Trafficking in human beings and Foucauldian biopower: 
A case study in the expansion of the human rights phenomenon

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September 2011
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## Abbreviations

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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>CDA</td>
<td>Contagious Diseases Act</td>
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<tr>
<td>ECAT</td>
<td>Council of Europe Convention on Action against Trafficking in Human Beings</td>
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<tr>
<td>ECHR</td>
<td>Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>HE</td>
<td>Government Bill (Hallituksen esitys)</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>LaVM</td>
<td>Legal Affairs Committee Report (Lakiasiainvaliokunnan mietintö)</td>
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<tr>
<td>LBGTQ</td>
<td>Lesbian, gay, bisexual, transgender, queer and questioning (people)</td>
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<tr>
<td>NGO</td>
<td>Non-governmental organization</td>
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<tr>
<td>THB</td>
<td>Trafficking in human beings</td>
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<tr>
<td>TVPA</td>
<td>Victims of Trafficking and Violence Protection Act of 2000</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>U.S.</td>
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1. Introduction

In summer 2010, roughly about a year prior to writing this Introduction, I was sitting in a quite well crowded lecture room, on the final day of the Helsinki Summer Seminar on Human Rights, having trouble concentrating. This was not because the lecture would have been boring — on the contrary, it was very gripping and quite thought-provoking. Nor was it because of the heavy rain pummeling the skylight window of the lecture room. What kept distracting my attention, instead, was that I could not get over the idea that the topic of the lecture, trafficking in human beings, had nothing to do with human rights (their past, present, and future, to be precise), the theme of the seminar. The reader should understand that this was the first lecture I had ever had on trafficking and I had no prior knowledge on the subject. I did not, therefore, doubt the suffering of the victims — we had actually been shown the movie Lilja 4-ever during the seminar, which should prove my point for all readers that have seen said film — but, without real understanding of the issue, trafficking struck me as a pretty standard, albeit transnational and exceptionally horrible crime. I simply could not see where human rights would come into play. The act of trafficking violated several of the human rights of the victim, sure, but what crime does not?

Now, after having spent some months researching the topic, I can see that my initial reactions to the topic were quite naïve. Without real knowledge on the issue, I simply could not really grasp all the nuances and levels of the problem. My view of the matter was, therefore, too simplistic to allow me to picture all the phases of the process. But still, even after this research, I’m haunted by the idea that some of my questions were actually valid, although badly framed. Perhaps it was exactly because of my naivety, and for not having exposed to any discourses surrounding the topic, that I could intuitively reach some problems surrounding the anti-trafficking phenomenon?

It is my intention, in this thesis, to finally confront those haunting feelings and to paint a satisfying picture of the trafficking phenomenon. It should be remarked, however, that this is not a thesis about trafficking per se. Although the bulk of the thesis does indeed deal with the trafficking quagmire,¹ it is really about human rights, and their proliferation — although through a single, particular case (because of the limitations set for a master’s thesis). It is only through the critical discourse surrounding the expansion of the human rights

¹ I chose the term ‘quagmire’, utilized by James Hathaway (Hathaway, James C, The Human Rights Quagmire of “Human Trafficking”, 49 Virginia Journal of International Law 2008-2009, 1-59), since it pictures perfectly, in my opinion, the complicated nature of the crime, the measures against it, and the discourse surrounding it.
phenomenon that the question that arose in the lecture room a year ago finally receives a sensible frame.

At this point a clarification regarding terminology is, perhaps, in order. What do I mean by the ‘expansion of the human rights phenomenon’, exactly — or even with the individual term ‘human rights phenomenon’? Following Miia Halme-Tuomisaari, the human rights phenomenon could be defined as being constituted of three elements: discourse, community and artifacts.\(^2\) As Halme-Tuomisaari demonstrates, all of these three elements have expanded significantly since the drafting of the Universal Declaration of Human Rights (UDHR),\(^3\) producing the expansion of the human rights phenomenon: “an infinite community of NGOs, experts, policy makers, volunteers, educators, politicians and ordinary citizens has emerged around the [human rights] discourse”\(^4\); international human rights instruments, policies, institutions, and other artifacts have proliferated;\(^5\) and “these developments have also dramatically expanded the human rights discourse.”\(^6\)

What is interesting about this expansion is how rapidly it has occurred. While traces of rights language can be tracked from the concept of *dominium* used by Catholic scholars (perhaps most importantly those of the School of Salamanca\(^7\)), through the enlightenment era natural law theorists, to the rights of man presented in the U.S. and French declarations — and some protectors of the human rights language, adopting a more philosophical approach towards human rights, are even ready to claim that similar concepts appear in the history of most cultural traditions around the world —\(^8\) the common opinion seems to be that the contemporary human rights were born with the UDHR in 1949, and have been proliferating ever since. But even this story of the development of human rights, ignited not much more than half-a-century ago, can be put into question. It is certainly true that the contemporary human rights were formulated in the drafting process of the UDHR, or rather in the tireless and groundbreaking work of countless wartime and interwar era activists, publicists, lawyers and NGOs,\(^9\) but the declaration did not launch an immediate triumph of human rights.

\(^3\) Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).
\(^4\) Halme-Tuomisaari 2010 at 8.
\(^7\) See Koskenniemi, Martti, Empire and International Law: The Real Spanish Contribution, 61 *University of Toronto Law Journal* 2011, 1-36.
According to Samuel Moyn, the UDHR was more a burial of war-time dreams than a birth of a new era. “The world looked up for a moment”, writes Moyn, “[but t]hen it resumed its postwar agendas.”¹⁰ Not only was the non-binding character of the UDHR a big disappointment, but human rights also seemed irrelevant in the heating competition between capitalism and communism.¹¹

"The drama of human rights is”, then, writes Moyn, “that they emerged in the 1970s seemingly from nowhere.”¹² In contrast to the story of the birth of the human rights phenomenon as a grand awakening of the mankind as a response to the Nazi atrocities, human rights came to bloom as other utopias fell — when people lost their faith to Cold War politics, human rights emerged to fill the ideological void.¹³ Not only did a return to morals seem like a pure, fresh option for ordinary citizens after the soiled and failed capitalism and communism, giving birth finally to the social movement that was lacking in the aftermath of the war, but the anti-colonialist movement was withering too, allowing international lawyers, also, to look at human rights from a fresh angle, without the fear of dangerous radical self-determination.¹⁴ And after its (re-)emergence, the expansion of the human rights phenomenon was explosive, rather than steady. The drafting processes of the International Covenants on Human Rights (ICCPR¹⁵ and ICESCR¹⁶) finally came to an end and the documents started to gain ratifications. New instruments were prepared at an increasing speed,¹⁷ NGOs mushroomed,¹⁸ and the term ‘human rights’ started to find its way into the

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¹² Ibid. at 3.
¹³ Ibid. at 4, 8, 120-121, 170-175, 213.
¹⁴ Ibid. at 179.
¹⁷ Halme-Tuomisaari 2010 at 41; Halme, Miia, From the Periphery to the Centre: Emergence of the Human Rights Phenomenon in Finland, 18 Finnish Yearbook of International Law 2007, 257-281 at 266; Lauren, 1998 at 257.
speeches of politicians and the pages of newspapers. In only three decades we came to the point where the Nobel peace laureate Elie Wiesel could, in 1999, proclaim that human rights have become a “worldwide secular religion.”

What makes this expansion relevant for my thesis, however, is not so much the speed of the expansion — although it certainly gives it an interesting framework — but the critical discourse surrounding it. It seems that the expansion is a double-edged sword. The success of human rights certainly seems like a wonder worth applauding for. From women’s human rights to racial struggles and LGBTQ rights, human rights have fueled countless (often victorious) emancipatory struggles and have forced governments to change their policies towards a more humane direction, achieving freedoms that one could have only dreamt of only couple of decades ago, and — as cheesy as it may sound — have truly made the world a better place (at least in the ‘Global North’). But even so, there has arisen some critical voices that warn us of the possible unwanted consequences of this progress.

One of the most prominent critics of the expansion is Costas Douzinas, who has famously proclaimed that we are witnessing the ‘End of Human Rights’. At the core of the problem is the necessary universality of human rights. Only as universal, writes Duncan Kennedy, can human rights be something else than ‘ordinary’ laws, mediators between law and politics, rules and ideology, *sein* and *sollen*. But this requirement has two inevitable consequences: human rights must remain abstract in character, for only then can they be accepted globally in different cultures and different contexts; and they cannot have any hierarchy, since a hierarchically superior right would inevitably come to conflict with all the other rights, rendering them all but inalienable and universal. This inescapably abstract nature of human rights means, at least in theory, that every claim, desire or interest can be translated into human rights language. For Douzinas — according to whom rights operate as the *petit objet a*, borrowed from Lacanian psychoanalysis, that represents the object of an unreachable desire, but at the same time represent lack and prevent the desire from being

19 See the table “‘Human rights’ in Anglo-American news, with 1977 breakthrough” in Moyn 2010 at 231. See also Moyn 2010 at 4.
filled (since law is always a compromise and no right can therefore completely achieve one’s aims) — this means rights claims are doomed to proliferate *ad infinitum*. Every desire that becomes law as a consequence of a successful rights struggle, charges the initially empty signifier (in this case the word) ‘human’ with a new meaning, turning it into a floating signifier that every political movement wants to harness as a part of its campaign, using it to claim new, more specialized rights. Eventually this will lead, according to Douzinas, to a point — and we are already reaching this point in his dark prophecy — where the *raison d’être* of rights is completely lost: human rights are meant to defend the most inalienable rights of every human-being, but when everything is a human right, it is completely impossible to decide what these most inalienable rights are (rights are, by definition, hierarchically equal, after all).

A particularly concern for Douzinas is the bureaucratization of human rights. Rights are, for Douzinas, fundamentally a way for protest, protecting individuals against absolutism by restraining the power of the sovereign. But as human rights came to dominate legal and political discourse, states and other political actors had to change their attitude towards them. Governments came to adopt the rights language, fusing it into mainstream politics and administration — in other words, bureaucratizing it. At this point, of course, the application of rights came to rely more and more on expert knowledge. This is natural, as both Jarna Petman and Martti Koskenniemi explain, for rights — like any rules that arise as a compromise reached in a negotiation process — are always under- or over-inclusive. They cover things they should not and leave important things uncovered: it is impossible for the legislators or drafters to accurately predict what the future might bring. “To govern this uncertain future”, writes Petman, “exceptions and abstractions will be needed”, which, of course, creates indeterminacy. To assure that the indeterminate rules are interpreted and applied in an efficient, reasonable way, experts are needed. But then the question of legitimacy appears. How do we know that the experts are making the rights decisions? Rules

25 Douzinas 2002 at 312-314; Douzinas 2007 at 47-49.
27 Douzinas 2000 at 242-245, 252.
30 Petman 2011 at 400.
31 See also Koskenniemi 2010 at 51.
are needed to regulate the work of experts and limit their power. But these rules will also end up being indeterminate, meaning that more experts are needed to apply them. The legitimacy problem reappears, of course, and more experts are again needed. As Petman explains, “[t]he move from function to rules to indeterminacy to contextualized expert decisions will start again — only to start again. There will be no place to stop.”

Human rights have, therefore, as a consequence of this process, been, ‘hijacked’ by governments and bureaucrats, claims Douzinas. There is nothing bad about the bureaucratization of human rights, as such, however, in contrast to what Douzinas is suggesting. The bureaucratization means that a human rights struggle has been successful enough to influence governmental policies, and as a consequence of this success the implementation of said rights has become more effective. But just like the expansion of the human rights phenomenon in general, bureaucratization, too, is a double edged sword. Human rights do not lose any of their open-endedness in the hands of experts and bureaucrats. Instead, in order to be able to solve complicated rights conflict, authorities are forced to create “complex balancing practices and rights-exceptions schemes that defer to general considerations of administrative policy, public interest, economic efficiency, and so on — precisely the kind of criteria that rights were once introduced to limit”, as put by Koskenniemi. Through bureaucratization, human rights lose, then, their protest function (or at least some of it). They risk becoming a tool of the sovereign, a bedfellow of positivism. At this point, human rights actually become dangerous, according to Douzinas, for they are, as he puts it, “not just restraints on power; they are tools of the new society of control.”

Human rights can be used to discipline, exclude and dominate. They teach individuals to solve conflicts in a certain, legalized way and shape the thoughts of the right-bearer. Disciplinary technologies, including human rights, define some behaviour as normal and other as deviant. Anne Orford has demonstrated how this aspect of human rights serves to produce the human capital necessary to reproduce markets. The link between human rights and markets is also made by Wendy Brown, who states that the rights language “stands as a

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32 Petman 2011 at 399. See also Koskenniemi 2010 at 54.
33 Koskenniemi 2010 at 49.
34 Douzinas 2000 at 241-245; Douzinas 2007 at 24. See also Koskenniemi 2010 at 48-49.
35 Douzinas 2007 at 113.
critique of dissonant political projects, converges neatly with the requisites of liberal imperialism and global free trade, and legitimizes both as well.”37

This split nature of the expansion of the human rights phenomenon — as a successful and necessary process for the upgraded implementation of rights, on the one hand, and as a theoretical risk for the essence of rights, on the other — shall, then, provide a frame for my study on the human rights approach to trafficking in human beings. It is my aim, in this thesis, to understand why THB has been made a human rights issue, and, more fundamentally, to ponder how such an approach really benefits the victims of the crime. It is clear that the victims should be provided all possible help, but do the dark clouds summoned by Douzinas shade this process as well?

It is the first question, namely “why and how has the anti-trafficking campaign been translated into human rights language”, that I shall begin with in Chapter 2, after setting some basics of the trafficking quagmire. Regarding this question, I am guided especially by Sally Engle Merry, who has significantly illuminated the translation process of human rights in her research on human rights and gender violence.38 As we come to see, translation is a complicated process also in the case of trafficking, driven in large part by the will of activists, publicists, NGOs, and other actors to improve the situation of the victims, but also by political, structural and even economical aims. After arriving to this messy conclusion, it is necessary, however, to take one more detour, in order to be able to provide an adequate assessment of the human rights approach, and study how the human rights approach is crystallized into concrete claims on behalf of the victims. While it is clear that the act of trafficking violates several human rights of the victims, what makes trafficking any different from other crimes, such as murder, battery or theft? Should trafficking be dealt with some specialized human rights instruments or do the existing, more general human rights treaties provide adequate protection? What does the ‘human rights approach to human trafficking’ mean, exactly, and how can human rights improve the situation of the victims?

As we will come to see, the human rights approach to trafficking, seeking still its final form, consists of several, only loosely connected, factors or claims. Although all of the claims include important insights regarding the trafficking phenomenon, it is my claim that the human rights approach is judicially most relevant in the case of mistreatment, especially

deportation, of the victims of trafficking, whereas the other claims have some critical problems from a purely legal perspective. In Chapter 3, I adopt, then, the ‘victim’s’ perspective and ponder the reasons that could explain the poor treatment of the victims despite the good intentions of many authorities and the involvement of many relevant actors in the anti-trafficking movement. I reject any conspiracy theories and argue that the only way to understand the paradoxical difference between the intentions of the relevant actors and the end-results of their actions is to adopt a Foucauldian perspective of (bio)power and governmentality. From a biopolitical perspective the victims of trafficking can be seen as a threat to the population — a threat that must be eliminated either by assimilating them to the main population with the help of disciplinary techniques, or by excluding them completely from the society. This biopolitical aim is accomplished through an impenetrable net of seemingly insignificant practices and discourses that not even the participants are aware of. As a result of these practices and discourses, trafficking victims become ‘invisible’ and therefore subject to deportation as (risky) illegal immigrants, turning them into ‘bare life’ in the Agambenian sense, represented by the homo sacer, who cannot be sacrificed, but does not enjoy the protection of the society and its laws. The question that must be raised, before concluding the thesis in Chapter 4, is then: if the society has turned against the victims, without the authorities even noticing it themselves, could human rights provide an escape from this situation?

