimate power after a fair trial, but rather to the process by which a trafficked person is privately and illegally “captured”, transported, employed, detained, against or regardless of his/her will<sup>9</sup>. As stated by Judith Butler, even when imposed by private powers, this kind of detention has a political nature because

it carries implications for when and where law will be suspended [and in] determining the limit and scope of legal jurisdiction itself. Both of these, in turn, carry implications for the extension and self-justificatory procedures of state sovereignty<sup>10</sup>.

This deprivation of freedom, movement and choice is exactly the common denominator between contemporary trafficking and slavery<sup>11</sup>, the legally established relationship which was provoked, according to Justinian's *Corpus Iuris Civilis*, *jure gentium* (*mancipia, quasi manu capti*, as a consequence of a just war), *jure civili* (the so-called “voluntary sale”), or *jure naturae* (*fiunt, servi nascuntur*)<sup>12</sup>.

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<sup>8</sup> Art. 3 of the additional Palermo Protocol (2000).

<sup>9</sup> To this extent, see G. Zagrebelsky, *Liberi servi. Il Grande Inquisitore e l'enigma del potere*, Torino, 2015, 250.

<sup>10</sup> J. Butler, *Prekarious Life. The Powers of Mourning and Violence* (2004), London-New York, 2006, 51.

<sup>11</sup> See especially Th. Casadei, *Sujetos vulnerables, trata y formas contemporáneas de esclavitud: el papel de las instituciones*, cit.

<sup>12</sup> As explained by William Blackstone's *Commentaries on the Laws of England* (1765), book I, cap. XIV, par. 423-424, available at: [avalon.law.yale.edu/subject\\_menus/blackstone.asp](http://avalon.law.yale.edu/subject_menus/blackstone.asp). According to Justinian's *Intitutiones*, «*iure enim naturali ab initio homines liberi nascebantur*» (D. Dalla, *Note minime di un lettore delle Istituzioni di Giustiniano*, Torino, 2007, 44). See also, *ivi*, 65-71, 107-111, and, with reference to *capitis deminutio*, 205-211.

As is well known, from ancient to modern<sup>13</sup> and contemporary times, slavery has been conceived of as basically the legal deprivation of the *status libertatis*<sup>14</sup>, turning a person into a “chattel” or “property”. Slaves were objectified, “used” like things, turned into «bodies that do not matter»<sup>15</sup>, de-personalised to the extent that the word “person” loses its meaning and recalls its etymological root of “mask” (*prosopon*), where an old slave can be replaceable with a new one, thing against thing<sup>16</sup>.

Referring to the loss of personal freedom, Gaius’ *Institutiones* also provide a clear definition of *capitis deminutio maxima*: «*maxima est capitis deminutio, cum aliquis simul et civitatem et libertatem amittit*»<sup>17</sup>.

In the sources of Roman law<sup>18</sup>, there was therefore a dichotomous contrast between free men and slaves, even if this distinction could always be overcome: the most frequent example of *capitis deminutio maxima* was capture by an enemy. Unlike “slavery by nature” described in Aristotle’s *Politics*<sup>19</sup>, slavery “by capture” – mainly due to *polemos*, an almost constant and uninterrupted state of war – could happen to anyone, as Homer had already stated with reference to the fate of Andromache and the other Trojan princesses<sup>20</sup>.

While trying to follow the advice of Jean-Pierre Vernant to avoid the de-contextualization of classical culture, but assuming the perspective of Hans

<sup>13</sup> From the point of view of global history, see O. Pétré-Grenouilleau, *La tratta degli schiavi. Saggio di storia globale*, Bologna, 2006. For a detailed bibliographic review of essays on the history of trafficking and slavery, see also J.C. Miller, *Slavery and Slaving in World History. A Bibliography*, Milwood (NY), 1999 which, although mentioning only the works written in the 20<sup>th</sup> century, refers to more than 14,000 items. The work is updated annually in a section of the journal *Slavery and Abolition*.

<sup>14</sup> Paola Monzini wonders (in *Il mercato delle donne. Prostituzione, tratta e sfruttamento*, Roma, 2010, VII, the translation is mine) «what distinguishes a trafficked woman from an independent prostitute? The latter has her own profits, may refuse customers or even bargain; in short, she is free to move and decide. The former, conversely, is far from being independent: her daily work ends only when she has earned the agreed sum, otherwise she is beaten or forced to pay a penalty. She cannot take a walk, but may be transferred to another foreign country, or even sold to the highest bidder. She can be subjected to physical and psychological violence at any time. Her life revolves around constant exploitation. She can be forced to work along the streets or in night clubs, video cafés or massage centres. In any case, she is constantly threatened and blackmailed. This exploitation does not arise from the type of the services requested, but rather from deception, coercion, blackmail or abuse to which she is subjected, as well as the deprivation of her ability to control her own existence».

<sup>15</sup> See J. Butler, *Bodies that Matter. On the Discursive Limits of Sex*, Milton Park, Abingdon-on-Thames, 1993 and, more recently, Ead., *Prekarious Life. The Powers of Mourning and Violence*, cit. Although Butler’s reasoning mainly concerns GLBTQ claims or the victims of the US war violence after 9/11, her assumptions could be extended also to those who share the same “invisibility” due to their political irrelevance with respect to the “standard”.

