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*EUROPEAN COURT OF HUMAN RIGHTS*

Council of Europe  
Strasbourg, France

**Third Party Intervention**

**L'Altro diritto onlus**

***S.M. v. CROATIA***

**(application no. 60561/14)**

With letter dated 4 March 2019, the Deputy Grand Chamber Registrar informed L'Altro diritto onlus that the President of the Grand Chamber had granted leave, under Rule 44 § 4 (b) of the Rules of Court, to make written submissions to the Court in the case *S.M. v. Croatia* (Application no. 60561/14).

Please find enclosed the Third Party Intervention of L'Altro diritto, in the case *S.M. v. CROATIA* (application no. 60561/14).

Date: 25/03/2019

Sofia Ciuffoletti, Ph,D  
President of L'altro diritto onlus

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## **Internal Trafficking**

The 2000 United Nation Protocol to “Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children” (the so called “Palermo Protocol”) has provided the first internationally agreed definition of trafficking: a broad and comprehensive definition that is gender neutral (affecting women and men, boys and girls) and encompasses a wide range of exploitative practices. More specifically, under Article 3 of the Palermo Protocol trafficking comprises three constituent elements: 1) the act: “the recruitment, transportation, transfer, harbouring or receipt of persons”; (2) the means for carrying out the action: “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”; (3) and the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs. The Protocol also provides that a victim’s consent to the intended exploitation is irrelevant when any of the stipulated means have been used.

The Palermo Protocol supplements the 2000 United Nations Convention against Transnational Organized Crime, which is the main instrument in the fight against transnational organized crime. Therefore, as Art. 1 of the Palermo Protocol affirms, the provisions of the Protocol shall be interpreted together with the Convention. This has raised debate about whether the Protocol requires States Parties to take action against trafficking only in situations involving a transnational movement and/or a criminal organization. However, as the United Nations Office of Drugs and Crime (UNODC) has highlighted, while the offence of trafficking “must involve transnationality and organized criminal groups for the Convention and its international cooperation provision to apply, neither of these must be made elements of the domestic offence” (UNODC 2004, *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, p. 10). Indeed, according to Art. 34 (2) of the United Nations Convention against Transnational Organized Crime, the offence of trafficking “shall be established in the domestic law of each State Party, independently of the transnational nature or the involvement of an organized criminal group”.

The 2005 Council of Europe Convention on Action against trafficking in human beings, which incorporated the definition of trafficking contained in the Palermo Protocol, was the first international document to expressly recognize that this definition covers both internal and as cross-border trafficking. As affirmed in its Article 2, “Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organized crime”

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(Art. 2). In addition, the 2005 Council of Europe Convention includes a definition of victim, described as “any natural person who is subjected to trafficking in human beings”. Thus, a victim of trafficking is anyone subject to the combination of the essential elements of the offence (action, means, purpose), irrespective of his/her nationality and legal status.

Since the adoption of the 2005 *Council of Europe Convention on Action against trafficking* (hereafter *Council of Europe Convention on trafficking*), the notion of “internal trafficking” has been also explicitly adopted by the United Nations Office of Drugs and Crime (UNODC) in several of its official documents and reports, affirming that the definition of trafficking prescribed in the Palermo Protocol encompasses both trafficking across the borders and within a country (not just cross-border). In this regard, it is worth mentioning that, by highlighting the changes in the features and, accordingly, in the common understanding of the crime of trafficking in persons over the last 10 years, the UNODC, in its recent *Global Reports on trafficking in persons*, has underlined an increase in the cases of internal trafficking. In particular, in its *Global Report* of 2016, it affirmed: “the share of detected trafficking cases that are domestic – that is, carried out within a country’s borders – has also increased significantly in recent years, and some 42 per cent of detected victims between 2012 and 2014 were trafficked domestically. While some of the increase can be ascribed to differences in reporting and data coverage, countries are clearly detecting more domestic trafficking nowadays. These shifts indicate that the common understanding of the trafficking crime has evolved” (UNODC, *Global Report on trafficking in persons*, 2016: 6). Significantly, the 2018 *Global Report* of UNODC has pointed out that victims who have been detected within their own national borders now “represent the largest part of the victims detected worldwide” (UNODC, *Global Report on trafficking in persons*, 2018: 13). This study reports that “since 2010, there has been a significant and steady increase in the share of victims detected within their own country’s borders. The share of identified domestic victims has more than doubled over the last few years, from 27 per cent to 58 per cent in 2016” (UNODC, *Global Report*, 2018: 41).