2. Trafficking in human beings and human rights

2.1 Not really an introduction: The birth of the anti-trafficking campaign

The 19th century was not an easy time to exist as a young woman in England. Radical shifts in the structure of the society and the rapid spread of capitalism brought not only new exciting possibilities and ideas but also insecurity, anxiety, and even distress. In this context, many girls and women were forced — or allowed, depending on the person — to dramatically alter their lives and to find new ways of livelihood and survival. But, simultaneously with these changes, new techniques of control and paternalistic ideologies also emerged. As Nickie Roberts explains: "[m]ass trade unionism, revolutionary ideologies,  

the sexually liberal culture of the urban poor, and the entry en masse of young girls into the labour force, all combined to throw elements of the bourgeoisie into a panic: the very fabric of the middle-class social order was apparently at threat.”⁴¹ In response to this threat, Roberts continues, “the middle class turned to its own tradition of social discipline, the puritanical control of sexuality and worship of the […] patriarchal nuclear family.”⁴²

It is in this context that the campaign against trafficking in human beings — or the ‘white slavery’, as it was known back then — first appeared. This is not to say that trafficking was born in the 19th century, of course (although the increased migration could have accelerated the business), for as John Piccarelly demonstrates, trafficking, as one form of ‘unfree labor’, can be seamlessly connected to the history of slavery, of which the best known ‘chattel slavery’ is only one part of (although it is extremely important to notice that slave-like conditions fit only a very small portion of trafficking victims, whereas many are rather exploited migrants).⁴³ But it is at this time that the practice finally captured the attention of the middle classes and the elite. To understand this grand awakening — as well as modern discussion on trafficking, I would claim — it is necessary to start with the obvious enemy of this Victorian utopia: the prostitute.

For the Victorians, the ‘whore’ represented everything that was wrong and dangerous in the world: an autonomous working woman, free of moralistic sexual control.⁴⁴ But there was more. By the mid-19th century, the doctors and public officials had come to assess venereal diseases as a serious threat to the British population. A special concern was the state of the armed forces.⁴⁵ The prostitutes, therefore, constituted a double threat: not only did they endanger the morale of the population, but they also jeopardized its health by spreading diseases. Not surprisingly, then, soon followed the anti-prostitute measures. To Victorian officials, regulation was the favored solution. Already in the 1850s repressive measures had hit prostitutes hard, but the real turn was the first Contagious Diseases Act (CDA), in 1864, that intended to root out sexually transmitted diseases among soldiers. Not surprisingly,


⁴² Roberts 1992 at 245.


⁴⁴ Roberts 1992 at 246.

prostitutes, instead of soldiers, whose manhood could have been violated by examinations, were blamed for the venereal disease problem and became the target of the measures.\textsuperscript{46} The metaphor of pollution was used to describe the prostitutes as carriers of infection and as a dreadful danger to the society.\textsuperscript{47} The first Act provided for the compulsory examination of prostitutes in British naval ports and garrison towns, but soon the CDAs had been extended well beyond their initially defined limits.\textsuperscript{48} “[A] police morals squad was set up, with the power to stop any woman and define [and register] her as a ‘common prostitute’.”\textsuperscript{49} Once registered, the women had to undergo medical examination that often had more to do with disciplining and demonstrating the state’s power of access to the women’s bodies than a medical procedure. If found infected, women were detained to Lock Hospitals where they were again subjected to extremely harsh discipline and arbitrary regulation.\textsuperscript{50}

But the prostitutes had their defenders, too. The harsh measures of the state officials started to raise critique in the late 1860s and had become a considerable force by the 1880s.\textsuperscript{51} At the forefront were middle-class feminists, most importantly a woman named Josephine Butler. In 1869 the feminists published a Ladies’ Protest that condemned the Acts that gave the police absolute power over women and “punish the sex who are the victims of vice and leave unpunished the sex who are the main causes both of the vice and its dreaded consequences”.\textsuperscript{52} The protest movement was haunted by serious conflicts of interests, however. Not only were there gaps and disagreements between sexes and social classes,\textsuperscript{53} but, more importantly, the agendas of the protesters did not often fit those of their alleged beneficiaries, i.e. the prostitutes. The ultimate goal of the feminists and other repealers was to get rid of prostitution altogether. Furthermore, and partly because of the above, the claims and actions of the feminists never really challenged the Victorian stereotypes. In fact, horror stories about young girls forced into prostitution made discussion about voluntary prostitution and women’s right to labor impossible. These stories of innocent girls as the victims of the lusts of men also raised the interest of conservative, especially Christian, groups, which soon led to hijacking and de-radicalization of the movement.\textsuperscript{54}

\textsuperscript{46} Roberts 1992 at 246; Walkowitz 1980 at 73-79; Barry 1979 at 12; Doezema 2000 at 26-27.
\textsuperscript{47} Walkowitz 1980 at 4.
\textsuperscript{48} See Walkowitz 1980 at 79-87.
\textsuperscript{49} Roberts 1992 at 248.
\textsuperscript{50} Ibid. at 245-248; See also Barry 1979 at 13.
\textsuperscript{51} Walkowitz 1980 at 90-91.
\textsuperscript{52} “Ladies’s Protest” quoted in Walkowitz 1980 at 93. See also Barry 1979 at 13-14.
\textsuperscript{53} See in more detail Walkowitz 1980 at 90-104.
\textsuperscript{54} Doezema 2000 at 27-28; Roberts 1992 250-252. See also de Vries 2005 at 43-45.
It was no surprise, then, that soon the anti-CDAs campaign had transformed into a social purity campaign. In fact, Josephine Butler herself played a significant — although possibly unintentional — part in this transformation, having founded the Social Purity Alliance in 1873. It is in this context that the anti-trafficking movement finally emerged. To keep up the momentum that the feminist movement had managed to establish, the social purity movement needed a new topic to rally against after the CDAs had mostly been suspended — one that would benefit from the achievements of the feminists but that could gain a wider and less homogenous audience. Enter ‘white slave trade’. The increased migration of women had given birth to horror stories of young girls being drugged and abducted, only to “wake up in some foreign brothel, where they were subject to the pornographic whims of sadistic, non-white pimps and brothel masters.” This new scandal was the answer to the prayers of the purists. Not only did the early anti-trafficking campaign include the feminist agenda against the exploitation of women by men, but it was rallied for the benefit of innocent victims (instead of ‘filthy prostitutes’) and against a much more vague and distant enemy (the savage and exotic non-white — or, at the very least, foreign — pimps). In 1880 Alfred Dyer published his pamphlet, *The European Slave Trade in English Girls*, which claimed that masses of British girls were abducted and forced to work in brothels in Brussels. This led to the formation of the London Committee for Suppressing the Traffick in British Girls and the new campaign was underway.

But even though it was true that there were English prostitutes working in brothels in Brussels, many of them had in reality migrated voluntarily to escape the British regulation system. Beside the abusive practices described above, the CDAs had made the life of prostitutes very difficult by isolating them from the society and by transforming casual prostitution into a specific professional class. Before the CDAs, most prostitutes were young and single: prostitution was simply a way to survive for a while. But in the post-CDAs atmosphere, it was increasingly difficult to escape from prostitution. Removed from their neighborhoods into red-light districts, the prostitutes were no longer capable of returning to the routines of everyday life, but were categorized forever as ‘whores’ and therefore excluded from the rest of the population — in other words, trapped. Transformed into a social purity movement and mixed into Victorian standards, the anti-CDAs movement was

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56 Roberts 1992 at 252.
59 Walkowitz 1980 at 246-252; Roberts 1992 at 253-254. See also Barry 1979 at 18-20.
60 Barry 1979 at 25.
unable to provide help. Therefore, single young women without jobs were forced to search livelihood somewhere else, unless they wanted prostitution to become a career. It is true that many of them did find coercion in Brussels and elsewhere: the reformers did base their evidence for the white slave trade on the actual international migration of prostitutes. But just like modern day trafficking in human beings, as we will come to see, the trafficking business seldom had anything to do with the sensational stories of white slave trafficking. With the internationalization of capitalism and the increased regulation of prostitution in many countries, prostitutes were on the move to escape poverty and oppression in their home countries, which made them easy targets of exploitation. In some sense, then, the campaign managed to create what it was trying to eradicate — a fate that we must keep in mind in the modern campaign against trafficking, in order not to renew our mistakes.

It would be unfair to only criticize the hard work done by the anti-trafficking campaigners, however. Their achievements must be acknowledged as well. Perhaps the most important one is the much needed legislation on the issue. After its ignition in Britain, the fear of well-established underground networks spread fast and soon reached Europe and the United States as well, forcing the powers-that-be to finally respond. In 1902 representatives of several governments met to draft an international instrument to put an end to white slave traffic. The International Agreement for the Suppression of the White Slave Traffic was ratified by twelve nations in 1904, followed soon by other, updated documents in the sphere of League of Nations. Finally, the UN Convention for Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others was adopted in 1949. When the UN Convention was drafted, the buzz concerning the issue had already faded, however. The closing of borders in the world wars era had significantly hindered the trafficking business, and the wars had directed the attention of the public to other matters.

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61 Roberts 1992 at 253-254. See also de Vries 2005 at 41-42, 56.
66 It had, in fact, already started to do so in 1914 when WW I halted migration from Europe (Doezema 2000 at 30).
2.2. The real introduction: Criminal law and human rights approaches to trafficking

It was not until the easing in the atmosphere of the Cold War politics allowed increased international tourism and female migration in the 1970s that the issue arose again into public knowledge (much like in the case of human rights). Since then, however, trafficking in human beings, accelerated by the fall of the Soviet Union, the Yugoslavian crisis and globalization, has evolved into one of the most talked about global criminal concerns of the twenty-first century. As explained by one publicist on the field, “it is cast by political leaders, alongside terrorism and drug trafficking, as one of the three ‘evils’ that haunts the globe, and it has become the subject for much academic research, policy work, and action in a wide variety of disciplines and fields.”

In 2000, the newly found attention towards trafficking finally gave birth to a new international document on the matter, when the drafting process of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime was finished. The Trafficking Protocol (TP), or ‘Palermo Protocol’, was a long-awaited addition to the field, patching the holes and problems left by the outdated treaties of the early 20th century. As Kalen Fredette writes, "the Protocol offers the most comprehensive, explicitly articulated international legal framework on human trafficking and overcomes many of the limitations of its predecessors." It adopts the so-called 3-P approach to trafficking, emphasizing not only the prosecution of traffickers, but also the prevention of trafficking and the protection of victims. Regarding protection, the Protocol requires Member States "to protect the privacy and identity of victims" to provide victims information about relevant proceedings and ensure that the victims are represented in such

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69 Fredette 2009 at 112.

70 For more detail on the 3-P approach, see Fredette, Kalen, Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation, 17 Cardozo Journal of International and Comparative Law 2009, 101-134 at 120-133.

proceedings;\textsuperscript{72} to provide victims with needed care and assistance;\textsuperscript{73} and to secure the safety of the victims while they are in its territory.\textsuperscript{74} States should also consider “measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases”,\textsuperscript{75} and to facilitate the repatriation of the victims.\textsuperscript{76} Regarding prevention, “States Parties shall endeavor to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.”\textsuperscript{77} States are also required to cooperate in the areas of law enforcement and border security and to control identity and travel documents.\textsuperscript{78}

Perhaps most importantly, the Protocol provides, for the first time, a globally accepted definition of trafficking in human beings. According to Article 3a of the Protocol:

“[t]rafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.\textsuperscript{79}

The article then goes on to explain that:

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;\textsuperscript{80}

The Trafficking Protocol “supplements the United Nations Convention against Transnational Organized Crime.”\textsuperscript{81} It is, therefore, according to its Article 4, limited to trafficking that involves organized crime and includes an international element, i.e. cases where the victim is transported form one state to another. While the definition in Article 3a does not actually require either, and it is generally accepted that THB is possible also within a single state,\textsuperscript{82} there seems to exist a consensus in the academia that the Protocol adopts primarily a criminal law approach to trafficking. As Elizabeth Bruch puts it, “[a]ll of the international documents addressing human trafficking in detail have essentially embodied a law

\textsuperscript{72} Article 6(2), ibid.
\textsuperscript{73} Articles 6(3) and 6(3), ibid.
\textsuperscript{74} Article 6(5), ibid.
\textsuperscript{75} Article 7, ibid.
\textsuperscript{76} Article 8, ibid.
\textsuperscript{77} Article9(2), ibid.
\textsuperscript{78} Articles 10-13, ibid.
\textsuperscript{79} Article 3(a), ibid.
\textsuperscript{80} Article 3(a), ibid.
enforcement perspective”, and the Trafficking Protocol, too, is “simply one more component of the fight against organized crime.”

This way of approaching the trafficking problem has recently become the object of severe criticism, however. Countless commentators have pointed out that the measures for punishing traffickers and tightening border controls have happened at the expense of the interests of victims. As Hannah Simon puts it:

> While the criminalization approach to trafficking is essential, it is not without limitations. By focusing on the criminal offence, anti-trafficking law becomes not only associated with, but sometimes also limited to, deterrence and punishment strategies. In fact, by nature, the criminal justice system focuses on the prosecution of a perpetrator rather than on the needs of the victim.

It is not difficult, in general, to see a connection between the states’ measures against trafficking and the rise of the security discourse in the wake of the war on terrorism. As Elspeth Guild explains:

> after the attacks of 9 September 2001 in the USA and 11 March 2004 in Spain, the foreigner as a security threat has become part of the political and social debate on immigration and asylum. The security issue has been very much dominated by the need to control people and their movement.

The influence of the security discourse is, indeed, clearly visible in the approach that, for example, United States authorities have taken towards trafficking. According to Arthur Richer and Sheri R. Glaser from the United States Department of Justice, “human trafficking rots the fabric of [the U.S.] society and, as a result, has a destructive effect on the United States' national security.” They explain that trafficking gives birth to corrupt governments that “have enormous potential to affect the national security of the United States on a military level”, “can affect the economy of the United States on a national security level”, and “can also cause diplomatic burdens ultimately affecting national security.” Furthermore, according to Richer and Glaser, “[a]nytime there is a motive to illegally penetrate the borders of a country, national security questions are raised”: trafficking can

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83 Bruch 2004 at 16.
87 Ibid. at 78.
88 Ibid. at 80.
89 Ibid. at 81.
provide not only criminals but also terrorists and spies an access to the U.S. territory.\textsuperscript{90}
Finally, trafficking serves to finance terrorists, breed more crime,\textsuperscript{91} and spread AIDS.\textsuperscript{92}

It is, thus, believed by many commentators that states do not fight trafficking out of sincere will to help the victims, but that at least part of the enthusiasm is due to the fact that “the border control emphasis inherent in the Trafficking Protocol and its companion Smuggling Protocol\textsuperscript{93} has provided states with a reason […] for the intensification of broadly based efforts to prevent the arrival or entry of unauthorized noncitizens.”\textsuperscript{94} It is not, indeed, difficult to believe, as James Hathaway does, that the anti-trafficking measures may have “created a legal slippery slope” in which states have found a way to criminalize not only trafficking but also smuggling in general.\textsuperscript{95} Smuggling and trafficking are clearly distinguished in the context of the Convention against Transnational Organized Crime. Unlike smuggling, trafficking relates not only to the crossing of a border but also to the treatment of the transported person, consisting of three elements: the act (the recruitment, transfer and receipt of the person), the means (threat or use of force etc.) and the purpose (some form of exploitation).\textsuperscript{96} Furthermore, smuggling is generally considered to be a voluntary arrangement between the smuggled person and the smuggler, whereas trafficking always includes an element of coercion. These kinds of clear cases are very difficult to find in real life, however, with smuggling often including elements of violence, coercion and exploitation, and trafficking being in many cases ignited by the eventual victims’ will to migrate.\textsuperscript{97} It is, therefore, possible to conclude that the quite artificial distinction between smuggling and trafficking gives authorities quite a wide margin of discretion with the result that “authorities are more likely to identify irregular migrants as smuggled rather than as trafficked”,\textsuperscript{98} as Simon puts it — meaning that the victims are deported instead of being given an access to the victims protection and assistance provided for victims of trafficking.