<sup>16</sup> F. Resta, *Vecchie e nuove schiavitù. Dalla tratta allo sfruttamento sessuale*, cit. See also S.M. Barkat, *Le corps d’exception. Les artifices du pouvoir colonial et la destruction de la vie*, Paris, 2005.

<sup>17</sup> Gaio, *Institutiones*, G.1.160.

<sup>18</sup> To this extent, see S. Pietropaoli, *Il concetto giuridico di umanità. Breve storia di un non-detto del diritto*, in M. Russo (a cura di), *Umanesimo. Storia, critica, attualità*, Firenze, 2015, 255-279.

<sup>19</sup> Aristotle, *Politica*, Roma-Bari, 1993, 4.

<sup>20</sup> See *Iliad*, XXIV, vv. 723-745.

Blumenberg<sup>21</sup>, it should be stated that the awareness of the precariousness of freedom and its potential porosity in relation to the possibility of being captured are very far from the contemporary mindset. In the latter, conversely, a sort of re-naturalization of the fate of slaves can be observed, based on their marginality which dooms them to being “invisible”<sup>22</sup>.

Another divergent element between ancient and present forms of slavery refers to the economic value of slaves, who in the past had a high purchase cost and represented a rare asset. Therefore, the “masters” did whatever they could to keep them alive, taking care of them and their children as if they were working animals.

Conversely, in an era marked by the excesses of capitalism, the price of slave labour has fallen dramatically since slaves can now be easily replaced: due to the law of supply and demand being affected by a series of variables connected to global post-colonial economic inequalities as well as the re-organization of criminal and mafia groups<sup>23</sup>, the purchase cost of trafficked and enslaved persons is often very low; actually, as is well known, the latter often have to pay their own travel expenses to their jailors, disproportionately burdened with interests and increases. Based on the assumptions of Zygmunt Bauman, some scholars have found that this “surplus” of availability is exactly what leads new slaves to be regarded as «disposable bodies»<sup>24</sup> to be exploited until they are profitable, and then to be discarded when they become old or ill<sup>25</sup>.

However, as evidenced by René Girard and Giorgio Agamben, this collective attitude to creating «sacrificable» bodies is directly associated with the reasons for the onset and strengthening of sovereign political power, which has always gone hand in hand with the awareness of its own limits and, consequently, with the definition of external disposable interstices which could be sacrificed<sup>26</sup>.

The slave has always been a non-citizen, a *xenos*, or foreigner<sup>27</sup>. The

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<sup>21</sup> As stressed by Francesca Brezzi, the latter allows classical culture to be tested with new forms of ancient questions: see F. Brezzi, *Antigone e la philia. Le passioni tra etica e politica*, Milano, 2014, 121. See also J.P. Vernant, P. Vidal-Naquet, *Mito e tragedia nell'Antica Grecia*, Torino, 1976, 21.

<sup>22</sup> Th. Casadei, *I veli da squarciare: forme di schiavitù nel mondo contemporaneo*, cit. See also Gf. Zanetti, *Filosofia della vulnerabilità. Percezione, discriminazione, diritto*, Roma, 2019.

<sup>23</sup> See L. Cacho, *Schiave del potere. Una mappa della tratta delle donne e delle bambine nel mondo*, Roma, 2010, 11.

<sup>24</sup> See again K. Bales, *Disposable People: New Slavery in the Global Economy*, cit. With reference to the links between globalization and «human wastes», see Z. Bauman, *Wasted Lives. Modernity and its Outcasts*, Cambridge, 2003 and Id., *Liquid Fear*, Cambridge, 2006. See also Th. Casadei, “Human wastes”? *Contemporary forms of slavery and new abolitionism*, cit.

<sup>25</sup> L. Cacho, *Schiave del potere. Una mappa della tratta delle donne e delle bambine nel mondo*, cit., 11.

<sup>26</sup> See R. Girard, *La violence et le sacré*, Paris, 1972; G. Agamben, *Homo sacer. Il potere sovrano e la nuda vita*, Torino, 2005. For a comment on these texts, see E. Cuomo, *Tutta colpa di Ismene?*, cit., 97-107.

<sup>27</sup> With reference to the concept of “foreigner” in the Indo-European languages, which covers the whole semantic field of “foreignness”, see U. Curi, *Sul concetto filosofico di straniero*, in *Diritto, immigrazione e cittadinanza*, n. 3, 2005, 42-58. For further readings, see also M. Ponzi, V. Borsò, *Topografia dell'estraneo. Confini e passaggi*, Milano, 2006; C. Resta, *L'estraneo*.



juxtaposition between slave and citizen (or friend<sup>28</sup>) has acquired particular strength with the edification of the modern concept of the State, and particularly through the political anthropology introduced by Thomas Hobbes in the middle of the 17<sup>th</sup> century and «still in force»<sup>29</sup> in spite of the dramatic historical and cultural changes of the following three-and-a-half centuries.