The irrelevance of the crossing of an international border as an element to define a case of trafficking also applies with regard to Directive 2011/36/EU on “preventing and combating trafficking in human beings and protecting its victims”, which indeed covers both trafficking across borders and trafficking within a country. This is implicitly recognized in Art. 10(a) of the Directive stating that Member States shall take the necessary measures to establish their jurisdiction over the offence of trafficking where: a) “the offence is committed *in whole* or in part within their territory”; b) “the offender is one of their nationals”.

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Over recent years, EU policy actions against trafficking, such as the Strategy towards the Eradication of Trafficking in Human Beings 2012–2016 launched by the European Commission in 2012, have dedicated special attention to the issue of internal trafficking. Significantly, in the Strategy the European Commission has highlighted that “internal trafficking, in which many of the victims are EU citizens who are trafficked within their own or another Member State, is on the rise” (European Commission 2012: 9).

Therefore, as the European Court of Human Rights (First Section) has highlighted in the present case (*S.M. v. Croatia*, application no. 60561/14), trafficking in human beings, within the meaning of the Palermo Protocol and the Council of Europe Convention on Action against Trafficking, can take place within a single country, including the victim’s own and, accordingly, irrespective of the fact that the victim is a national of that country. This has also been affirmed by Directive 2011/36/EU, by recognizing - among the minimum standards of Member States' positive obligations to prevent and prosecute trafficking, and to protect the victims - the criminalization of this phenomenon when it occurs within their territory.

At the same time, and strictly related to internal trafficking, trafficking does not always require the movement element. Movement is just one possible way the “action” element can be satisfied. Notions such as “receipt” and “harbouring” (identified in the Protocol’s definition of trafficking among the “acts” of the offence) mean that trafficking does not refer just to the process whereby a person is moved into a situation of exploitation but it also extends “to include the maintenance of that person in a situation of exploitation” (UNODC, *Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons*, 2013: 7). As the UNODC highlighted, “trafficking is rooted in the exploitation of victims, and not necessarily their movement” (UNODC, *Global Report on trafficking in persons*, 2018: 13).

In view of these considerations, we argue that to assess whether a case amounts to trafficking the focus should be mainly on exploitation rather than on the movement element. The essence of trafficking is the purpose of exploiting people that are in a condition of personal and social vulnerability (see Statement by Maria Grazia Giammarinaro, Special Rapporteur on Trafficking in Persons, Especially Women and Children, 2016). Certainly, not all forms of exploitation amount to trafficking. In order to qualify a case as trafficking, it is necessary to evaluate each case on its own merits and look at all the factors and parameters at stake.

However, in contemporary socio-economic context marked by a strong increase in poverty and precariousness and, accordingly, by a significant increase in cases of exploitation – which rely on the abuse of a condition of vulnerability but that are

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not necessarily linked with the transfer of the person concerned or committed by a criminal organization – it is extremely important that the internal nature of trafficking has become part of the common understanding of this phenomenon. In this scenario, it is important that the Court clearly frames the positive duty of the states to protect the victims of both international and internal (not cross-border) trafficking. In fact, while many states have means and specific programmes to protect the victims of sexual exploitation and of the exploitation of prostitution, this is not true for the victims of the other types of exploitation, first of all of labour exploitation.