\textsuperscript{90}Ibid. at 82.
\textsuperscript{91}Ibid. at 86.
\textsuperscript{92}Ibid. at 91.
\textsuperscript{94}Hathaway 2008-2009 at 6.
\textsuperscript{95}Ibid. at 5.
\textsuperscript{96}Simon 2009-2010 at 639.
\textsuperscript{97}Ibid. at 640-642; Munro, Vanessa E., A Tale of Two Servitudes: Defining and Implementing a Domestic Response to Trafficking of Women for Prostitution in the UK and Australia, 14 Social & Legal Studies 2005, 91-114 at 97-98.
\textsuperscript{98}Simon 2009-2010 at 640. See also Gallagher, Anne T, Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis, 23 Human Rights Quarterly 2001, 975-1004 at 1000.
The connection between the criminal law approach and the security discourse is not the only thing bothering scholars and activist in the states’ measures against trafficking, however. Another source of protest is the fact that THB is increasingly considered to constitute more than a simple crime. The Finnish National Rapporteur on Trafficking in Human Beings, for example, begins her first report on trafficking by stating that, “[t]rafficking in human beings and related exploitation are considered one of the greatest human rights challenges of our time.”

This notion of trafficking as first and foremost a human rights violation, combined with the aforementioned worry that, in concentrating on public interests, criminal law pushes the victim away from the center of the process and may even confuse him or her as a participant in a criminal activity, has lead countless publicists to demand the replacement of the criminal law approach with a human rights approach that takes the victim’s rights and needs as its starting point. “[A] human rights approach”, proclaims Federico Lenzerini, for example, “is endorsed by those who see the need of restoring the human dignity of victims as the main goal to be pursued [sic] in the context of the fight against trafficking in human beings.”

Elizabeth Bruch agrees, emphasizing that “[p]erhaps the most significant advantage that a human rights approach offers [for the fight against THB] is the ability to hold states accountable for how they treat both their nationals and other individuals under their control.”

The human rights discourse has entered the trafficking discourse with trumpets blazing and has already achieved some significant victories, forcing states to change their anti-trafficking measures into a more effective and humane direction. Progress is perhaps most visible in the context of the Council of Europe. In 2005 the Council finished the drafting process of its own treaty on trafficking, the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT). The Convention, declaring in its preamble that “trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being […]”, has been widely celebrated as the first human rights document on the matter. Despite its regional status and fairly low number of ratifications, the Convention symbolizes an important step forward in the anti-trafficking campaign.

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101 Bruch 2004 at 32.


103 Ibid, preamble.
Moreover, the European Court of Human Rights (ECtHR) gave tremendous support for the human rights approach when it found in its 2010 judgment *Rantsev v. Cyprus and Russia*\(^\text{104}\) that both Cyprus and Russia had violated several of their obligations under the European Convention on Human Rights (ECHR)\(^\text{105}\) by failing to efficiently investigate the trafficking and eventual death of the daughter of the applicant.

The human rights approach provides, then, a valuable and anticipated counterforce to the security paradigm that has so far been too powerful in the fight against trafficking. What this human rights approach would include has, however, remained vague at best. As Tom Obokata, one of the champions of the human rights approach, admits, “the nature and the extent of obligations imposed upon States and non-State actors are not entirely clear, and a human rights discourse in relation to trafficking remains without much substance.”\(^\text{106}\) This is, perhaps, not very surprising, for it is, indeed, quite difficult to picture an efficient human rights solution to trafficking from a black-letter positivist perspective. Despite the fact that trafficking certainly has important human rights dimensions, it seems like a pretty straightforward criminal matter from a purely legal point of view, being a crime committed (usually) by an individual, or a group of individuals, against another, and therefore (often) lacking the vertical element that has traditionally been thought to constitute an important part of a human rights violation. Since the horizontal effect of human rights is still not very well established, human rights sadly seem like quite an ineffective tool from the victim’s perspective — at least at first glance.

It is, therefore, necessary to get a better grip of this human rights approach to trafficking in order to be able to draw any conclusions regarding the expansion of the human rights phenomenon in general. This will be my goal in the remainder of this Chapter. To achieve my aim, I must first understand, how the fight against trafficking was translated into human rights language and therefore came to be seen as a human rights issue. I have already given a partial answer to this question above: the human rights language provided scholars a chance to criticize the selfish actions of the states and to demand better protection of the victims. Academic protest does not, however, suffice alone to explain how the human rights approach has become such a force that it has succeeded in forcing states to change their policies.

\(^{104}\) *Rantsev v. Cyprus and Russia*, Application no. 25965/04, European Court of Human Rights, Court (First Section), Judgment, 7 January 2010.


towards trafficking, as is evidenced, for example, in the adoption of the ECAT — it is clear that there have been other forces behind this success, as well. It is these forces that I shall concentrate my attention on next, before concluding the Chapter with an assessment of the human rights approach.

2.3. Translating anti-trafficking into human rights language

It would not be possible to study the translation of the human rights language without mentioning the work of Sally Engle Merry. Merry’s study on how human rights law is translated into local justice in the context of gender violence demonstrates that the translation is a complex process, where a key role is played by intermediaries that navigate between the global and the local. As Merry puts it, “[t]ranslators are people who can easily move between layers because they conceptualize the issue in more than one way.”\textsuperscript{107} They must, on the one hand, speak the international language of human rights that the international donors prefer, and on the other hand, be able to present their initiatives in cultural terms that will be acceptable locally. The translation process has, according to Merry, three dimensions. The first is framing. This means packaging and presenting ideas so that they generate shared beliefs and therefore seem appealing and motivating to various actors. As Merry explains, “[t]he frame is an interpretative package surrounding a core idea.”\textsuperscript{108} The second dimension is “adapting the appropriated program to the structural conditions in which it operates”,\textsuperscript{109} and the third the redefinition of target population.\textsuperscript{110}

In the case of trafficking, there seem to be two (groups of) actors, in addition to the academia, that are especially important in this sense and that could therefore be called the translators of the trafficking paradigm. These are the women’s movement, and competing feminist groups, on the one hand, and (local and global) NGOs and activists, on the other. Of these, the feminists have operated mostly (although not exclusively) on the global, governmental level, trying to affect state policies and pushing for legislation — and have therefore earned the moniker “governance feminism” from Janet Halley —\textsuperscript{111} whereas the NGOs and activists, constituting a more heterogeneous group, have operated both from top down, in the form of campaigns launched by global NGOs, and from bottom up, with local activists linking up with NGOs in a strive for wider visibility. Since these actors have had a

\textsuperscript{107} Merry 2006 at 210.
\textsuperscript{108} \textit{Ibid.} at 136.
\textsuperscript{109} \textit{Ibid.} at 136.
\textsuperscript{110} \textit{Ibid.} at 137.
\textsuperscript{111} See Halley et al. 2006.
more direct impact in the actual policy-making, anti-trafficking measures, and legislative processes, I would claim that they have played at least an equally important role as the scholars in the translation process of trafficking. It is these actors, therefore, that I turn my attention to now.

2.3.1 The women’s movement and governance feminism

Trafficking in human beings, understood commonly to consist mostly of sex trafficking and to constitute, thus, an extreme form of violence against women, has, for obvious reasons, always been an important topic for the women’s movement. The anti-trafficking campaign has, therefore, always been tightly connected to the dominant currents inside the more comprehensive network. It is, consequently, clear that the translation of the anti-trafficking discourse into human rights language, too, was at least partly dependent of the more general warming towards the human rights discourse inside the women’s movement. The movement had for a long time kept its distance from the human rights phenomenon, concentrating instead on more practical matters, such as providing shelter for victims of domestic violence, lobbying for national legislation, and making the problems caused by discrimination and violence against women better known. But in the late 1980s it became quite clear that it had to change strategy. The human rights phenomenon had achieved such measures that, to maintain its appeal, the women’s movement had to learn to translate its claims into human rights language. It was claimed that states were responsible for violence against women by failing to exercise due diligence in the protection of women from private individuals and therefore violated their human rights obligations. It was also stated that violence against women is a form of discrimination. Women’s rights and THB were merged into the human rights phenomenon at the latest in the 1993 Vienna World Conference. The Vienna Declaration and Program of Action states that:

112 Merry 2006 at 40.
114 Merry 2006 at 22.
Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking are incompatible with the dignity and worth of the human person, and must be eliminated […]

Soon it was reaffirmed, in the Fourth World Conference of Women in Beijing, that THB constitutes violence against women and a strategic objective to eliminate THB was set. As Merry concludes, “by declaring the rights of women and girl children to protection from violence as a universal human right, the conference reasserted [the] dramatic expansion of human rights.”

The adaptation of the rights language and the increasing popularity of the anti-trafficking campaign also allowed the women’s movements to gain a stronger position in international politics. As the Cold War came to an end, the forms of power started to change. The fragmented, mobile, regulatory ‘new governance’ favored non-state actors and allowed feminists to take part in decision-making. Sex-trafficking became an especially important topic for feminists. Chantal Thomas bases this on three grounds. First, there existed conventions and principles, such as the 1949 Convention, that provided fuel and credibility for activism. Secondly, the Working Group on Slavery and the enthusiasm of the Clinton administration to fight organized crime provided feminists a role in global governance through THB. And finally, the willingness of several actors to combat THB, and organized crime in general, allowed the feminists to link up and network with other actors and therefore increase their power and effectiveness.

Because of the resources, contacts and possibilities the fight against THB provided, it soon became the battlefield of different feminist ideologies, especially relating to prostitution. Regarding sex work, there are roughly two competing views inside the feminist movement. In this study, I shall call them the structuralist and individualist approaches, although other terms have also appeared in the academic literature.

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117 Roth 2010a at 52; Chew 2005 at 71-72, Bruch 2004 at 12.
118 Merry 2006 at 24.
119 Halley et al. 2006 at 352.
120 I use the word ‘roughly’ in order to avoid oversimplification. For example sex work activists cannot really be included in either of these large blocks, since they object the whole anti-trafficking campaign. In the drafting process of the TP, however, they allied with the individualist feminists (but only in their private capacities) in order to keep the damage to sex workers as low as possible — but simultaneously becoming ‘invisible’. See Doezema, Jo, Now You See Her, Now You Don’t: Sex Workers at the UN Trafficking Protocol Negotiation, 14 Social & Legal Studies 2005, 61-89.
121 The structuralist/individualist — division is borrowed from Chantal Thomas (Halley, Janet & Kotiswaran, Prabha & Shamir, Hila & Thomas, Chantal, From the International to the Local in Feminist Legal Responses to
The structuralist feminist view is based on the radical feminist approach, created by Catharine A. MacKinnon, Andrea Dworkin and Kathleen Barry. Following radical feminism, the structuralists claim that all prostitution should be criminalized, for it is impossible to completely voluntarily engage in prostitution, since sexual domination is structural. Prostitution in all its forms therefore oppresses women, and is comparable to slavery (consenting to which is not possible). Applied to THB, this means that transporting a woman into prostitution always constitutes trafficking, irrespective of whether this happened with the woman’s consent or not.122

Individualist feminists, on the contrary, emphasize the importance of free consent. Even with the danger of oversimplification: one cannot be trafficked if one is not transported without one’s will. The same goes for prostitution. As long as prostitution does not occur in a coercive environment, it must be allowed. Criminalization actually justifies harassment of prostitutes and increases rapes. According to the individual feminists, the discussion on prostitution, as well as the fight against trafficking, should concentrate on the individual and her rights. It is, therefore, no wonder that the human rights approach to trafficking is

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emphasized among the individualist feminists and that many human rights NGOs play a key role inside the movement.\textsuperscript{123}

The conflict between these two feminist groups intensified as the fight against THB started to gain a more central role in the official authorities’ war on organized crime. This war was one of the main priorities of the Clinton administration. Originally, it targeted money laundering and drug trafficking, but after Hillary Clinton attended the Beijing Women’s Conference and met representatives of feminist NGOs, THB became a third major concern. The liberal Clinton administration teamed up with like-minded feminists with the end-result that trafficking and prostitution were conceptualized distinct. To achieve this, the Clinton administration and the individualist feminists invoked the classical liberal concept of human rights that necessitated the idea of the right to choose and the need to balance competing rights in a liberal-legal frame.\textsuperscript{124} This approach met fierce resistance among the more radical structural feminists, of course. The separation of prostitution and trafficking, and the emphasis on the right to choose, threatened to water down the radical feminist project of making prostitution illegal. The Clinton administration was therefore accused of weakening international laws against THB.\textsuperscript{125}

It is at this moment that we see how THB started to play a key role in the power struggle, not only inside the feminist movement, but also in American and international politics, and how this connected to the human rights discourse in general. As the individualist feminists had allied with the Clinton administration, the structuralists also had to network to maintain their power, and indeed found support from conservative and religious organizations.\textsuperscript{126} This alliance between radical feminists and conservatives may sound surprising, but it illustrates extremely well the political value that the fight against THB possesses. While both feminists and religious organizations share the resistance against all kinds of sexual objectifying of women, including sex work, and the church has traditionally campaigned against all forms of slavery, it is clear that there are also more practical reasons behind this (un)holy alliance. As

already noted, the structuralist feminists understood that without help they would soon lose
the internal feminist power struggle over prostitution. And the religious groups must have
realized how powerful the image of an innocent girl chained to a brothel bed is, and how
much positive publicity active campaigning against this atrocity would bring. Furthermore,
more politically oriented conservative groups saw in the THB discussion a chance to score
some political points against the Clinton administration.127 It is, perhaps, not that surprising,
then, that similar alliances have occurred elsewhere, as well. Josephine Ho, for example, in
an enlightening essay, shows how the Presbyterian Church in Taiwan seized the opportunity
to prop up its position when it noticed the outrage caused by stories of young aboriginal girls
sold into brothels. The Church quickly networked with such a wide array actors as labor
issue-oriented progressives, human rights groups promoting universal human rights,
women’s groups, various religious groups (of other denominations) and feminist NGOs.128

It is also at this moment of mainstreaming of the anti-THB campaign and the escalation of
the rupture inside the feminists that we see how the human rights language was, partly under
compulsion, adopted to justify completely opposite political agendas. In light of how I have
described the individualist and structuralist feminists, it would be easy to conclude that the
individualist feminists acted as the advocates of the human rights approach and the
structuralists adhered to a criminal law approach. But in fact both sides invoked the human
rights language. The connection of the individualists to the liberal concept of human rights
was already explained, and indeed the individualists and the Clinton administration found
support from a branch of the UN human rights machinery, namely the UN High
Commissioner for Human Rights.129 But the language of abstract human rights supported
also another interpretation of the subject, one that fitted the aims of the structuralists and the
conservatives. The Kantian concept that man exists as an end and must never be treated as a
means alone, allowed the translation of the oppressive and objectifying nature of prostitution
to be translated into human rights language, and therefore human rights also justified the
view that all transfer of women into prostitution constitutes human trafficking, irrespective
of the woman’s consent,130 allowing the structuralists and conservatives to avoid the massive

127 Hathaway 2008 at 42-43; Block, Jennifer, Why the Faith Trade is Interested in the Sex Trade, Conscience
128 Ho, Josephine, From Anti-Trafficking to Social Discipline: Or, the Changing Role of “Women’s” NGO’s in
Taiwan, in Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human
Rights (Kempadoo, Sanghera and Pattanaik eds.), Paradigm Publishers, Boulder, London, 2005, 83-105 at 84-
85.
129 Halley et al .2006 at 357.
legitimacy loss that they would have faced, should the individualists have seized the monopoly of human rights language in the struggle. This case seems to give a testimonial to the fact that Sally Engle Marry already discovered in her study on gender violence and human rights on the local level: “[h]uman rights are clearly an open resource, a source of political power available for mobilization by various groups in many different ways, but how they work depends on the context.”

The anti-trafficking campaign, therefore, soon became a platform for various political aims, interests and agendas. What started as a protest for the oppressed victims of trafficking was soon merged — in a story not that different from that of the 19th century England — with feminist power struggles, debates on prostitution, domestic and international politics and, through the religious groups, even with the anti-abortion campaign. All this was framed into abstract human rights language that could be invoked by both sides. And just like in the Victorian era, the faith of the campaign was soon snatched out of the hands of the activists that had launched the process. Although feminist gained more power and an active role in global governance by linking up with political actors, they also exposed their cause to the whims of power politics. The two important documents at the turn of the 21st century, the U.S. Trafficking Victims Protection Act (TVPA) and the Trafficking Protocol do not seem to be so much a result of a careful balancing of the needs of the victims of trafficking as manifestations of the prevailing American political atmosphere.