The modern political and legal order bases its paradigm on the concepts of Subject and State, intended as two entities resulting *more geometrico* from scientific and disembodied rationality. These aspects have provided an extraordinary power to create order, to abstract and to unify but, precisely for this reason, have acted by “excluding” those individuals who do not conform to these same definitions<sup>30</sup>. In this sense, the construct of modern political and juridical liberties could coexist with the phenomenon of slavery and the slave trade<sup>31</sup>, provided these did not pollute the «pure air»<sup>32</sup> being breathed within the boundaries of European States<sup>33</sup>.

### 3. Within the State. *Habeas corpus* as protection against forced detention

It was exactly within the legal perimeters of the modern State that the most effective measures against unlawful forced detention were developed, in terms of protecting the subject of law, the citizen or “natural person” under the law<sup>34</sup> – starting with the institution of *habeas corpus*.

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*Ostilità e ospitalità nel pensiero del Novecento*, Genova, 2008, 14, 29-30, 34; J. Kristeva, *Stranieri a noi stessi. L'Europa, l'altro, l'identità*, Roma, 2014.

<sup>28</sup> The terminological analogy between free and friend is particularly evident in the German assonance between *Frei* and *Freund*.

<sup>29</sup> O. Guaraldo, *Introduzione*, in J. Butler, *Vite precarie. I poteri del lutto e della violenza*, Milano, 2013, 15.

<sup>30</sup> To this extent, see C.H. Wellman, P. Cole, *Debating the Ethics of Immigration. Is There a Right to Exclude?*, Oxford, 2011; M. Fioravanti, *Il lato oscuro del moderno. Diritti dell'uomo, schiavitù ed emancipazione*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, n. 42, 2013, 9-41. See also M.S. McDougal, H.D. Lasswell, L. Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, in *The American Journal of International Law*, n. 3, 1976, 432-469; M.S. P. Cole, *Philosophies of Exclusion. Liberal Political Theory and Immigration*, Edinburgh, 2000; S. Benhabib, *The Rights of Others*, Cambridge, 2004.

<sup>31</sup> For some data on the triangular trade in England see G. Patisso, *Lo Sketch of Negro Code di Edmund Burke. Una bozza di Codice Nero nell'impero coloniale britannico (1780-1792)*, in *Itinerari di ricerca storica*, n. 1, 2015, 130.

<sup>32</sup> See the *Cartwright's case* (1569) in H. Tunnicliff Catterall, *Judicial Cases Concerning American Slavery and the Negro*, Vol. 1: *Cases from the Courts of England, Virginia, West Virginia, and Kentucky*, Shannon, 1968, 9. In this regard, see also S. Vantin, *A Sketch of A Negro Code. Edmund Burke and the Regulation of Slavery*, in *Soft Power. Revista euro-americana de teoría e historia de la política y del derecho*, n. 1, 2019, forthcoming.

<sup>33</sup> To this extent, see M. Satterhwaite, *Crossing Borders, Claiming Rights. Using Human Rights Law to Empower Women Migrant Worker*, in *Yale Human Rights and Development Journal*, n. 1, 2005, 1-66; A. Pécout, P. de Guchteneire, *International Migration, Border Controls and Human Rights. Assessing the Relevance of a Right to Mobility*, in *Journal of Borderlands Studies*, n. 1, 2006, 69-86; A. Abizadeh, *Democratic Theory and Border Coercion*, in *Political Theory*, n. 1, 2008, 37-65.

<sup>34</sup> See J. Crawford, *State Responsibility. The General Part*, Cambridge, 2013.

Its origins dated back to the *writ of habeas corpus*, which took form with English case law in the years 1199 or 1200<sup>35</sup>. A more explicit formulation is found in chapter 39 of *Magna Carta Libertatum* signed by John Lackland, which later became chapter 29 of *Magna Carta* signed by Henry III<sup>36</sup>.

In general, *writs* or *brevia* were legal instruments of *common law* which conveyed the orders given to judges by the king with the purpose of ascertaining some facts and handing down a sentence accordingly. Like the Roman formulaic trial, they were based on specific assumptions which were issued upon request of the plaintiff against payment of a tax<sup>37</sup>. The *writ of habeas corpus*, in particular, expressed the order to make a detainee appear before a court – “to have his body” –, so that the judge could assess the legal assumptions underlying his/her detention. As early as the 14<sup>th</sup> century this writ was mainly used by the Lord Chancellor to amend unfair sentences issued by lower courts, based on its equity prerogatives. Thus the great political potential of this instrument soon became clear and its popularity increased. In fact, the Lord Chancellor started to deal with matters previously assigned to decentralised local courts when there was an alleged case of injustice that he had the faculty to ascertain.

Throughout the evolution of this legal instrument, the crucial issue was the identification of any unlawful detention. The famous *Darnel's case* (1627)<sup>38</sup> started a long parliamentary debate which culminated in the *Petition of Rights* (1628): this questioned whether a king's order was sufficient to avoid the case of illegitimate detention and whether judges could withdraw a royal order by virtue of an act issued in the name of the king himself.