### **Exploitation of prostitution**

In *Rantsev v. Cyprus and Russia* (no. 25965/04) the European Court of Human Rights held that “trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere [...]. It implies close surveillance of the activities of victims, whose movements are often circumscribed [...]. It involves the use of violence and threats against victims, who live and work under poor conditions [...]. It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade” (*Rantsev v. Cyprus and Russia*, § 281; *M. and Others v. Italy and Bulgaria*, § 151). The Court argued that trafficking “threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention” (*Rantsev v. Cyprus and Russia*, § 282). The Court considered unnecessary to identify, in the context of trafficking in persons, whether the treatment about which an applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour” (*Rantsev v. Cyprus and Russia*, § 282). Instead, it concluded that trafficking itself, as defined in the Palermo Protocol and the Council of Europe Convention on Action against Trafficking, falls within the scope of Article 4 of the European Convention on Human Rights.

In the present case (*S.M. v. Croatia*, application no. 60561/14), while the European Court of Human Rights (First Section) restates this reasoning, it also goes far beyond this position, holding that: “trafficking itself as well as exploitation of prostitution, within the meaning of Article 3(a) of the Palermo Protocol, Article 4(a) of the Anti-Trafficking Convention, Article 1 of the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others and the CEDAW (see paragraphs 27, 28, 31 and 33 above), fall within the scope of Article 4 of the Convention [...] In this connection it is irrelevant that the applicant is actually a national of the respondent State and that there has been no international element since Article 2 of the Anti-Trafficking Convention encompasses “all forms of



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trafficking in human beings, whether national or transnational" (see paragraph 33 above) and the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others refers to exploitation of prostitution in general (see paragraph 27 above)" (§ 54).

The Court, thus, seems to consider trafficking and exploitation of prostitution as two distinct phenomena falling within the scope of Article 4 of the Convention. However, it needs to be highlighted that in the definition of trafficking provided by the 2000 Palermo Protocol and subsequently incorporated in the 2005 *Council of Europe Convention on trafficking*, "exploitation of prostitution" is relevant only as one of the types of exploitation that the conduct of trafficking involves (see *UN Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions. Addendum Interpretative notes for the official records -- Travaux préparatoires -- of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 2000, § 63; *Explanatory Report of the Council of Europe Convention on Action against trafficking in Human being*, 2005, § 88).

In our opinion, considering "exploitation of prostitution" itself as falling within the ambit of Article 4 raises some problematic aspects. First of all, it is worth noting that there is no uniform understanding of "prostitution", "exploitation of prostitution" and "sexual exploitation". Some people, in particular so called neo-abolitionist feminists, view prostitution as a practice inherently degrading and exploitative that must be criminalized. Others, in particular sex workers' rights activists and feminists, consider prostitution as a form of work and, accordingly, they shift the terms of analysis from sexual exploitation to labour abuse in sex work, arguing that women in the sex industry should be able to access the same labour rights as women in other industries.

The lack of a uniform view on prostitution is also reflected at the national policy levels. As the Court noted in the case *V.T. v. France* (no. 37194/02), there is no European consensus on the policy approach to prostitution. Indeed, in some countries prostitution (both selling and buying) is outlawed; in others, prostitution itself is not illegal but the exploitation of prostitution constitutes a criminal offence; in some countries, there is the criminalization of the activities related to prostitution, targeting for instance the buyers; and in others prostitution is legal and regulated (see, for example, Schulze, E., Novo Canto, S. I., Mason, P., Skalin, M., *Sexual exploitation and prostitution and its impact on gender equality*, European Parliament manuscript, 2014). In this regard, it is worth mentioning that in 2001 the European Court of Justice stated that prostitution "is a provision of services for remuneration which [...] falls within the concept of 'economic activities'" (Ruling no. 268-20/11/2001, § 49). According to the Court, sex workers

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may work legally in any EU country that tolerates prostitution. At the same time, it clarified that “it is not for the court to substitute its own assessment for that of the legislatures of the member states where an allegedly immoral activity is practiced legally” (§ 56).

The absence of a homogeneous approach to prostitution has also been recognized in both the *Interpretative Notes to the Palermo Protocol* and the *Explanatory Report of the Council of Europe Convention on trafficking*, by affirming that “the terms ‘exploitation of the prostitution of others’ and ‘other forms of sexual exploitation’ are not defined in, respectively, the Palermo Protocol and *Council of Europe Convention on trafficking*, which are therefore “without prejudice to how States Parties deal with prostitution in domestic law” (*UN Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions. Addendum Interpretative notes for the official records -- Travaux préparatoires -- of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 2000, § 63; *Explanatory Report of the Council of Europe Convention*, 2005, § 88).