The TVPA was a clear expression of the liberal view of the Clinton administration and contained a very narrow definition of trafficking. This approach also held fast in the drafting process of the Trafficking Protocol, although the structuralist NGOs were able to counter the influence of the liberal view much more effectively due to their leverage in the Working Group on Slavery and their experience with the UN framework, as well as the shifting political atmosphere in the U.S. The definition of trafficking was, therefore, much wider in the international sphere but perhaps still represented the liberal view. According to Article 3(b) of the TP, consent of the victim is deemed irrelevant where any of the means found in the definition of trafficking (Article 3) have been used, which means, impliedly, that

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131 Merry 2006 at 132.
132 See Ditmore 2005 at 114.
consent is relevant when none of those measures is used, thus recognizing the possibility of choice in trafficking (and in prostitution).\textsuperscript{135} Things changed dramatically, however, as soon as Bush succeeded Clinton in the White House.\textsuperscript{136} Bush, influenced strongly by religious groups and committed personally to the anti-trafficking effort, adopted the abolitionist view and devoted great amounts of resources to the fight against THB. In his presidential directive on THB, Bush defined prostitution as “inherently harmful and dehumanizing.”\textsuperscript{137} At latest at this point the feminists were deprived of their campaign, for the religious groups, that had originally assisted the structuralist feminists, overtook the place of the feminists in the administration.\textsuperscript{138} In 2007 the State Department’s website proclaimed that: “[n]o U.S. grant funds should be awarded to foreign non-governmental organizations that support legal state-regulated prostitution.”\textsuperscript{139} It could be claimed, therefore, that just like in the 19\textsuperscript{th} century England, the campaign was transformed into a social purity campaign as the Bush administration “committed to a far-reaching attack on commercial sex [targeting not only THB but also] prostitution, strip clubs, and pornography — all of which are associated with sex trafficking according to crusade leaders and government officials”, \textsuperscript{140} These changes obviously had direct consequences also outside the U.S, as already witnessed in the case of the Trafficking Protocol (Hila Shamir, for example, shows that the Israeli governments approach to THB is directly correlative to the political atmosphere in the U.S.\textsuperscript{141}).

The women’s movement and the more modern feminists groups have played a vital role in the birth of the human rights approach, then. The adaptation of the human rights language among the women’s movement opened ground for the anti-trafficking campaign to follow, and the feminists, having become important players in global governance, have played a key role in indoctrinating the human rights approach into the consciousness of legislators and policy-makers, both on the international and on the national level. There are some dangers in this approach, too, however. Although I do not doubt that the primary aim of the feminists has always been to help the victims of trafficking, it seems that this wish has not been the sole motivation behind the adoption of the human rights language — the dominance of the rights language, and the legitimacy boost that they bring in power struggles also played a


\textsuperscript{136} On Bush’s actions against THB, see Berman 2005-2006 at 290-291.


\textsuperscript{138} Halley et al. 2006 at 356-360; Berman 2005-2006 at 275-276.

\textsuperscript{139} Quoted in Weitzer 2007 at 464. This applied also to Justice Department’s funding for research on THB.

\textsuperscript{140} Weitzer 2007 at 466.

\textsuperscript{141} Halley et al. 2006 at 363-368.
vital part. There is nothing terrible about this, necessarily, if the end-result is the increased protection of the human rights of the victims. But the aura of legitimacy created by human rights also allowed measures that are against their function. As we have noticed, the bureaucratization of the anti-trafficking campaign also transformed the content of the campaign. It is not, perhaps, completely unreasonable to conclude that the campaign was ‘hijacked’ by authorities in the sense that Douzinas lectures about regarding human rights in general: the feminists were so preoccupied with the conflict between abolitionist and pro-work approaches to sex work and questions of governance that they missed the fact that serious human rights problems quietly slithered their way into the documents, with states being able to use their internal schisms to introduce tighter border control measures.142

2.3.2 Human rights NGOs and local activist

The other relevant actors in the process of translation of the anti-THB cause into human rights language are human rights NGOs that got interested in the cause, and local activists and movements fighting for the attention of funders. Both have been important actors in raising awareness of the trafficking problem, for well known international NGOs, such as Amnesty International and Human Rights Watch, with efficient marketing techniques, provide publicity for the cause, whereas local NGOs are often well connected and networked in the grass root level, operating daily with both trafficked persons and state authorities. In this context, too, we can see several, sometimes conflicting, interests guiding the translation process alongside the will to help the victims of trafficking. The set of NGOs is even more heterogeneous here than in the case of feminists, however, the field consisting of global human rights NGOs, funders, countless small NGOs helping trafficking victims locally, and everything in between. In this study, I must resort to a very crude generalization and concentrate my attention only on the simplest examples: the global human rights NGOs and the local activist groups. I shall start with the former.

It is a common thought that NGOs make their decisions on a purely humanitarian basis and therefore concentrate their attention to the crises which cause most suffering. A considerable number of studies suggest that things are not quite this simple, however.143 While driven with

142 See in general Hathaway 2008-2009.
a sincere will to help, NGOs — being just organizations, although particularly noble ones, after all — must still base their decisions as much on strategic and structural as moral grounds in order to survive. In a world of scarce resources, Amnesty International, Human Rights Watch and other global NGOs have under compulsion become brands that must treat each other increasingly as competitors, which means that they must concentrate their resources to such conflicts and violations that provide profit — that is to say interest the audience and the associates, and seem cost-effective. Consequently, states, groups and movements with most publicity, resources, and contacts are most interesting for NGOs.

As Upendra Baxi explains:

[B]oth the NGOs and funding agencies compete for scarce resources; this scramble for support generates forms of investor rationality, which may be generally defined as seeking a tangible return on investment.

In addition to scarce resources and each other, NGOs must also combat against compassion fatigue. To quote Baxi again:

Human rights violations must be constantly commoditized to be combated [...] Injustice and human violations is headline news only as the pornography of power, and its voyeuristic potential lies in the reiterative packaging of violations that titillate and scandalize, for the moment at least, the dilettante sensibilities of the globalizing classes.

If we forget, for a brief moment, all the humanitarian causes affecting the work of NGOs, imagine that there exists a human right markets where NGOs act (depending on the perspective) as buyers or producers and different human rights violations, problems and crises act as products, and look at things from a purely economical view, it is not difficult to see that trafficking in human beings is the luxury product — the Armani, Ferrari or Jimmy Choo — of this market. There is everything in human trafficking that NGOs could hope for: constantly increasing publicity, terrifying (and therefore interesting) stories, innocent,
beautiful victims, as well resources and contacts provided by different kinds of campaigns and state interests. It is, therefore, clear that trafficking is a very tempting object of investment, both from a humanitarian and an economical point of view. But crucial here is that, in order to become an acceptable target of a campaign, trafficking must be pictured as a human rights issue, for it is vital that organizations, including human rights NGOs, are seen to achieve the function that they were founded for — that they fulfill their *raison d’être*.\(^{148}\)

The function of human rights NGOs being the campaigning for human rights, it is necessary for them to translate trafficking into human rights language.

A similar logic affects the local NGOs and activists, too. In many states, it is NGOs that have taken up the task of assisting the victims of trafficking, providing “social and psychological assistance, shelter provision, […] return and reintegration assistance […] and legal advice[…]”\(^{149}\) NGOs are, indeed, often better placed to help the victims than official authorities, since many victims, immigrating illegally, or having had their documentation removed by traffickers, hesitate to contact authorities. The NGOs also provide a more gender neutral environment for the victims in many states.\(^{150}\) All the tremendously important work of NGOs require a lot of resources, however, meaning that NGOs often have “limited capacity to provide all the basic needs of […] trafficked survivors”,\(^{151}\) as put by Marina Tzvetkova. The NGOs must, therefore, “work in co-operation with other professionals and organisations.”\(^{152}\) Shelters for the victims, for example, "are often funded by international agencies and administered by local NGOs."\(^{153}\) It is, thus, of crucial importance that local actors can raise the attention of funders. To achieve this, they must modify their campaign so that it fits the goals and the image of the funding NGO: the aims of the campaign must be fitted into a globally accepted frame.\(^{154}\) Here human rights come to play a key role, once again. Since human rights provide the most universally accepted option, it is natural that grass root actors (and others) strive to translate their claims into human rights language. This trend is further strengthened by the fact that the most powerful so-called "gatekeeper NGOs”

\(^{148}\) Bob 2005 at 15.
\(^{149}\) Tzvetkova, Marina, NGO responses to trafficking in women, 10 *Gender and Development* 2002, 10-68 at 61.
\(^{150}\) Ibid. at 61.
\(^{151}\) Ibid. at 61-62.
\(^{152}\) Ibid. at 62.
\(^{153}\) Ibid. 2002 at 62.
\(^{154}\) Bob 2005 at 26-28. See also Merry 2006 at 54.
are currently human rights organizations, such as Amnesty International and Human Rights Watch.\(^{155}\)

### 2.3.3 What can we learn from this?

We can conclude, then, that the translation process is, in the case of trafficking, guided by several interests and necessities — as it always is. The will to help the victims of trafficking is certainly the most prevalent one in this respect, but there are also other reasons behind the translation process, ones that are required for structural reasons, in order to keep the various activist organizations and movements alive. Being able to put one’s claims into human rights language seems like a vital condition for many actors on the field. Nevertheless, this multicolored past of the human rights approach to trafficking seems to explain why it has remained quite vague and unfocused so far.

Not too much should be read into this, however. For those working daily with trafficked women, it must seem self-evident that trafficking constitutes a grave human rights violation. I am not suggesting, therefore, that these activists working daily to make the world a better place would see the victims — or human rights, for that matter — as merchandise, but it is clear that some economic calculations and structural biases must play a role in the background, at least subconsciously. There is nothing scandalous in this, of course, nor does it seem like a particularly terrible thing — the end-result is the promotion of the rights of the victims, after all, and the protection of victims should be the primary objective in fighting any crime. There could lie some unintended dangers in this approach, however, considering the open nature of human rights and their capacity to be invoked for various causes. It is always necessary to reflect critically one’s own actions and motivations before suggesting human rights as a catch-all-solution. As David Kennedy writes:

> The vague and conflicting norms, their uncertain status, the broad justifications and excuses, the lack of enforcement, the attention to problems which are peripheral to a broadly conceived program of social justice — all these may, in some contexts, place the human rights movement in the uncomfortable position of legitimating more injustice than it eliminates.\(^{156}\)

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\(^{155}\) “Gatekeeper” refers to NGOs whose field research smaller NGOs (with insufficient resources for research of their own) rely on. It is extremely vital for local activists and movements to raise the attention of these “gatekeepers”.

This is particularly a problem when the human rights discourse merges with foreign policy processes,\textsuperscript{157} such as in the case of THB, where THB became a central political goal (and tool) of both the Clinton and Bush administrations. As cynical as it may sound, the presence of the human rights movement may indeed make global governance blind to the bad consequences of its actions “by strengthening the habit of understanding of international governance in legal terms rather than political terms [and weakening] its ability to perform what we understand domestically to be these political functions”,\textsuperscript{158} as Kennedy suggests. Procedures to enforce human rights may become rituals that direct attention away from the actual targets of the whole campaign, the victims of THB, and their problems, and other interests, such as political aims or the desire to build the anti-THB (or anti-prostitution) movement may take their place.\textsuperscript{159} “[Human r]ights language”, Merry explains, is [usually] adopted because it offers political possibilities to activists [and political actors].”\textsuperscript{160} In the translation process, international, often elitist, perspectives are translated down more than grass root aims are translated up. There is, therefore, a great danger that the needs of the victims of THB are set aside and are never transformed, just like the battered or discriminated women’s own experiences were alienated in the cases that Merry herself studied.\textsuperscript{161} For example Merry’s research on Female Inheritance Movement in Hong Kong demonstrates that the movement’s activism “depended on a complex layering of distinct groups with quite divergent ideologies.”\textsuperscript{162} Although the village women campaigned on behalf of their human right to equal inheritance, they were not very committed to this matter, but rather protested against much more specific injustices. According to Merry, it was local women’s groups that translated the grievances into human rights language so that transnational elites in Hong Kong, interested in human rights, could hear their protest: it was not necessary, in other words, for the rural women to have a deep commitment to human rights.\textsuperscript{163}

I must therefore conclude my general excursion into the human rights approach by returning to the level of academic publications and assessing legally and critically the arguments asserted in the name of the human rights approach. How are the various interests and

\textsuperscript{157} Ibid.
\textsuperscript{158} Ibid. at 31.
\textsuperscript{159} See Kennedy 2004 at xxi.
\textsuperscript{160} Merry 2006 at 215-216.
\textsuperscript{161} Ibid. at 216.
\textsuperscript{162} Ibid. at 193.
\textsuperscript{163} Ibid. at 193.
incentives behind the translation process crystallized into actual legal and policy claims, and how capable are these actually alleviating the plight of the victims?

2.4 Assessing the human rights approach to trafficking

After a study of academic texts advocating the human rights approach to THB, it is possible to identify at least four — or maybe I should say three and a half — claims made in the name of the human rights approach. First, it has been demanded that traffickers should be made responsible of their violations under human rights law.\(^{164}\) Second, it has been claimed that states drive the victims of THB in the hands of the traffickers by violating their obligations following from economic cultural, social and cultural rights.\(^{165}\) Third, it has been argued that the treatment of the victims of trafficking on behalf of the governments constitutes a human rights violation.\(^{166}\) The final factor was called only half a factor, for it is actually related to all of other dimensions of the human rights approach. This is the claim that the three other factors (or at least one of them, depending on the author), require a specific right to be free from trafficking to be effective.

The sensibleness and assertiveness of these dimensions of human rights approach seem to vary. Let’s go through them one at a time. To recap, the first dimension is that THB violates the human rights of the victim. If we reflect on what elements this kind of crime consists of, it becomes clear that the crime of THB does indeed include several severe human rights violations. The freedom of the victims is restricted; they may be subjected to cruel or inhuman treatment, even torture, to coerce them to follow orders; victims are usually deprived of their property; transportation risks the health of the victims; even right to life may be threatened, for victims are often transported in overcrowded, dangerous ships and boats and, in some very extreme cases, disobedient individuals may even be murdered to frighten others. In their destination, the victims are often forced to work with minimal pay in horrible conditions, violating right to just and favorable conditions of work. It is not a surprise, then, that the ECtHR came in its case \textit{Rantsev v. Cyprus and Russia} to the conclusion that:

\(^{164}\) See for example Twomey, Patrick, Europe’s Other Market: Trafficking in People, 2 \textit{European Journal of Migration and Law} 2000, 1-36 at 27.
\(^{166}\) Twomey 2000 at 28-29.
There can be no doubt 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.  

But, as we witnessed in the Introduction, almost any act or desires can be turned into a human right — or the violation thereof. Therefore, every crime consists of a human rights violation, at least in theory. Murder is a clear violation of the right to life, battery can be seen as inhuman treatment, or even torture, and theft violates the right to property and so on. Nevertheless, it would seem strange to treat these crimes in the court as human rights violations. The reason for this is clear: human rights are usually understood to operate in the relationship between individuals and the state. In human rights cases, the perpetrator is the state and the victim the individual. But in the above mentioned crimes, the perpetrators are the murderer, a frustrated gang of teenagers or a drunken husband and the pickpocket in need of some cash — in other words, another individual or a group of them. THB is not an exception in this matter. Although trafficking can include bribed border guards, for example, it is in most parts an activity practiced by private actors, be they individual criminals or larger criminal organizations. Someone forces or deceives the victim to join her and hands him/her to someone else to be transported, or transports him/her by herself into a new destination where (s)he is abused in some way, for example in a private business activity. THB is, therefore, fundamentally a quite conventional — although particularly heinous and often transnational — crime.