The *Petition of Rights* and the period of Commonwealth (1649-1660) regarded the writ as a shield against illegitimate detention. The *Habeas Corpus Act* of 1679<sup>39</sup> made the enforcement of this instrument clearer and quicker. Subsequently, later *Acts* were issued in 1803, 1804, 1816 and 1862.

More recently, the scope of *habeas corpus* has been extended to the entire European jurisdiction (for example, Article 5 of the ECHR, or Article 13 of the

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<sup>35</sup> G. Coppi, *Il writ di habeas corpus. Le origini del baluardo delle libertà civili*, in *Le carte e la storia*, n. 1, 2009, 135.

<sup>36</sup> Ivi, 135-136.

<sup>37</sup> A. Padoa Schioppa, *Storia del diritto in Europa. Dal Medioevo all'età contemporanea*, Bologna, 2007, 205-220.

<sup>38</sup> G. Coppi, *Il writ di habeas corpus. Le origini del baluardo delle libertà civili*, cit., 137-138.

<sup>39</sup> It should be noticed that the *Habeas Corpus Act* was drawn up in a period in which slave trade was still allowed. Although the law extended the protection to «subject», «inhabitant» or «resident» (see [press-pubs.uchicago.edu/founders/documents/a1\\_9\\_2s2.html](http://press-pubs.uchicago.edu/founders/documents/a1_9_2s2.html), Sec. XII), it was interpreted in restrictive terms and was not extended to slaves. Moreover, the *Navigation Act* of 1651 was understood as if the slaves fell within the «commodities» category: see V.N.C. Mtubani, *African Slaves and English Law* (2007), available at: [pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/PULA/pula003002/pula003002007.pdf](http://pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/PULA/pula003002/pula003002007.pdf), 73.; J.A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, in *Yale Journal of Law & the Humanities*, n. 5, 1993, 431, n. 51. The Preamble of the *West India Free Ports Act* (1766) regards the Africans as “commodities”. A well-established case law orientation also considered black people as «chattels», or *tamquam bona*, starting with the case *Butts v. Penny* (1677): H. Tunnicliff Catterall, *Judicial Cases Concerning American Slavery and the Negro*, vol. 1, cit., 9.

Italian Constitution). Moreover, a view of *habeas corpus* intended as a “principle”<sup>40</sup> has gradually appeared alongside the “rule” of the «grand writ»<sup>41</sup>.

In this regard, the distinction formulated by Ronald Dworkin in the 1970s<sup>42</sup> and later taken up by several scholars<sup>43</sup>, is quite controversial. However, it is worth distinguishing the regulatory notion of *habeas corpus* intended as a closed instance, characterised by high accuracy and able to exhaustively cite the facts leading to certain juridical consequences – based on the «all-or-nothing»<sup>44</sup> assumption – from its “principle”, i.e. an open, more generic rule not able to effectively identify facts and legal consequences, aimed at expressing the need for justice, fairness, or some other moral obligations<sup>45</sup>.

In fact, about fifty years after the enforcement of the *Petition of Rights*, the appeal to *habeas corpus* became the legal instrument used to claim personal freedom against any form of illegitimate detention, as evidenced by the case of the Leveller John Lilburne, who was imprisoned in the Tower of London by order of the House of Commons<sup>46</sup>. Over the centuries, this institution became the manifesto safeguarding personal freedom. Moreover, precisely in its dimension as a “principle”, it is still currently protected pursuant to European Union law<sup>47</sup>, by virtue of the «pervasive» force carried out by the EU legislation and, in particular, by the Charter of Fundamental Rights of the European Union<sup>48</sup> (CFR, see in part. art. 6, which recalls art. 5.1 European Convention of Human Rights, ECHR; read together with art. 47.2 and 48 CFR).

Three factors have especially concurred to the expansion of some European fundamental rights in terms of principles: the gradual broadening of the European law over the national law; the progressive specification of the European law by means of the activity of the European Court of Justice (ECJ); the reduction of the national judicial power through a narrow margin of appreciation and the limitation of the role of the national Constitutional Courts<sup>49</sup>. With reference to *habeas corpus*, an example of its development from a

<sup>40</sup> See M. Daniele, *Habeas corpus. Manipolazioni di una garanzia*, Torino, 2017, 7-26.

<sup>41</sup> W. Blackstone, *Commentaries on the Laws of England*, cit., book III, chap. VIII.

<sup>42</sup> R. Dworkin, *Taking Rights Seriously*, Cambridge, MA, 1977.

<sup>43</sup> R. Alexy, *Teoria dei diritti fondamentali* (1993), Bologna, 2012, 101; G. Bongiovanni, *Neocostituzionalismo*, in *Enciclopedia del diritto*, annali IV, Milano, 2011, 756-757; R. Guastini, *La sintassi del diritto*, Torino, 2011, 73-74; G. Pino, *I principi tra teoria della norma e teoria dell'argomentazione giuridica*, in *Diritto e questioni pubbliche*, n. 11, 2011, 80-81; G. Zagrebelsky, *Il diritto mite*, Torino, 1992, 147; J. Raz, *Legal Principles and the Limits of Law*, in *Yale Law Journal*, 1972, 825-829.