In *V.T. v. France*, by acknowledging that there is no consensus among the member States of the Council of Europe regarding prostitution, the Court did not examine whether prostitution was in itself “inhuman” or “degrading” within the meaning of Article 3 of the Convention. Yet, it affirmed very firmly that forced prostitution is incompatible with human rights and human dignity. In the present case (*S.M. v. Croatia*, application no. 60561/14), the Court has confirmed this position holding that “exploitation of prostitution threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention” (§ 54).

However, in our view, in the present case, there are some highly problematic aspects to the reasoning of the Court that are ambiguous with respect to adopting a neutral stance towards prostitution itself. First of all, the Court holds that “in international law, prostitution, sexual exploitation, and trafficking in human beings are closely related”, conveying the idea that prostitution always involves exploitation. In addition, the Court refers to definition of sexual exploitation provided by the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others that, although it does not criminalize or prohibit prostitution *per se*, but the “exploitation of prostitution”, has an ambivalent approach to prostitution. The 1949 Convention requires States Parties “to punish any persons who, to gratify the passions of another: procures, entices or leads away, for purpose of prostitution, another person, even with the consent of that person; exploits the prostitution of another person, even with the consent of that person” (Article 1). It also requires States Parties to punish any person who:

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“keeps or manages, or knowingly finances or takes part in the financing of a brothel; knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others” (Article 2). However, the Convention also declares in its preamble that “prostitution and the accompanying evil of the traffic for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger(ed) the welfare of the individual, the family and the community”.

In this light, considering the ambiguous approach of the 1949 Convention to prostitution, the reference to this treaty may raise questions over the neutrality of the Court's approach to prostitution per se. In this respect, it is also worth noting, as pointed out by Judge Koskelo in its dissenting opinion, “a large number of member States of the Council of Europe have not ratified this particular Convention (26 of the 47 member States are parties to it), whereas all of them have ratified the more recent and less comprehensively formulated Anti-Trafficking Convention” (§ 20).

### **Article 3**

Finally, as we have argued above, in our view exploitation - not transfer/movement - shall be considered the core element of trafficking. However, this may raise, in many legal systems, a problem around how to distinguish trafficking from other forms of exploitation such as slavery, servitude and forced labour.

In this regard, we would like to invite the Grand Chamber to take the opportunity of this ruling, which for the first time addresses (and, we hope, recognizes) the duty of Member States to prosecute internal trafficking and protect the victims of this phenomenon, to consider trafficking itself no more within the scope of Article 4, but under Article 3 of the Convention. The Court has recently framed trafficking under the Article 3 in *J. and Others vs Austria* (no. 58216/12).

Considering trafficking under Article 3 can be useful to review the understanding of this phenomenon established in *Rantsev v. Cyprus and Russia* where, as we have mentioned above, the Court affirms that trafficking “is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour [...]. It implies close surveillance of the activities of victims, whose movements are often circumscribed [...]”. In *Chowdury vs Greece* (No. 21884/15), the Court has already recognized a case of human trafficking without the reduction of the victims to the condition of an object in the hands of the exploiter, without their complete loss of freedom.

Considering trafficking under Article 3 means distinguishing this phenomenon from slavery and forced labour, both of which involve an almost complete denial of



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freedom. It is a way of affirming that what is at stake in the case of trafficking, even before freedom, is the dignity of the victims. This shift would make it possible to distinguish, within national systems, the cases in which exploitation is accompanied by the complete removal of the freedom of the victims from those in which exploitation is conducted by more lenient violations of liberty or merely by taking advantage of their position of vulnerability.

Letizia Palumbo, Ph.D. (researcher of the NGO)  
Emilio Santoro, Professor (president of the Scientific  
Board of the NGO)