This argumentation can be criticized of oversimplification at least on two grounds, however, as was hinted already in the (real) introduction of this Chapter. First, one could point out that my view of a human rights violation as something between an individual and the state is outdated. As the court practice of the ECtHR shows, human rights do also possess a horizontal effect. Individuals must respect the human rights of each other. But as true as this may be — as witnessed already in the critique presented in the last section towards the expansion of the human rights phenomenon — another human being cannot be sued in court for her human rights violation (except in very particular cases). The horizontal effect of human rights has admittedly been increasing its support, and it is therefore suggested by

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167 Rantsen v. Cyprus and Russia, para. 282.
166 See Piotrowicz 2009 at 193-194.
165 X and Y v. Netherlands, Application no. 8978/80, European Court of Human Rights, Court (Chamber), Judgment, 26 March 1985, para. 23.
164 An important exception is the International Criminal Court, in which an individual can be accused of human rights violation, if they cross the threshold of crimes against humanity. It has been claimed that THB could meet this criterion. See Obokata 2006 at 133-144. On the competence of the ICC in respect of human rights violations, see Cassese, Antonio, International Criminal Law, Oxford University Press, Oxford, 2003 at 64-66.
some commentators that approaching the case with too much caution serves only to “justify lesser obligations [on] corporations” and other non-state actors, but the fact is, nevertheless, that such an effect is not well established legally, and does not, therefore, constitute a very effective tool for the victims or their representatives. The horizontal effect means, therefore, at best, that the state must protect the subjects of its jurisdiction from human rights violations.

This leads us to the second claim of oversimplification. Could it not be argued that THB is a human rights violation on the basis that the state has allowed such a terrible crime to occur? As stated, a state does indeed have a certain responsibility, deriving from its international obligations, to protect those under its jurisdiction, and according to the preamble of the ECAT, trafficking constitutes a violation of the human rights of the victim. Furthermore, the ECtHR has in its case Siliadin v. France explicitly stated that states have a positive obligation to combat slavery and forced labor, and it was reaffirmed in the case Rantsev v. Cyprus and Russia that this obligation includes fighting trafficking. But — as regrettable as it may be — it cannot be realistically expected that the positive obligation could mean that a state must be able to prevent all crimes under its jurisdiction. States usually fulfill their responsibility to protect with legislation that criminalizes certain acts and adequately protects victims of crime. It cannot, therefore, be held responsible for a crime solely on the basis that an individual under its jurisdiction has been trafficked. The responsibility would require a significant negligence of the state’s responsibilities. This is reflected also in Rantsev, where the Court could find Cyprus and Russia violating their obligation under the Convention only on the basis of failing to effectively inspect the death of the daughter of the applicant (and for unlawful and arbitrary detention, in the case of Cyprus), not on the basis

171 Pati 2011 at 137.
172 Roth 2010a at 107; Piotrowicz 2009 at 193.
175 The court starts by notifying that Article 4 of the Convention does not refer to human trafficking (para. 272). It goes on to remind, however, that the Convention is “a living instrument” and “must be interpreted in light of present day conditions.” (para. 277) The Court “observes that the International Criminal Tribunal for the Former Yugoslavia concluded that the traditional concept of ‘slavery’ has evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership”, (para. 280) and therefore concludes that trafficking “falls within the scope of Article 4 of the Convention.” (para. 282) See also Pati 2011 at 93-94. For the case law of the International Criminal Tribunal for the Former Yugoslavia on slavery, see especially Prosecutor v. Kunarac, Vakovic and Kovac, Case no. IT-96-23 & IT-96-23/1-A, ICTY Appeals Chamber, Judgment, 12 June 2002, paras 117-119.
176 Piotrowicz 2009 at 195-196.
of failing to take the necessary steps to combat trafficking or protect the life of the victim.\textsuperscript{177}

The Court explicitly stated, in fact, that:

In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked […]\textsuperscript{178}

This was followed with the reminder that:

Bearing in mind the difficulties involved in policing modern societies and the operational choices which must be made in terms of priorities and resources, the obligation to take operational measures must […] be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities […]\textsuperscript{179}

It would, therefore, seem that the appeal of this first dimension of the human rights approach depends on one’s perspective. The dimension certainly has merit from a more general perspective. It could be important for the victim to know that his/her suffering constitutes a human rights violation and this might also bring more compassion for the victims. Sadly, this does not seem to offer much relief for the victim from a strictly legal perspective, however. Since human rights do not usually have a horizontal effect (in practice), the fact is that whether the human rights of the victim have been violated, or not, matters only in some very exceptional cases (although it is good to know that there is such a backup if states act in a clearly negligent way).

The situation is quite similar regarding the second dimension of the human rights approach. This is the claim that states — and not least those rich Western states most enthusiastically fighting against THB — have enabled the abuse of the (soon to be) victims of THB, and therefore the whole phenomenon, by failing to oblige with their obligations to provide adequate standard of living, education, opportunities, health care, protection from discrimination and violence, and so on, to individuals, and have therefore driven the least

\textsuperscript{177} \textit{Rantsev v. Cyprus and Russia}, Application no. 25965/04, European Court of Human Rights, Court (First Section), Judgment, 7 January 2010, paras 234-247, 290-309, 314-325.

\textsuperscript{178} \textit{Ibid.}, para 286.

\textsuperscript{179} \textit{Ibid.}, para 287.
well-off into a situation where they are easy targets for exploitation, including THB.\footnote{Mattar 2006 at 252-258. See also UN Economic and Social Council, \textit{Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council}, UN Doc. E/2002/68/Add. 1, 20 May 2002 at 11-12.}

Accordingly, there is, as Alice Edwards writes,

> a strong need for human rights discourse around human trafficking to be broadened to consistently acknowledge and address root causes, and not only victim’s rights. Trafficking occurs along a continuum from the country of origin through to the country of origin, transit, and destination. Human rights treaties on economic, social and cultural rights have a key role to play in this regard.\footnote{Edwards 2007-2008 at 47.}

This is also often framed as a human security approach to THB. As Mohamed Y. Mattar explains,

> [a]pplying the extended concept of human security means that it is necessary to address not only the right of the trafficked person to personal safety, but the other aspects of human security as well, including economic security, political security, legal security, and community or cultural security.\footnote{Mattar 2006 at 254.}

This argument is excellent and cuts deep into the hearth of the whole problem. States have traditionally been unwilling to commit to even minimal redistribution of wealth and have, therefore, been incapable to combat the most fundamental reasons of THB. Something akin to the capabilities approach developed by Amartya Sen and Martha Nussbaum could indeed be the most elegant and efficient solution to the trafficking quagmire.\footnote{See Sen, Amartya, \textit{Development as Freedom}, Oxford University Press, Oxford, 1999; Sen, Amartya, Human Rights and Capabilities, \textit{6 Journal of Human Development} 2005, 151-166; Nussbaum, Martha C., \textit{Women and Human Development: The Capabilities Approach}, Cambridge University Press, Cambridge, 2000. See also Cavalieri 2011 at 1455-1458.} But, taking into consideration that the negligence of the economic, social and cultural rights, and the question of redistribution of wealth have for a long time been the topics of a much wider discussion, it must be questioned whether the trafficking discourse is the best platform to approach these issues, although it is certainly important to make the connection between poverty and trafficking clear. While fighting for the still groundlessly neglected economic, social and cultural rights is a tremendously important task, narrowing the discussion to THB does not seem to add anything to the paradigm, but risks leaving important factors out of the equation. Attempting to construct the much needed campaigns against poverty in order to stop trafficking would most likely mean feeding one’s fuel for the wrong fire (although if there was a chance that one would actually succeed in eradicating poverty through this channel, who would I be to criticize?). Besides, if we put the black-letter lawyer glasses back on, it seems impossible to successfully argue that a state could be made responsible of THB solely...
on the grounds that it cannot provide its citizens (or the citizens of some other state) the standard of living demanded in a human rights treaty, even though I do not doubt that publicists such as Caraway are right, when they proclaim that, "[i]f slavery stops being profitable, and women are empowered, educated, employed, and respected, the practice of human trafficking will be contained."\footnote{Caraway, Nancie, Human Rights and Existing Contradictions in Asia-Pacific Human Trafficking Politics and Discourse, 14 Tulane Journal of International and Comparative Law 2005-2006 at 316.} We have to remain realistic. As stated by Mattar himself (although I admit that I am taking the phrase quite out of the context): “In essence, human security can encompass almost anything related to people’s lives […]”\footnote{Mattar 2006 at 252.} The ineffectiveness of a state can indeed have affected the crime — and many other problems — but this does not mean that the state has involved into the crime or has consciously allowed it to occur.

The last target of the human rights approach to THB is the unsatisfactory treatment of the victims of trafficking by state authorities, after the victims have ‘escaped’ from the hands of their abusers. Indeed, the stand of authorities towards victims, often seeing them as criminals, the deportations of victims and the difficulties in courts have been widely reported in academic literature.\footnote{See for example Gallagher, Anne T., Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway, 49 Virginia Journal of International Law 2008-2009, 789-848 at 831; Fitzpatrick 2002-2003 at 1154.} “[I]t is not unusual”, according to Joan Fitzpatrick, for example, “for foreign women and children who have been trafficked to be arrested, detained in immigration or criminal facilities, punished for engaging in prostitution or violations of immigration laws and deported […]”\footnote{Fitzpatrick 2002-2003 at 1154.} It is here, then, that we come to the most relevant dimension from the strictly legal perspective. In mistreating the victims of trafficking, the state directly violates the rights of an individual as well as its responsibility to protect, constituting a human rights violation in its most traditional sense. This kind of treatment also usually follows from inadequate legislation on the matter, or from the unwillingness to apply the provisions, unlocking, therefore, all the tools that were out of the reach of the ECtHR in Rantsev. It is here at latest, then, that the human rights approach has finally won me on its side, if I was still a little hesitant before.

What it all comes down to, however — and this is relevant regarding all of the dimensions of the human rights approach, not just this third one — is the question, whether the campaign
for the rights of the victims should be carried out within the existing human rights and
criminal law frameworks, or whether the victims of trafficking require their own human
rights, the right to be free from trafficking, or something similar. Roza Pati concludes, after
listing all the human rights that the act of trafficking could possibly violate, that:

If these provisions can be legitimately called rights and a part of the human rights universe,
then it is scarcely comprehensible why the more fundamental right underlying all human
trafficking instruments, the right to be free from being trafficked, can only be part of the
criminal law. Both with respect to structure and content, this right is no different than the right
to be free from torture or the right to life.\footnote{Pati 2011 at 138. Emphasis mine.}

She continues that:

Consequently, human trafficking deserves precedence under the hierarchy of evils that
overpower the social fabric of our everyday lives. The plague of its casualties is unspeakable
and is immeasurably aggravated by the element of transnationality and by the specific
characteristics of many of its forms.\footnote{Ibid. at 139.}

But is it really necessary to have a specific right against trafficking to fight for the rights of
the victims? What bothers me in this is the despair of the advocates of this approach to prove
that the victims of THB do indeed have human rights. But this should be a given, something
that should go without saying — and there are indeed multiple human rights that already fit
the situation, as was proved in Rantsev. If we believe that there exists such a thing as human
rights out there, then the victims of THB have human rights simply because they are people,
not because they are victims of THB. It is my fear, then, that it is here — as admirable, pure
and innocent as the aim might be — that the whole movement could make an honest
mistake, one that could trigger many of the backlashes that David Kennedy warned us of,
regarding human rights and humanitarianism in general. It is also in this kind of situation
that the potential problems relating to the expansion of the human rights phenomenon could
possibly be activated, the specialized right requiring more detailed legislation and the
application of expert knowledge.

The specification of human rights law regarding a specific topic could also cause problems
to other human rights campaigns. Signs of this have already been reported in the case of
THB. James Hathaway lists three problems related to the attention given to the anti-THB
campaign. First, concentrating on THB steers focus away from a larger human rights
problem, namely slavery. Most of the modern day slaves are not victims of THB and are
therefore left without protection. According to Hathaway, combating slavery would be too
massive an economic sacrifice for many states, and the fight against THB provides them a
chance for an undeserved vindication. Secondly, the campaign also justifies the criminalization of smuggling. But since illegal crossings of borders will never stop in our unequal world, the criminalization of smuggling forces migrants to turn to professional criminal organizations, which raises prices and enables exploitation, such as THB. Finally, the fight against THB justifies hardened border control, which threatens the rights of refugees (for example).\footnote{190}{Hathaway 2008 at 3-35. Hathaway’s arguments have been criticized, however. (See Gallagher 2008 for Anne Gallagher’s response James Hathaway’s article). It is my opinion, however, that Gallagher misunderstands what Hathaway is arguing. Gallagher focuses in her response to the defense of the criminal law approach, adopted in the Trafficking Protocol, against a human rights approach. But Hathaway attacks primarily the attention that the anti-THB campaign has achieved and the damage this has caused to more general human rights campaigns (although part of the critique relates to the increased border control and the criminalization of smuggling). Hathaway does not argue, therefore, that a human rights approach would have been a more efficient way to combat THB than the criminal law approach, but that THB should be combated as a part of a larger whole.}\footnote{191}{Pati 2011 at 121-122.}

Moreover, it must also be asked, whether it is rational to approach trafficking, and the rights of the victims, primarily through human rights instruments, or whether it should be approached as a criminal law matter, but simply with a better consideration of its human rights dimensions. Labeling an act or a treaty as a human rights treaty does not improve the situation of the victim in any significant way, if the criminal law treaty already contains provisions of a reflection period and other relevant safeguards, as is the case in most of these treaties. Actually, the ECAT, celebrated as the first human rights treaty on trafficking, does not seem to differ from the TP as much as one could assume. As Pati writes, “[i]ts provisions are similar in many respects to the Palermo Protocol [adopting] the same definition of trafficking as the Palermo Protocol and focus[ing] on prevention, protection, and prosecution.”\footnote{192}{Article 6(3), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (opened for signature 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319, Finnish Treaty Series 70/2006. See also art 7(1).}\footnote{193}{Article 6(5), ibid.}\footnote{194}{Article 7(2), ibid.}\footnote{195}{See also Gallagher 2001 at 990-991; Simon 2009-2010 at 644-650; Warren 2007 at 250.}\footnote{196}{Article 13(1), Council of Europe Convention on Action against Trafficking in Human Beings (opened for signature 16 May 2004, entered into force 1 February 2008), Council of Europe Treaty Series – No. 197.} It is certainly true that the Convention takes some very significant steps forward in comparison to the TP in replacing the vague, unbinding provisions on the repatriation of the victims, reflection periods and residence permits — consisting of such legal nightmares as “[e]ach State Party shall consider implementing”;\footnote{197}{Hathaway 2008 at 3-35. Hathaway’s arguments have been criticized, however. (See Gallagher 2008 for Anne Gallagher’s response James Hathaway’s article). It is my opinion, however, that Gallagher misunderstands what Hathaway is arguing. Gallagher focuses in her response to the defense of the criminal law approach, adopted in the Trafficking Protocol, against a human rights approach. But Hathaway attacks primarily the attention that the anti-THB campaign has achieved and the damage this has caused to more general human rights campaigns (although part of the critique relates to the increased border control and the criminalization of smuggling). Hathaway does not argue, therefore, that a human rights approach would have been a more efficient way to combat THB than the criminal law approach, but that THB should be combated as a part of a larger whole.}\footnote{198}{Gallagher 2001 at 990-991; Simon 2009-2010 at 644-650; Warren 2007 at 250.}\footnote{199}{Hathaway 2008 at 3-35. Hathaway’s arguments have been criticized, however. (See Gallagher 2008 for Anne Gallagher’s response James Hathaway’s article). It is my opinion, however, that Gallagher misunderstands what Hathaway is arguing. Gallagher focuses in her response to the defense of the criminal law approach, adopted in the Trafficking Protocol, against a human rights approach. But Hathaway attacks primarily the attention that the anti-THB campaign has achieved and the damage this has caused to more general human rights campaigns (although part of the critique relates to the increased border control and the criminalization of smuggling). Hathaway does not argue, therefore, that a human rights approach would have been a more efficient way to combat THB than the criminal law approach, but that THB should be combated as a part of a larger whole.}]\footnote{197}{Hathaway 2008 at 3-35. Hathaway’s arguments have been criticized, however. (See Gallagher 2008 for Anne Gallagher’s response James Hathaway’s article). It is my opinion, however, that Gallagher misunderstands what Hathaway is arguing. Gallagher focuses in her response to the defense of the criminal law approach, adopted in the Trafficking Protocol, against a human rights approach. But Hathaway attacks primarily the attention that the anti-THB campaign has achieved and the damage this has caused to more general human rights campaigns (although part of the critique relates to the increased border control and the criminalization of smuggling). Hathaway does not argue, therefore, that a human rights approach would have been a more efficient way to combat THB than the criminal law approach, but that THB should be combated as a part of a larger whole.}
‘human rights document’ — a title that derives, to my understanding, from the facts that it is drafted within the Council of Europe framework and recognizes trafficking as a human rights violation in its preamble — or whether this is simply because the Convention was drafted five years later, in a regional setting, and within a much smaller and much more homogeneous group of states, than the TP (meaning that it is much easier to come into agreement on more binding terms).