<sup>44</sup> R. Dworkin, *Taking Rights Seriously*, cit., 59.

<sup>45</sup> Ivi, 60.

<sup>46</sup> G. Coppi, *Il writ di habeas corpus. Le origini del baluardo delle libertà civili*, cit., 139.

<sup>47</sup> As explained by M. Daniele, *Habeas corpus. Manipolazioni di una garanzia*, cit., 6, 159-228. Beyond the European law case, see: L. Kutner, *World Habeas Corpus*, Dobbs Ferry (NY), 1962.

<sup>48</sup> See M. Daniele, *Habeas corpus. Manipolazioni di una garanzia*, cit., 179.

<sup>49</sup> Ivi, 162-178.



regulatory norm to a principle could also be represented by the case law relative to the European Arrest Warrant (EAW)<sup>50</sup>.

In this way, an “open” meaning of *habeas corpus* has been established, with its scope extended in theoretical terms so that it has become a pillar of the “ownership of one’s body”<sup>51</sup> against any form of illegitimate coercion. Butler states that the claim of the integrity of one’s body and self-determination has become «essential» to the «claim that our bodies are in a sense *our own* and that we are entitled to claim rights of autonomy over our bodies»<sup>52</sup>.

In this regard, *habeas corpus* could be claimed today not only before a constituted power, but also as a tool to state the entitlement of one’s person with reference to the full ownership of rights expressed by means of the body<sup>53</sup>, like the freedom of movement.

#### 4. Beyond the State. International law’s perspectives

The first anti-trafficking normative measures date back to the 19<sup>th</sup> century, triggered by the abolitionist movement<sup>54</sup> but also by the strategic strengthening of the United Kingdom’s power on the global geopolitical chessboard, aimed at ensuring the control of maritime trade and sea patrols.

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<sup>50</sup> Ivi, 199-228. On these aspects, see also E. Pérez Alonso, *Tráfico de personas e inmigración clandestina (Un estudio sociológico, internacional y jurídico-penal)*, Valencia, 2008; J.L. De La Cuesta Arzamendi, *Tráfico y trata de seres humanos: regulación internacional y europea*, in M. Richard González, I. Riaño Brun, M. Poelemans (dir.), *Estudios sobre la lucha contra la trata de seres humanos*, Pamplona, 2013; C.M. Díaz Barrado, *La lucha contra la trata de seres humanos en la Unión Europea: los componentes para una política propia*, in *Revista de Derecho Comunitario Europeo*, n. 45, 2013, 461 e ss.

<sup>51</sup> See L. Verdi, *Habeas corpus. Figure sociali del corpo*, Milano, 1996; F. Leoni, *Habeas corpus. Sei genealogie del corpo occidentale*, preface by C. Sini, Milano, 2008.

<sup>52</sup> J. Butler, *Prekarious Life*, cit., 46. However, the author states that, beyond this claim, we must accept the awareness that «the skin and the flesh expose us to the gazes of the others, but also to touch, and to violence, and bodies put us at risk of becoming the agency and the instrument of all these as well. Although we struggle for rights over our own bodies, the very bodies for which we struggle are not quite ever only our own. The body has its invariably public dimension. Constituted as a social phenomenon in the public sphere, my body is and is not mine. Given over from the start of the world of others, it bears their imprint, is formed within the crucible of social life; only later, and with some uncertainty, do I lay claim to my body as my own, if, in fact, I ever do. Indeed, I deny that prior to the formation of my “will”, my body related me to others whom I did not choose to have in proximity to myself, if I build a notion of “autonomy” on the basis of the denial of this sphere of a primary and unwilling physical proximity with others, then am I denying the social conditions of my embodiment in the mane of autonomy?» (ivi, 26).

<sup>53</sup> See V. Giordano, *Le regole del corpo. Costruzioni teoriche e decisioni giudiziarie*, Torino, 2018, 125-130; A. Facchi, *Sulle radici della proprietà di sé*, in *Materiali per una storia della cultura giuridica*, n. 2, 2018, 427-442.

<sup>54</sup> Among the broad bibliography on abolitionism, see: F.J. Klinkberg, *The Anti-Slavery Movement in England*, New Haven, 1926; S. Drescher, *Capitalism and Anti-Slavery: British Mobilization in Comparative Perspective*, London, 1986; D. Turley, *The Culture of English Anti-Slavery, 1780-1860*, London, 1991; T. Bender, J. Ashworth, D.B. Davis, T.L. Haskell, *The Antislavery Debate. Capitalism and Abolitionism as a Problem in Historical Interpretation*, Berkeley, 1992; B. Carey, *British Abolitionism and the Rhetoric of Sensibility. Writing, Sentiment and Slavery, 1760-1807*, London, 2005.

The first relevant act was the *Declaration on the Abolition of the Slave Trade*, contained in Annex 15 to the Final Act of the Congress of Vienna (1815)<sup>55</sup>. It was followed by a series of bilateral agreements signed by the United Kingdom with other European Countries (Portugal, Spain, the Netherlands, France, plus the United States) and with African and Asian kingdoms and potentates<sup>56</sup>. These were enforced with different methods including some forms of economic compensation<sup>57</sup>, which were initially intended for sea trafficking and progressively extended to the land as well.

In 1885 and 1890, the Berlin and Brussels Conferences included the prohibition of trafficking and slavery in general international law, in line with the «plan to split Africa», or the «scramble of Africa», and the beginning of the great colonial expansion<sup>58</sup>.

The first Convention on the abolition of slavery dates back to 1926. After the establishment of the United Nations, a new Convention was put into effect in 1949 and later added to in 1956. The Palermo Protocols dated 2000 amended the “United Nations Convention against transnational organized crime” with special reference to the “prevention, suppression and persecution of trafficking in human beings, especially women and children” and “against the trafficking of migrants by land, air and sea”<sup>59</sup>. More recently, at the European regional level, the Council of Europe approved the “Convention on action against trafficking in human beings” (2005) and the European Union issued Directive 2011/36/EU (5 April 2011) “on preventing and combating trafficking in human beings and protecting its victims”<sup>60</sup>.

<sup>55</sup> S. Angioi, *Schiavitù e tratta. Antiche e nuove forme*, cit., 23.

<sup>56</sup> In particular, the isles of Zanzibar and Pemba, the archipelago of Comore, Madagascar, Kenya and Somalia supplied slaves to the Arabian countries of the Persian Gulf, Persia, the Ottoman Empire and India. See S. Angioi, *Schiavitù e tratta. Antiche e nuove forme*, cit., 43. About the “Moresby Treaty” (1822) and the subsequent “Hamerton Treaties” (1845 and 1873), see *ivi*, 55-65.

<sup>57</sup> See *ivi*, 29, n. 18.

<sup>58</sup> *Ivi*, 69-70.

<sup>59</sup> See A.T. Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling. A Preliminary Analysis*, in *Human Rights Quarterly*, 2001, 975-1004; J. Doezema, *Who Gets to Choose? Coercion, Consent, and the UN Trafficking Protocol*, in *Gender and Development*, n. 1, 2002, 20-27; K. Arabmsom, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, in *Harvard International Law Journal*, n. 44, 2003, 473-504; W. Chapkis, *Soft Glove, Punishing Fist: The Trafficking Victims Protection Act of 2000*, in E. Barnstein, L. Schaffner (eds.), *Regulating Sex: Sexual Freedom and the Politics of Intimacy*, London, 2005, 51-66.

<sup>60</sup> See A.T. Gallagher, *Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments*, in *European Journal of Migration and Law*, 2006, 163-189; R. Raffaelli, *The European Approach to Protection of Trafficking Victims. The Council of Europe Convention, the EU Directive, and the Italian Experience*, in *German Law Journal*, n. 3, 2009, 205-221.

With reference to the EU law, whose first dispositions on trafficking date back to the Treaty of Amsterdam and the Programme of Tampere (1999), see also the Tampere European Council 15 and 16 October 1999, Presidency Conclusions ([www.europarl.europa.eu/summits/tam\\_en.htm#c](http://www.europarl.europa.eu/summits/tam_en.htm#c)); the European Parliament Resolution on the Communication from the Commission to the Council and the European Parliament “for further actions in the fight against trafficking in women” COM(1998) 726 + C5-0123/1999 + 1999/2125(COS) ([eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A52000IP0127](http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A52000IP0127)); the 2001/87/EC

The binding nature of the prohibition of trafficking in persons, slavery and slave trade is now acknowledged on an international scale<sup>61</sup>. This regulatory dimension is backed up by international courts<sup>62</sup> such as the International Tribunal for the former Yugoslavia (ICTY), whose Statute, albeit mentioning slavery among the crimes under its jurisdiction, does not define it, referring instead to sources of customary international law<sup>63</sup>. In any case, to avoid any doubt the above Court has repeatedly acknowledged the clear and unconditional connection between traditional and new forms of slavery<sup>64</sup>, explicitly establishing that the latter fully falls within the category of slavery.

In the case *Prosecutor v. Kunarac, Kovac, Vukovic*, it was stated that «enslavement as a crime against humanity must be given a much broader