The steps taken in the ECAT, as important as they are, are also subject to some criticism, with Simon noting that the reflection period “is limited to a short period of time, and therefore, does not offer any guarantee that once it has expired the victim will not be returned to its country of origin”; and that lacking “national or even regional assessments regarding the appropriateness of return, repatriation procedures may leave space for forced return to a place which could present further risks of abuse, stigmatisation or retrafficking.” Furthermore, the right to remain in the country of destination is left “at the discretion of state parties “, instead of being “a decision based solely on whether the victim risks serious abuse in the prospective country of return”, meaning that “a protection gap exists in the anti-trafficking framework and needs to be filled.”

What matters with regard to both of these treaties, and treaties in general, then, is, in the end, the application of the treaty, and there is a great danger that a human rights treaty would be applied that differently from a criminal law treaty, taking into account the notorious indeterminacy and the already mentioned bureaucratization of human rights. More importantly, regulating trafficking through a detailed human rights treaty would be a step from the ‘core’ of human rights towards positivism and state sovereignty. It would mean abandoning the protest function of rights and activating the bureaucracy and administrative mechanisms of the state. No longer would it be possible to contest the inhuman treatment of the victims by invoking the most inalienable rights of every individual, if the application of the (criminal law) documents fails — that is to say to contest the treatment simply because it is clearly wrong and unjust — but one would have to invoke specific provisions of a specific treaty, and to the incalculable exceptions thereof, the interpretation of which would be solely in the hands of the (expert) judges and other (expert) authorities. We could therefore end up

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197 Simon 2009-2010 at 647. The limited nature of the reflection period has not escaped the notice of the drafters of the ECAT. Article 14 of the Convention provides for a renewable residence permit in certain circumstances. The permit depends, however, on an exceptional ‘personal situation’, leaving a very wide margin of discretion to the authorities, or on the willingness of the victims to participate in the investigation of the crime and their usefulness therein (their help has to be ‘necessary’). See Simon 2009-2010 at 648-649.

198 Ibid. at 646.

199 Ibid. at 650.
in the same situation in which we are now with criminal law provisions and various regulations, but without the moral and ‘universal’ protest of human rights to back us up.

An ideal situation from a human rights perspective would be one where the concept of trafficking would be required only for criminal proceedings against traffickers and the right to remain and the possibility for assistance would be provided for all immigrants (if this is what they want). Since it is unrealistic to assume that this would happen anytime soon, however, we are forced to choose between inadequate solutions. In this situation, I am not too optimistic of an approach that would utilize human rights for very detailed legislation. While I completely agree with human rights activists in that the importance protection of the victims of trafficking greatly outweighs that of the prosecution of traffickers, and share with critics the worry of the utilization of the trafficking discourse as a way of tightening borders and other security measures, I might prefer approaching trafficking through criminal law instruments — although ones that give adequate protection for the victims — and reserve human rights for the interpretation of this legislation and for a tool of protest in case that the application of this legislation leads to negative results — that is in case that we take a truly radical reform in favor of the human rights of immigrants out of the equation, of course. In my interview with her, the Finnish National Rapporteur on Trafficking in Human Beings, Venla Roth, told that she understands the human rights approach as a method through which authorities (and others, such as the scholars criticizing these authorities) could assess their cases. It is my opinion that this seems like a very reasonable way of approaching the present situation.

We cannot draw very far reaching conclusions simply on the basis of these very general and theoretical considerations, however. We must, therefore, study this last dimension of the human rights approach, the violation of the rights of the victims on behalf of the state (in the form of deportations and other such measures), that gained my trust in the human rights approach, in greater detail. In the next Chapter, we shall, then, descend from the level of theory to the level of practice, to the intricate web of practices and discourses that makes the situation of the victims of trafficking so complicated. Can human rights provide help for the victims of trafficking, and if so, in what form?
3. Biopolitics of trafficking in Finland and elsewhere

3.1 Introduction

As we have seen, THB has become the target of global moral outrage, and states have shown great enthusiasm to combat this atrocity. Despite some problems, this combat, including the protection of victims, has found its way reasonably well into international documents and national legislation. In the (few) court cases where judgments of THB have been handed, the penalties have generally been quite severe. States therefore want to give a clear signal that they are seriously committed to the fight against trafficking.

But the actual application of the impressive documents seems to be strikingly different than the grandiose campaigns and the spent resources would lead one to believe. Several problems have been discussed in academic literature. First of all, it is criticized that the acts of the authorities seem to concentrate primarily on preventing illegal border crossings, i.e. in smuggling. If the traffickers manage to cross the border legally, the trafficking crime will quite likely remain undetected. Authorities also often overlook the use of the state’s soil as a waypoint in trafficking. To exaggerate a little bit, the attitude seems to be that as long as illegal aliens do not stay in their area, everything is fine. Secondly, it is pointed out that very few judgments have been handed over the crime of THB, while at the same time potential victims of THB are often deported as illegal aliens. All in all, the identification of victims seems to be the greatest challenge in the fight against THB. Even if the victims are identified, the rights granted to them in international documents are seldom realized in practice. Staying in country is often possible only if the victim testifies in court against the traffickers or is otherwise for use in the solving of the crime, and even then only


203 See Mattar 2006 at 268-271; McGaha and Evans 2009.
temporarily.\textsuperscript{205} It is also not uncommon that potential victims are closed to immigration facilities for indeterminate time or even prosecuted for status related offences such as illegal entry, illegal stay or illegal work.\textsuperscript{206} It has, then, been concluded by various authors, that the motivations of many states to fight trafficking are questionable at best. Anne Gallagher, for example, writes that “[s]ome states, aided and abetted by civil society groups, continue to manipulate the global momentum against trafficking to wage their own wars against perceived social harms such as prostitution and illegal migration.”\textsuperscript{207} I shall now look at these problems in more detail in the context of Finland.

3.2 (Anti-)Trafficking in Finland

It was for a long time believed by Finnish authorities — and seems to be believed by some still — that THB does not concern Finland.\textsuperscript{208} For example, in 2002, the Finnish National Bureau of Investigation estimated that all of the prostitutes that had arrived in Finland that year were fully aware of the nature, terms and conditions of their work, even if there was knowledge of means of pressure and coercion that the prostitutes were subjected to.\textsuperscript{209} This belief was shattered, however, at latest, when the Trafficking in Persons Report 2003 of the U.S. Foreign Ministry listed Finland among the states that did not meet the minimum requirements to combat THB. It was stated in the report — and every report since — that Finland functions both as a destination and as a transit country for trafficking. According to the Report 2010 of the Finnish National Rapporteur on Trafficking in Human Beings, trafficked persons are abused in Finland as prostitutes and as cheap (or free) labor, for


\textsuperscript{206} Gallagher 2008-2009 at 831; Fitzpatrick 2002-2003 at 1154.

\textsuperscript{207} Gallagher 2008-2009 at 830-831.

\textsuperscript{208} Nieminen, Liisa, Nais- ja lapsikauppa ihmisoikeusongelmana, 34 \textit{Oikeus} 2005, 130-156 at 131.

example in construction, restaurant, cleaning and horticultural sectors, as well as in berry-picking.

Worried of its international reputation, Finland quickly took appropriate measure to combat THB, and amended its criminal law provisions. THB is now punishable under Section 25, Articles 3 (trafficking) and 3a (aggravated trafficking) of the Penal Code. The former provision on kidnapping was abolished and included in the definition of aggravated trafficking under Article 3a. Article 3, therefore, covers such acts that are included in the TP but not in Article 3a. There is no mention about the consent of the victim, but this can be explained by the fact that the crime of THB is regarded to be so grave that it is impossible to validly consent to it.

Despite legislative amendments, other anti-trafficking measure and a positive change of attitude in Finland, the situation has not, unfortunately, improved significantly. As elsewhere, the greatest difficulty seems to be the identification of the victims of THB. The Finnish Ministry of Foreign Affairs has estimated that hundreds of victims of trafficking arrive yearly to Finland to be exploited here, or to be transferred to another country. Until 2010, only a few dozen victims were identified and guided to the victim assistance system. Even if it is possible that the statistics are exaggerated — reliable research on trafficking is notoriously difficult to achieve — it is clear that only a fraction of the victims are identified. The reasons are also similar as elsewhere. The Finnish National Rapporteur lists the following factors: THB is a hidden crime; victims are afraid of revenge if they identify themselves to the authorities; victims are suspicious of authorities; victims are hard to find, for they are marginalized; and the threshold for seeking help is high because the victims do not know their rights or are ashamed to betray their family or ‘friends’ (that often act as the perpetrators).

It seems insufficient, however, to explain the low number of identified victims solely on these grounds, connected to the nature of the crime. As Venla Roth notes, the problems of

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214 See Report 2010 at 45.
the authorities in identifying victims of THB is at least as important a factor. Victims of trafficking are again and again identified as prostitutes, undocumented aliens or illegal workers, which means that their access to the rights granted to victims of THB in international and national documents is denied and they are removed from the country.217 According to Roth “[t]he identification of [victims] is impeded, in particular, by the section of the Aliens Act under which an alien may be refused to enter the country if there are reasonable grounds to suspect that he or she may sell sexual services.”218 Between 1999 and 2007, the Border Guard authorities refused the entry of more than 1730 persons under the provision.219

The number of actual THB cases is also very low, even though the amount of cases that had elements of THB is much higher. Until now, only five cases have been heard in the Finnish courts as human trafficking. The first sentence for human trafficking in Finland was passed in July 2006.220 Members of an Estonian-Finnish criminal organization had procured 14 women, and the Helsinki District Court came to the conclusion that one of these women was trafficked. It noted that the definition of trafficking was met since the defendants had deceived the woman into prostitution by promising her a job as a nanny. The criterion of a vulnerable state was fulfilled since the woman suffered from mental health problems, and she also met the dependent status for she had been threatened with violence, should she not manage to pay her debt to the defendants. The court came to the conclusion that these facts also fulfilled the criterion of aggravated trafficking. The other women, however, had engaged in prostitution voluntarily, according to the court — a fact from which it drew the conclusion that they had not been trafficked, but procured, despite the very suspicious conditions under which the women has worked (including threats of violence against the women and their families, restrictions on their movement and different debts). Nothing changed in this respect in the Court of Appeal.221

In the second trafficking case (I am rejecting chronology for the sake of conceptual clarity, and address labor exploitation cases separately as cases four and five, despite the fact that the first of them was decided already in 2007),222 in summer 2008, a young Finnish girl was forced to sell sexual services to pay back a fabricated snitching debt. The defendants took control of the girl’s private property, emptied her bank account and made her take fast loans

219 Roth 2010a at 243.
220 Helsinki District Court, 20.7.2006, R 06/5204, 06/6857.
221 Helsinki Court of Appeal 1.3.2007, R 06/2317, decision no. 722.
that she was unable to pay back, rendering her to a state where she was unable to make independent decisions. She was also subjected to severe violence and threatened with death. The girl, the Court stated, therefore had no other choice but to submit to the demands of the defendants. The offence met the criteria of taking control of the victim, as well as sexual abuse and demeaning circumstances.

In the third trafficking case, an Estonian woman had been brought to Finland to work as a prostitute. In court, the injured party and the defendants disagreed on whether the woman knew about this prior to traveling to Finland. In any case, after arriving in Finland, the woman no longer had the courage to refuse since she was afraid that she would be left alone, without money, and unable to speak Finnish. When the woman refused to continue in prostitution, the defendants persuaded her to change her mind by promising her a different job in Sweden, once she had made them enough money. The District Court found the defendants guilty of procuring, but not of trafficking the woman. The Court of Appeal, however, considered the woman to have been, due to her indebtedness, life situation, and psychological properties, so helpless that she could not really make individual decisions, but had to submit to the will of the defendants. The Court of Appeal found, therefore, the defendants guilty of trafficking the woman.

The fourth and fifth trafficking cases differed from the other three in the sense that they did not concern trafficking for prostitution, but for labor exploitation. In the fourth case, two Finnish citizens with an Indian background had — for a high price — arranged the arrival of an Indian man to Finland to use him as free labor force. The defendants had confiscated the injured party’s passport, tried to arrange him into marriage with a Finnish woman and threatened him with violence. It was considered by the pre-trial investigation authorities that these acts fulfilled the requirements of human trafficking, although the authorities paid a lot of attention to the question of prior knowledge of the injured party of his wages, the nature of his work and to the role he had played regarding the arrangements.

Things changed in the District Court, however. Both the injured party and the witnesses considerably toned down their accusations — apparently as a consequence of a settlement between the parents of the parties in India. In this situation, human trafficking was no longer an option for the court. One of the defendants was found guilty of facilitation of illegal entry.

223 Helsinki District Court 28.11.2008, R 08/10613, 08/11690.
224 Helsinki Court of Appeal 29.12.2009, R 09/385, decision no. 3420.
In the fifth case, a Vietnamese man was suspected of having trafficked his nephew to Finland, in order to exploit him as forced labor in his restaurant. The nephew had told that he had worked in the restaurant 12 hours a day, seven days a week for minimal payment. He had also claimed that the defendant had controlled his bank account, taken his passport, acted violently towards him and threatened his life. According to the prosecutor, the defendant had, by bringing his nephew to Finland, in order to exploit his vulnerable position, committed the crime of trafficking. The District Court found, however, that there was not enough evidence of such a crime, since the workmates of the nephew could not (or did not want to) confirm the accusations, and the case was overruled.

These five cases will be studies in more detail later. It should already be noted here, however, that in all of these cases, the threshold to apply the provisions on trafficking was quite high. The second case, where it was found that THB had occurred, was quite clear and extreme, whereas the threshold seems to have been unreasonably high in the District Court in the third case, and in the first case only the woman with mental health problems was deemed to have been vulnerable and innocent enough to be trafficked. The Court of Appeal’s decision in the third case was a welcomed advancement in comparison to the District Court’s decision, but even there the grounds of the decision raise questions, for it seems that the court altered the decision solely on the ground that it found the procured girl to have been mentally challenged, making the decision bare some resemblance with the first case (although the court’s arguments had become much more advanced in the third case, suggesting that clear development had indeed occurred). It is impossible to say much about the fourth and fifth trafficking case, because of the dramatic change of tone of the applicant and the witnesses in the fourth case, and because of the unclear evidence in the fifth one. It should be noted, however, that these are the only case regarding trafficking to labor exploitation decided in the Finnish courts, even though it is commonly believed (at least in academic literature) that this practice is not that rare in Finland. Let’s take two examples of cases that could be seen to have crossed the threshold of THB.