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Council Decision of 8 December 2000 “on the signing, on behalf of the European Community, of the United Nations Convention against transnational organised crime and its Protocols on combating trafficking in persons, especially women and children, and the smuggling of migrants by land, air and sea” (publications.europa.eu/en/publication-detail/-/publication/94b3bfa4-694e-440f-9608-6013f053b48c/language-en ); the Santiago Plan 2002/C-142/02 titled “Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union” (eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2002:142:FULL&from=EN); the Council Framework Decision 2002/629/JHA of 19 July 2002 “on combating trafficking in human beings” (eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l33137&from=IT ); the European Parliament Resolution on “strategies to prevent the trafficking of women and children who are vulnerable to sexual exploitation” 2004/2216(INI) (eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006IP0005&from=IT); the Presidency Conclusions of the Brussels European Council 15 July 2005 (data.consilium.europa.eu/doc/document/ST-10255-2005-REV-1/en/pdf); the 2005 Communication from the Commission to the European Parliament and the Council titled “Fighting trafficking in human beings - an integrated approach and proposals for an Action Plan” (eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0514:FIN:EN:PDF); the Hague Programme COM (2005) 184 (ec.europa.eu/transparency/regdoc/rep/1/2005/EN/1-2005-184-EN-1-0.Pdf); the 2006 Report from the Commission to the Council and the European Parliament, based on Article 10 of the Council Framework Decision of 19 July 2002 on “combating trafficking in human beings” (eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006DC0187); the Stockholm Programme 2010/C 115/01 (ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the\_stockholm\_programme\_-\_an\_open\_and\_secure\_europe\_en\_1.pdf).

<sup>61</sup> See T. Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, Leiden, 2006; A.T. Gallagher, *Using International Human Rights Law to Better Protect Victims of Trafficking. The Prohibition of Slavery, Servitude, Forced Labor, and Debt Bondage*, in L.N. Sadat, M.P. Scharf (eds.), *The Theory and Practice of International Criminal Law. Essays in Honor of M. Cherif Bassiouni*, Leiden, 2008, 397-430; D.S. Weissbrodt, *The Human Rights of Non-Citizens*, Oxford, 2008; A.T. Gallagher, *The International Law of Human Trafficking*, Cambridge, 2010. At the Italian national level, see in particular art. 601 c.p. and subsequent modifications and M.C. Barbieri, *La schiavitù e i ferri del mestiere del penalista*, in *Ragion pratica*, n. 2, 2010, 439-454.

<sup>62</sup> See also A.M. Slaughter, *A Global Community of Courts*, in *Harvard International Law Journal*, n. 1, 2003, 191-219; P. Alston (ed.), *Non-State Actors and Human Rights*, Oxford, 2005; A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, 2006; J. Mertus, *Considering Nonstate Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application*, in *New York University Journal of International Law and Politics*, 2010, 537-566; P. Alston, R. Goodman, *International Human Rights*, Oxford, 2013.

<sup>63</sup> S. Angioi, *Schiavitù e tratta. Antiche e nuove forme*, cit., 122-123.

<sup>64</sup> See Case n. IT-96-23 and IT-96-23/1-A *Prosecutor v. Kunarac/Kovac/Vukovic*.

definition because of its diverse contemporary manifestations»<sup>65</sup>. The Appeals Chamber also revealed that «the traditional concept of slavery»

has evolved to encompass various forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights associated with “chattel slavery”, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the judicial personality<sup>66</sup>.

The sentence stresses that «contemporary forms of slavery form part of enslavement as a crime against humanity under customary international law»<sup>67</sup>. In light of this, the Court settled the issue raised by Appellant Kunarac and Kovac, who questioned the applicability of the crime of slavery because of its excessive vagueness<sup>68</sup>. They also stated that slavery would occur only where the following constitutive elements could be ascertained: the treatment of the victim «as its own ownership»<sup>69</sup>, the «constant and clear lack of consent» for the whole detention or transfer period<sup>70</sup>, the indefinite or extended duration<sup>71</sup> of time, and the specific *mens rea* of the perpetrator<sup>72</sup>.

In this regard, the college of judges established that art. 1.1 of the 1926 Convention should receive an extensive interpretation, as suggested by the letter of the same<sup>73</sup>, pursuant to which slavery occurs in case «a person over whom any or all of the powers attaching to the right of ownership are exercised»<sup>74</sup>. Moreover, «circumstances which render it impossible to express consent may be sufficient to presume the absence of consent»<sup>75</sup>, while «the duration of the

<sup>65</sup> Appeals Chamber, Case n. IT-96-23/1-A, par. 112, Appeal Transcript T 246 ([www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf](http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf)).

<sup>66</sup> Appeals Chamber, Case n. IT-96-23/1-A, par. 117.

<sup>67</sup> Ibidem.

<sup>68</sup> Ivi, parr. 106-111.

<sup>69</sup> Ivi, par. 107.

<sup>70</sup> Ivi, par. 108.

<sup>71</sup> Ivi, par. 109.

<sup>72</sup> Ivi, par. 110.

<sup>73</sup> Ivi, par. 118.

<sup>74</sup> Ibidem. In this regard, see the comment by Catharine A. MacKinnon who states that prostitution falls under art. 1.1 of the Convention for the abolition of slavery: «[w]hen pimps sell you for sex to johns who buy you and you want to leave but cannot, you are a sex slave by international legal definition». According to MacKinnon, in fact, both traffickers and the buyers of “prostituted” sex exercise real rights (in particular, property rights) on another person: «you cannot traffick yourself. [...] You cannot enslave yourself either» (C.A. MacKinnon, *Trafficking, Prostitution and Inequality*, in Ead., *Butterfly Politics*, Cambridge, MA, 2017, 171, 177). See also Ead., *Trafficking, Prostitution and Inequality*, in *Harvard Civil Rights-Civil Liberties Law Review*, n. 46, 2011, 271-309. With reference to trafficking in a gender perspective, see R. Kapur, *Erotic Justice. Law and the New Politics of Postcolonialism*, London, Press, 2005; J. O’Connell Davidson, B. Anderson, *The Trouble of Trafficking*, in C. v.d. Anker, J. Doomernik (eds.), *Trafficking and Women’s Rights*, cit., 11-26; L.M. Agustín, *Sex at the Margins. Migration, Labour Markets and the Rescue Industry*, London, 2007; R. Andrijasevic, *Migration, Agency and Citizenship in Sex Trafficking*, Basingstoke, 2010.

<sup>75</sup> Appeals Chamber, Case n. IT-96-23/1-A, par. 120.

enslavement is not an element of the crime»<sup>76</sup>. Eventually, the *mens rea* «consists of the intentional exercise of a power attaching the right of ownership»<sup>77</sup>, to the extent that, with reference to the *Pohl case*, slavery occurs even in the absence of torture or in the case of so-called «benevolent slavery»: it suffices that slaves are «deprived of their freedom by *forceful restraint*»<sup>78</sup>.

Forceful restraint is thus still the conceptual core of the legal instrument, resulting from «detention, captivity or psychological oppression [which] renders the victims unable to exert their freedom and autonomy»<sup>79</sup>, according to which the victims of slavery are such even before reaching their destination, or regardless of the subsequent pursuit or exploitation of illegal purposes.

## 5. Conclusive remarks

While the classical pillar of *habeas corpus*, intended as a principle, could contribute to strengthening protection against any form of illegitimate detention infringing on full ownership of one's own body, it is in the international normative dimension that new forms of protection against trafficking and slavery have recently been developed.

In an historical process that began in the mid-19<sup>th</sup> century and was driven by the United Kingdom, international law has developed several normative instruments to ensure multi-level coverage to oppose the phenomenon of trafficking and slavery. In addition, the orientation of international case law has established continuity between ancient and contemporary slavery which results in detention and forced transfers, thus depriving the subject of his/her personal freedom and full legal capacity. In particular, «forceful restraint» remains the common denominator on the basis of which protection against slavery can be extended to trafficking. For interpretative purposes the Courts have also stressed the relevance of customs in order to include new forms of slavery in the traditional concept of it<sup>80</sup>.

The normative tools on the international level appear to be the new frontier of legal protection against a crime which is often specifically realized by means of transfers between different countries and areas. However, the present world is still anchored in the soil of the modern State and its logic. This is probably the reason why, in a transition period where national sovereignty still struggles not to cede some of its competences to the international level<sup>81</sup>, cases

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<sup>76</sup> Ivi, par. 121.

<sup>77</sup> Ivi, par. 122.

<sup>78</sup> Ivi, par. 37 (*italics is mine*).

<sup>79</sup> Ivi, par. 113.

<sup>80</sup> For a conceptual explanation of the hierarchical relationship between law and custom in liberal democracies, see T. Todorov, *La paura dei barbari. Oltre lo scontro delle civiltà*, Milano, 2009, 115-119.

<sup>81</sup> See J. de Arechaga. *International Responsibility*, in M. Sørensen (ed.), *Manual of Public International Law*, London, 1968, 531-599; L. Henkin, *Human Rights and State "Sovereignty"*, in *Georgia Journal of International & Comparative Law*, 1996, 31-45; D. Jacobson, *Rights across Borders. Immigration and the decline of Citizenship*, Baltimore, 1996; S. Sassen, *Losing Control? Sovereignty in an Age of Globalization*, New York, 1996; S. Castles, *Why Migration Policies*



which lay “at the borders” or “at the margins” of the States’ boundaries, such as trafficking and slavery, appear to be so complicated to solve.

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*Fall*, in *Ethic and Racial Studies*, n. 2, 2004, 205-227; J.L. Goldsmith, E.A. Posner (eds.), *The Limits of International Law*, Oxford, 2005; J.M. Chacón, *Misery and Myopia: Understanding the Failures of US Effort to Stop Human Trafficking*, in *Fordham Law Review*, 2006, 2977-3040; C.C. Gould, *Self Determination beyond Sovereignty. Relating Transnational Democracy to Local Autonomy*, in *Journal of Social Philosophy*, n. 1, 2006, 44-60; H. Hongju Koh, *Why Transnational Law Matters*, in *Penn State International Law Review*, n. 4, 2006, 745-753; C. Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law*, Cambridge, 2008; A.T. Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking. A Vision for the Future of the US Trafficking in Persons Reports*, in *Human Rights Review*, n. 3, 2011, 381-400; J.L. Cohen, *Globalization and Sovereignty. Rethinking Legality, Legitimacy and Constitutionalism*, Cambridge, 2012; V. Mitsilegas, *Immigration Control in an Era of Globalization. Deflecting Foreigners, Weakening Citizens, and Strengthening the State*, in *Indiana Journal of Global of Legal Studies*, n. 1, 2012, 3-60; A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge, 2014.