First, in a case of the Savonlinna District Court, in spring 2009, a Finnish couple with a Chinese background had for ten years used Chinese workers in terrible working conditions. The employees had worked for up to 24 hours at a time in a small room that contained a hot steam. They were controlled during their free time and were not allowed to interact with Finnish people or study Finnish. As the workers also had no access to their accounts, and

\[226\] Österbotten District Court 30.4.2010, R 09/528/737, 10/74.

\[227\] Savonlinna District Court 20.2.2009, R 08/206, 09/60.
their work and residence permits were tied to the restaurant, they had no possibility to leave their jobs. Even though the case was examined as human trafficking in pre-trial investigations, the prosecutor decided to bring charges only of discrimination at work (tantamount to extortion).\textsuperscript{228}

In another case,\textsuperscript{229} a company in the horticultural sector employed Thai work force in inadequate working conditions. The employees did not have written contracts and many of the employees were not even aware of the terms of their agreement with their employer. The Thais worked for 200-290 hours per month, mostly without days off and without extra pay for overtime. The employer had confiscated the bankcards and bank accounts of the employees in order to be able to draw out different maintenance expenses from their accounts. When some of the employees wished to return to Thailand, the employer announced that they would have to earn the money to flight tickets with work. Later the employer stopped some workers from traveling home, unless they signed a contract in which they agreed not to demand more than 200-250 euros from the employer. Some of the employees were forced to stay in Finland by referring to their or their families’ debts to the employer, without ever informing them how large a per cent they had paid of the debts. Some had also been threatened with prison, and others were afraid that their families would be in danger, should they defy the employer. The employees lived in a trailer and in a warehouse arranged by the employer, without any contact to the outside world. The case was investigated as trafficking, but the Labour court sentenced the employer to fines and compensation for labor discrimination and other labor related crimes.\textsuperscript{230}

It is not difficult to see that both of these cases include several elements of trafficking. That they were still decided as cases of labor exploitation, however, seems to imply that the difference between labor exploitation and trafficking remains quite unclear to Finnish authorities and provides further evidence of the fact that victims of trafficking remain often unidentified in Finland.

Venla Roth has, in her dissertation, identified four factors that could explain the troubles of the Finnish authorities to identify the victims of THB and to treat them accordingly. The first two problems relate to the attitudes of the authorities. First, Roth notes that “the understanding that trafficking does not concern Finland — at least not as a destination

\textsuperscript{228} See in general Roth 2010b at 279-281.

\textsuperscript{229} Vaasa District Court 29.2.2009; R 09/791, 09/1215.

\textsuperscript{230} See in general Roth 2010b at 278-279.
country — seems to be emerging again among the authorities.”  

The authorities are, therefore, unable, or unwilling, to detect trafficking. The second problem is specific to trafficking to prostitution. According to Roth, “women in prostitution have always been considered as threats to society.”  

The effects of this attitude could be seen to be reflected in the other common belief that all foreign prostitutes migrate voluntarily and opportunistically to Finland with a purpose to sell sex. An extensive amount of cases dealing with foreign prostitutes, examined by Roth, show that a lot of weight is put to the free consent of the prostitutes. It is often emphasized that the prostitutes were aware of the nature and conditions of their work in Finland and had consented to the rules set by the procurers (traffickers). This leads into applying the anti-pandering law provisions instead of the provisions concerning trafficking. The notion is clearly problematic. Even if one had traveled to Finland in order to sell sex, this does not mean that one has consented to be controlled and mistreated, nor does it mean that one could not change his/her mind later. According to Government Bill HE 34/2004, pandering is transformed into THB, should the procurers use any methods described in the definition of THB to coerce the prostitutes to stay in business. As Roth notes, it is of extreme importance from the victim’s perspective that these provisions are then actually applied by the court instead of the provisions on procuring, for only as a victim of trafficking does the trafficked person acquire the victim status in the proceedings, and certain special rights, such as the reflection period and the victim assistance.

The remaining factors relate to Finnish legislation and especially to its application. The third factor is the complex and indeterminate relationship between the legal provisions concerning procuring, on the one hand, and trafficking, on the other. Both provisions become applicable if a person has been intimidated into prostitution. The preparatory works of the penal law provision on THB indicate that provisions are applicable even if no violent methods have been used. As was already explained, it is fundamental from the victim’s perspective that the provisions on THB are applied in this scenario. However, the Committee of Legal Affairs for the Parliament has stated that open concepts such as dependent status or insecure state should be interpreted narrowly and that the provisions on THB are to be applied only on the

231 Roth 2010a at 232.
232 Ibid. at 233.
233 Ibid. at 246.
234 Ibid. at 246.
235 HE 34/2004, Government proposal to Parliament for an Act amending the Penal Code and certain associated Acts at 100, See also at 102.
236 See also Warren 2007 at 253.
most serious offences. The Committee has, therefore, set the boundary between THB and pandering in such a way that the THB provisions are only to be applied in rare and extreme situations, for example where a prostitute has been explicitly prevented from giving up prostitution. According to Roth, the courts “seem to refer to this statement whenever they seek to restrict the scope of application of the penal provisions on human trafficking.”

Similarly, even though the preparatory works infer that in cases where serious harm is caused to the victim, the THB provisions should be applied, the courts apply the fairly similar pandering provisions.

The fourth factor is the narrow scope of the Alien Act regarding the right of the victims of trafficking to remain in Finland temporarily or permanently: the residence permit and the reflection period. It was discussed during the drafting process of the Act, whether the reflection period should also cover illegal immigration, but in fear of potential misuse the application was limited to THB. As Roth notes, because of this narrow scope of application, the implementation of the residence permit and the reflection period depend on whether authorities are able to identify victims of THB. Furthermore, to be granted the residence permit, the victim must co-operate with the authorities in the investigation of the crime, unless the victim is in a particularly vulnerable position. The reflection period is granted by the District police or the border control authorities. It may be suspended by the same authorities if the victim has voluntarily and on his/her own initiative re-established relations with the traffickers, or if (s)he is considered a danger to public order, security, health or international relations. The period and its suspension are not subject to appeal. This seems to leave quite a wide margin of reflection to the authorities, especially since there is insufficient information available on what kind of persons the reflection period is grantable to, or how the duration of the period should be determined. According to Roth, “there are […] reasons to believe that reflection periods are not issued even if the issuing of such a period would be possible.” She continues that “a large number of potential victims

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238 Roth 2010a at 199.
240 Roth 2010a at 200-201.
241 Ibid. at 208-209.
243 Section 52b, ibid.
244 Section 191, ibid.
245 Roth 2010a at 210.
246 Ibid. at 211.
arguably remain in the ‘gray zone’ without being identified and referred to the system of victim assistance.”

The margin of discretion is also very wide regarding victim assistance. The system of victim assistance is administered by two refugee reception centers situated in Joutseno and Oulu. The decision to apply the provisions on assistance, and to stop applying them, is made by the director of the specific reception center. The directors are assisted by a multi-professional expert group. The final issue that should be mentioned is the already mentioned section of the Aliens Act, under which an alien may be refused to enter the country if there are reasonable grounds to suspect that he or she may sell sexual services. Again, the wording “reasonable grounds to suspect” seems to leave quite a lot to the discretion of the border authorities.

We can conclude, then, that despite positive changes in the Finnish legislation (that now seems to be up to date, for most part), there are still countless small problems and seemingly insignificant practices that make the situation of the victims very difficult. But what could explain the incapability of Finland, and other states, to correct these small problems despite their clear commitments on the levels of policy and legislation? A conspiracy is not a very convincing argument. It is not very believable that some mysterious actor would order authorities to act against legislation or that police officials, border authorities, judges and other authorities would independently decide to mistreat the victims. It seems rather, that there exists a sincere will to fight trafficking and provide help for the victims of the crime, but that along the way something happens, without anyone noticing, that twists the outcome. It is my claim, then, that before we can understand the situation that the victims of trafficking continuously find themselves in, and therefore be able to answer assess the help that human rights can provide them, we need to examine Michel Foucault’s notions of power and governmentality, and most of all his theories on biopower and biopolitics.

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247 Ibid. at 211.
250 Theory might be the wrong term here, though, for Foucault did not want to be called a theorist, but saw himself as an “experimenter”. See Taylor, Dianna, Introduction: Power, freedom and subjectivity, in Michel Foucault: Key Concepts (Dianna Taylor ed.), Acumen, Durham, 2011, 1-9 at 1; Tuori, Kaarlo, Foucault’n oikeus: Kirjotuksia oikeudesta ja sen tutkimisesta, WSOY Lakitieto, Helsinki, 2002 at 10.
251 All the credit from the theory of biopower cannot be granted to Foucault alone, however. Hannah Arendt had before Foucault, on The Human Condition, observed how biological life had become the primary object of public power (See Oksala, Johanna, Violence and the Biopolitics of Modernity, 10 Foucault Studies 2010, 23-43 at 25-28). Moreover, several thinkers, such as Giorgio Agamben and Judith Buler have brought new, valuable perspectives on biopower.
3.3 What is biopower and what does it have to do with victims of trafficking?

Foucault developed his theory on biopolitics and biopower especially in his work *The History of Sexuality: An Introduction* and on his, now published, lecture series *Society Must Be Defended* in the Collège de France. To understand biopower, however, it is perhaps the easiest to begin with a more familiar form of power, the sovereign power. This sovereign power is most clearly depicted in a feudalist system where power was held by a king and lords who had pledged allegiance to the king. In this system, the sovereign was interested in his subordinates mainly as tax payers and military force, and did not have the possibility to control their lives in detail. Since control was ineffective and random, the sovereign had to base his power on fear and grandiose acts. Power was therefore put in practice in the form severe public punishments: horrible execution and torture shows represented the unlimited power of the sovereign and kept subordinates ‘obedient’. The sovereign had, therefore, the power to take the life of his subordinates, or to let them live. The sovereign could deprive the subordinates of everything they had: not only their lives, but also their property, work force and products. But everything it did not take, is let be.

A new form of power started to slowly develop alongside sovereign power, however. This form of power, emerging first as disciplinary power that concentrated in the shaping of individuals, and developing later into biopower, saw its subordinates as biological, living creatures. It concentrated on the detailed control of human life. The birth of biopower was enabled by the rapid growth of population from the 18th century onwards, the birth of capitalism, the increased productivity, and the advancements in biology and medicine. Especially these two latter achievements, combined with statistics, were crucial for biopolitics, for they allowed the manipulation of biological processes. Although an individual life might still be random — human beings fall ill and die unexpectedly — the life of an entire population or species is now easily predictable. The average lifespan of a human

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252 Foucault 1978.
253 Foucault 2003.
256 Giorgio Agamben denies that biopower would not have been born until the 18th century. According to Agamben, biopower is an indistinguishable part of the whole western metaphysics. See Agamben 1998 at 6-9; Oksala 2010 at 29.
being, the most likely risks for health, birthrate etc. are pure statistics and biology, and easy
to manipulate through medicine. Biopower, thus, focuses on human beings as a species or a
population, and no longer on subordinates as individuals.

If sovereign power takes life or lets live, biopower makes life live, or lets die: it fosters life
or disallows it to the point of death.\textsuperscript{258} As Foucault himself puts it:

\begin{quote}
Power would no longer be dealing simply with legal subjects over whom the ultimate
dominion was death, but with living beings, and the mastery it would be able to exercise over
them would have to applied at the level of life itself; it was the taking care of life, more than
the threat of death, that gave power its access even to the body.\textsuperscript{259}
\end{quote}

Biopower has become the dominant form of power from the 20\textsuperscript{th} century onwards, at
latest.\textsuperscript{260} It has not completely replaced other forms of power, such as sovereign power and
disciplinary power, however, as Foucault is often misinterpreted, for these other forms of
power still live alongside, or inside, biopower. Especially disciplinary power is an extremely
important tool from a biopolitical perspective. Like sovereign power, disciplinary power
focuses on the individual, but has a different aim. Where sovereign power punished to arouse
fear, disciplinary power, born in the 19\textsuperscript{th} century, uses punishments to shape individuals into
functional parts of the society. The aim of disciplinary techniques is not, thus, punishment,
as such, but the controlling and shaping of individuals in order to build a perfect machine.
Disciplinary power and biopower are therefore very similar to each other, but disciplinary
power focuses on individuals, whereas biopower centers its attention on the population as a
whole. These forms of power are, thus, more complementary than alternative: they need each
other in order to be perfect. Disciplinary power shapes individuals into functional parts of
the society in different institutions, such as kindergartens, schools, prisons and the army,
while biopower maintains and manipulates the thus formed machine or biomass at the
national (or nowadays perhaps global\textsuperscript{261}) level.\textsuperscript{262}

Perhaps a movie example could be illuminating here. Does not the Wachowski brothers’
movie \textit{The Matrix} depict biopower in its extreme form? In the movie, humans have been
enslaved into energy sources for highly sophisticated machines. Humans ‘live’ plugged in

\textsuperscript{258} Foucault 1978 at 138; C. Taylor 2011 at 41,43.
\textsuperscript{259} Foucault 1978 at 142-143.
\textsuperscript{260} Alhanen 2007 at 141.
\textsuperscript{261} For a critical assessment of this topic, see Chandler, David, Critiquing Liberal Cosmopolitanism? The
Macmillan, New York 2004 at 107-110. C. Taylor 2011 at 44-45; Alhanen 2007 at 141-142; Tuori 2002 at 3-5,
15-16; Dillon, Michael & Reid, Julian, \textit{The Liberal Way of War: Killing to make life live}, Routledge, London
and New York, 2009 at 84-85; Hardt, Michael & Negri, Antonio, \textit{Empire}, Harvard University Press,
machines in massive biofields, where every bodily function, nourishment and reproduction of each individual is in the precise surveillance of a computer. Humans are not aware of the situation, however, for the computer controlling them has programmed the ‘Matrix’, where people ‘live’ their virtual lives without realizing that they are simply virtual figures in a complicated computer program. Humans are, therefore, under the strict surveillance that biopower is aiming for, and their productivity is at its peak. Furthermore, the identity of each individual is carefully shaped and their apparently free choices are predefined by the rules and structures of the program.

What does all this have to do with the victims of trafficking, then? In order to be able to answer this question, we need to open Foucault’s theory a little bit more. Especially two matters require closer examination. First, we must better understand the protective mechanisms of the society: biopower can also take a violent and racist form in order to protect the population, which can help us explain the mistreatment of the victims of trafficking. Secondly, we must examine how biopower actually functions. Only then can we understand how the aforementioned protective mechanisms reject the victims, although authorities in all levels of administration think that they are protecting them.

First the protective mechanisms, then. Although the primary objective of biopower is to foster life, this does not mean that a biopolitical society would not be violent. Violence has simply changed its form so that it is more difficult to observe. But how can a society fostering life justify violence? Foucault’s answer is racism. Racism must be understood in this context in a very wide meaning, however. In controlling the population and in maximizing its functionality, biopower must also carefully assess all the risks facing the society. When the biopolitical society detects a risk for the population, it tries its best to neutralize this risk factor. Since the health of the population is vital for its functionality, biopower pays special attention to genetic purity. A biopolitical society, therefore, necessarily becomes racist, although this racism is not necessarily related to race in such a sense as the word ‘racism’ is usually interpreted to mean: humans are classified into different groups and those groups that constitute a threat to the population as a whole must be eliminated. The exclusion of this part of the society makes the population genetically stronger.

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264 See Foucault 2003 at 254-258; Dillon & Reid 2009 at 32, 87.
265 Oksala 2010 at 38-39; C. Taylor 2011 at 50; Dillon 2005 at 41-42, 44.
Again, the elimination of an entire part of the population should not be taken too literally — although the holocaust\footnote{On Nazis, the Camp and biopolitics, see Agamben 1998 at 166-180 and Foucault 2003 at 259-260.} is often claimed to have been the extreme biopolitical measure, and Foucault predicted that there would occur more genocides under biopower than under sovereign power —\footnote{C. Taylor 2011 at 50.} for biopolitical violence is often more discreet and difficult to detect. Risks that do not threaten the genetics of the population can be shaped through disciplinary power into a functional parts of the society in different institutions, making these threats ‘disappear’ into the mass.\footnote{See Hardt & Negri 2001 at 23.} If an individual is irreparable, (s)he is first tried to exclude from the society. Illegal immigrants can be deported, mentally disabled patients can be locked into asylums and different outcasts simply left outside all societal functions, as long as they do not endanger the mainstream population.

Let’s return to the Matrix. Early in the movie, the protagonist of the story, Neo, played by Keanu Reeves, is addressed by his boss, in the large company that he is working in, for a lack of respect of authority, after he has been (once again) late from work. The boss gives him the classical boss-speak:

> You think that you are special. That rules somehow do not apply to you. But you are mistaken. This company is one of the top software companies in the world because every single employee understands that they are part of a whole. Thus, if an employee has a problem, the company has a problem.

This short conversation (or rather a monologue), masked as a typical occasion in the work place (although one with a particularly strange atmosphere) summarizes brilliantly what biopower and disciplinary power are all about by revealing how Neo is forced to become an anonym part of the machine while still paying extremely strict attention to the functioning of this one piece. I take up this example here, however, since it also represents the first protective mechanism of the society: the conformation of the individual into the society through disciplinary power. At the end of the conversation the boss gives Neo a possibility to choose: either Neo starts to play by the rules or there is no need for him in the company anymore (i.e. he is excluded).

Not long after this incident, Neo is captured and questioned by the ‘Agents’ that act as the guardians of the Matrix. The Agents suspect that Neo might have been in connection with a dangerous rebel leader Morpheus, played by Laurence Fishburne. The Agents could kill Neo, but come to the conclusion that Neo is not great enough danger to Matrix that he is worth it (one is lead implicitly to believe that Neo is of more use as an energy source). Neo
has become classified as a risk, however, so he is assembled with a sort of tracer and therefore put under increased surveillance. Only later in the movie, when Neo becomes a real threat, despite his exclusion, by joining the resistance movement — symbolized of course, by unplugging Neo out of the machines controlling humans — does he become something that must be terminated (the most extreme protective mechanism of the ‘society’ is represented in the movie by squid-like elimination robots).

If we return finally to the main topic, i.e. the victims of trafficking, it is not difficult to deduct that they constitute a risk to the society from a biopolitical perspective. Let’s pause for a second to think who the victims of trafficking are, actually. It is clear that a typical victim of trafficking is not rich and successful. The victims typically become trafficked because they have no protectors and no alternatives and have therefore ended up in the hands of traffickers through coercion or fraud. The victims are, therefore, often outcasts of the society — those that have already been excluded from their societies or families. Let’s return to the first moments of the anti-trafficking campaign in 19th century England. As we remember, trafficking became a topic of sensation when British women ended up in the hands of traffickers when authorities started to fight prostitution as a threat to the health of the population. Trafficking (of the British women) was enabled, therefore, by the exclusion of a whole part of the society after they had become profiled as a risk. These kinds of measures were not limited to Victorian England, of course. Toomas Kotkas, for example, has studied the anti-prostitution laws in Sweden-Finland expressly from the biopolitical perspective, and his description matches very well the story of England.  

It is clear, therefore, that biopower and prostitution, and consequently trafficking, have from the very beginning been tightly connected. The victims of trafficking form, then, a risk to the society, for biopolitical risk assessments profile them to be ‘inferior’ outcasts and possible criminals and disease carriers and therefore a threat to the welfare of the population.

This leads us to the second question under examination, the functioning of biopower. Now that we understand why the society mistreats the victims of trafficking, what can explain that this problem has been unsolvable? As already mentioned, I do not find believable that legislators, police officers, judges, and other authorities, would consciously discriminate against trafficking victims. It seems much more likely that they are sincerely willing to help

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the victims but the outcome is twisted somewhere along the process without anyone noticing. To be able to comprehend this result, we must further explore Foucault’s notions of power and governmentality. According to Foucault:

Power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them […] Power is everywhere, not because it embraces everything, but because it comes from everywhere […] It is simply the over-all effect that emerges from […] mobilities, the concatenation that rests on each of them and seeks in turn to arrest their movement […] Power is the name that one attributes to a complex strategical situation in a particular society.²⁷¹

Power is, therefore, not a personal skill or capacity of an individual, nor is it an institution or a structure. Power is rather a complicated ratio of different forces.²⁷² Force means the possibility to carry out different tasks — labor force and coercive force are good examples — and power is therefore an attempt to manage and control these forces in order to achieve some aim.²⁷³ When this kind of situational power becomes settled, it transforms into planned, calculated governmentality.²⁷⁴ Kai Alhanen has substantially clarified this abstruse, even mystical, notion of power by interpreting Foucault’s analysis of power from the perspective of practices.²⁷⁵ According to Alhanen, “the use of power transforms into governmentality when practices generate and maintain planned and long-span relations of power.”²⁷⁶ Governmentality is, thus, possible because different practices constantly maintain and renew relations of power. For example, prisoners are constantly exposed (often without noticing) to the power of the prison guards, and this maintains power, and allows the result that a small group of prison guards are capable of governing a significantly larger number of prisoners.²⁷⁷

When relations of power are, thus, transformed, through practices, into governmentality, they become relatively independent of the aims of the subjects partaking of the practices. Foucault came to the conclusion, therefore, that power, and especially governmentality, is fundamentally non-subjective. Governmentality certainly has its aims (as we have noticed in the case of biopower, for example), but it is not dependent on the will of its executor. Foucault explains that large strategies of power are “anonymous, almost unspoken strategies

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²⁷¹ Foucault 1978 at 92-93.
²⁷³ Douzinas & Gearey 2005 at 59; Alhanen 2007 at 119-120.
²⁷⁴ Alhanen 2007 at 124.
²⁷⁵ Ibid. at 102-150. Different practices were a vital part of Foucault’s historical studies (See ibid. at 34-47).
²⁷⁶ Ibid. at 125. Translated by me from Finnish. The quote goes in original language as follows: “vallankäyttö muuttuu hallinnaksi, kun käytännöt synnyttävät ja pitävät yllä suunnitelmallisia ja pitkäjännitteisiä valtasuhteita.”
²⁷⁷ Ibid. at 126-127.
which coordinate the loquacious tactics whose ‘inventors’ or decisionmakers are often without hypocrisy.”

Richard A. Lynch illuminates this complex conclusion with an apt example. What kind of clothes a youngster wears in school tells a lot about that person and her status in school. How she dresses in the morning is, therefore, part of a complicated strategy or tactic, a very conscious and rational decision, and guided by power relations. Clothes act as part of power and governmentality, but the crucial notion is that no single student, group or supervisor can choose what is to be interpreted as ‘cool’ or ‘geeky’. That which is ‘in’ today can be ‘out’ tomorrow, which again affects the status of different groups of people.

The contemporary society is based on governmentality. Through governmentality, the (bio)political power governs, arranges, maintains and controls the population and goods. Governmentality, therefore, enables biopolitics. States have become dependent on governance that is actualized through different practices and tactics, not through clear political decisions. Having realized this, we can finally comprehend the difficult situation of the victims of trafficking. Although authorities operating with trafficking victims on different levels of society aim to help the victims, this is often impossible in practice, since power is fundamentally non-subjective. An individual or even a group does not really have much power, but power is actualized through different practices aiming for governance. This governmentality executes biopolitical aims, and since the victims of trafficking constitute a risk to the society from the biopolitical perspective, different control mechanisms — the ‘Agents’ of the real life — commanded by biopower try to exclude the victims from the society.

This point is, once again, hammered home, although in a way too aggressive and harsh way, in the scene in The Matrix — beginning, of course, with people standing in red lights, although cars are nowhere to be seen — where Morpheus is trying to describe Neo, how the Matrix operates. Morpheus explains:

The Matrix is a system, Neo. That system is our enemy. When you are inside [the Matrix] and look around, what do you see? Businessmen, teachers, lawyers, carpenters. The very people whose minds we are trying to save. But until we do, these people are still our enemies. You must understand that most of these people are not ready to be unplugged, and many of them are so hopelessly dependent on the system that they will fight to protect it.

278 Foucault 1978 at 95.
279 Lynch 2011 at 23.
The scene is ended with a woman, that Neo was eyeing during Morpheus’ monologue, suddenly transforming into an ‘Agent’ and pointing a gun at Neo. The point is made clear for even those that were not paying close attention to what Morpheus was saying: anyone can become an ‘Agent’, anytime, and without even realizing it. The effect is repeated throughout the movie, emphasizing that, in the ‘Matrix’, the ‘Agent’ is no-one and yet anyone.

What we should take from this scene-put-out-of-proportion is not that everyone is an enemy, but that biopower operates non-subjectively through different practices and mechanisms, and therefore potentially through any person. This also reveals the weakness of laws, and therefore also the criminal law approach, from the victims perspective, in cases, such as trafficking, where the victims can be classified as risk factors to the society. As Judith Butler demonstrates, governmentality uses laws as part of its tactic. When the interpretation of laws becomes part of the bureaucratic machine and is put into the hands of different experts, clear rules are vanished and the discretion of the authorities is increased. Since the authorities are, despite their pure intentions, still guided by biopolitical practices and structural biases, the blurring of rules leads to the vanishing of the rights of the victims. The diminishing of the rule of law combines sovereignty with governmentality and opens them more space to operate. Laws are either narrowed in the name of the sovereign or used to control the population. And the stronger the sovereign grows, the weaker the laws become, and the more governance there is, for the ultimate goal of sovereignty is always to strengthen itself, and this is possible (in the contemporary society) only through biopolitics. As already stated, the replacement of sovereign power with biopower and governmentality does not mean the evanescence of sovereignty or the decline of the state. It is exactly the diminishing of the rule of law that enables the revival of sovereignty inside governmentality and thanks to it.

Could not human rights provide an answer, then? Is not the whole raison d’être of human rights, as universal and inalienable, to challenge sovereignty, to establish something that cannot be sacrificed for the ‘common good’? Before being able to answer this fundamental question of the Chapter — and indeed the whole thesis — at least in the specific case of the victims of trafficking, we must take one more detour, however, and descend once more to the level of practice. To understand the intricate relationship between human rights and biopower, we must reassess the practice of the anti-trafficking measures from a biopolitical perspective.

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281 See also generally Petman 2011.
3.4 Reassessing the (Finnish) anti-trafficking measures from a Foucauldian perspective

As noted above, non-subjective biopower operates through discourses and practices. Small, seemingly insignificant details accumulate and multiply, creating an impenetrable and inescapable whole, an unnoticeable machine. It is not difficult to detect these small details in the Finnish and international anti-THB legislation, in the application of these provisions and in the whole discussion on THB, if one knows what to search for — although it is near impossible to predict how each of these details links up with others and what kind of consequences this may have.

It is perhaps the easiest to start from the two wide discourses, referred to already in Chapter 2.2 that could be seen to present two opposing poles in the case of THB, in between which other discourses place. On the one hand we have the security discourse. In this paradigm, THB is seen as a security threat to the state and the individuals inhabiting it: the population. The organized, large-scale nature of trafficking is emphasized and the alleged security problems — the expansion of transnational and international criminal organizations, terrorism, illegal immigration, and spread of diseases — caused by THB are put in the center of the discourse, even if it is difficult to tell whether all of these heterogeneous elements are truly consequences of THB, or the other way around. The language invoked is that of panic. The security and health problems related to trafficking are emphasized and exaggerated and shocking expressions and phrases are utilized.

None of this is to suggest a conspiracy theory, however. There is no one pulling the strings and plotting to let biopower operate. A journalist may use more dramatic expressions than need be to sell the newspaper; ministries and other governmental units may exaggerate a little bit to gain more funds, and to be sure not to make a mistake; a politician may fish for votes, perhaps; and there is certainly nothing surprising in people worrying for their jobs or the safety of their children. However, once these small elements start to combine and link up, the result can be quite immense.

After THB has been profiled as a security risk, stricter and more comprehensive control mechanisms are needed to tackle this threat. The results are, then, often very harmful to the victims of THB, as was noted in sections 3.1-3.3, since from the viewpoint of security, trafficked women start to appear as illegal migrants, foreign prostitutes, disease carriers, or other dangerous subjects — in any case threats to the population. It is exactly these

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governmental practices against which the language of human rights provides a valuable counter-force, advocated by NGOs, activists and academics. Human rights are needed to protect the victims and their human dignity from discrimination and inhuman treatment.

On the other hand, then, we have the humanitarian discourse. In this discourse, attention is directed away from the security questions surrounding THB, and the true victims of trafficking — the persons actually trafficked — are put into the highlight. Instead of a language of risk and panic, a language of pity is invoked. To protect the rights of the victims against the effects of the security approach, the horrific experiences of the trafficked persons are emphasized. Every horrible detail of their suffering carefully described and the story re-told and re-told again.

But even with horrendous stories, those invoking the language of pity may meet obstacles. It is a well known fact, after all, that “[p]ity cannot work for those who are deemed responsible for the ills that have befallen them or those who are considered dangerous to the community.” Since many of the victims of THB have actually been willing to act as prostitutes, and are therefore often deemed ‘responsible’ or even considered ‘dangerous’, this may become problematic. Suffering may suffice to be redeeming or purifying, if it can be described intensively enough, but if this does not work, the humanitarians have two possibilities. Either they can further emphasize the innocence of the victims, in which case the most important task becomes “identifying trafficked women through dis-identifying them from [the dangers of THB]” and a victim discourse starts to develop under the humanitarian discourse; or they can ask for tolerance (falling back on pity), in which case the discourse start to bear resemblance to the toleration discourse studied by Wendy Brown. In any case, we can see that new discourses start to emerge between the two poles.

Closer to the security pole, special attention should be given to the discourse of war. Connecting war with trafficking may sound surprising at first, but once we start looking at the terminology used in the trafficking discourse, we can notice that it is permeated with the rhetoric of war. It is impossible to write more than few sentences on the topic of THB without resorting — consciously or subconsciously — to such terms as ‘fight against trafficking’ and ‘war on trafficking’, as is evidenced, for example, in this study. And, as soon

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285 Ibid. at 262-263.
286 Ibid. at 259.
as we put more thought into it, we can understand that rather than being a surprising quirk, this intertwining of war and THB is actually a necessary phenomenon in the biopoliticized world. As Foucault explains, we should, in the present condition, “invert Clausewitz’s proposition [that war is the continuation of war by other means] and say that politics is the continuation of war by other means.” Power relations in our societies are, according to Foucault, “anchored in a certain relationship of force”, meaning that political power is forced to perpetually use “a sort of silent war” to maintain its power. It is no wonder, then, that, as Hardt and Negri point out, “[w]ar is becoming a general phenomenon, global, and interminable.” Through war, relations of power and techniques of domination are revised and all aspects of social life produced and reproduced. It has therefore been transformed from a Schmittian limited state of exception into a permanent, general state — the rule, one could claim — blurring the distinction between war and politics, giving way to the security paradigm, and allowing biopower, operating through indeterminate governmental techniques, to bloom.

In service of biopower, aimed to make life live, and allowed to kill only to improve life, war has changed its essence. Only seldom does it take the traditional form of an armed conflict between two sovereigns. Instead, it has transformed into a civil war on a global terrain, with abstract, rather than concrete enemies. War is now waged against poverty, or more concretely on drugs, crime and terrorism: it has been reduced to police action. War on THB is, then, a natural addition to this continuum, one that transcends social and political boundaries. Indeed, as Michael Grewcock has noted, the war against THB and smuggling is constantly used to legitimize and extend ‘Western exclusion zones’— areas of externalized border control.

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288 Foucault 2003 at 15.
289 Ibid. at 15.
290 Ibid. at 15-16.
292 Ibid. at 13, 21.
294 Hardt & Negri 2006 at 3-5.
295 Ibid. at 13-14.
humanitarians and academics alike, permeating the whole discussion, and therefore blurring
the distinction between governmental forces and humanitarians and allowing the
manipulation of the human rights rhetoric.297

In the midst of these general discourses, things start to happen also on a more particular
(regional, national or local) level. Beliefs, attitudes and smaller scale discourses start to
appear. These may be given birth by the more general discourses, or they may be born out of
specific or structural biases, concerns and interests. There is a countless amount of these
kinds of local effects, but some mentioned already in this study could perhaps be used as
examples. It was, for example, noted, referring to the study of Venla Roth, that there seems
to be an understanding among Finnish authorities that THB does not concern Finland (at
least not) as a destination country, which seems understandable, if the Finnish situation is
mirrored on the extreme cases pictured by both the language of panic, given birth by the
security paradigm, and the language of pity, advocated by the humanitarians. In addition to
this, the belief that all foreign prostitutes migrate voluntarily to Finland, with the intention to
sell sex, was mentioned. According to Roth, this belief can be connected to the liberal notion
of free will, as well as the exceptionally strong position of women in Finland compared to
many societies on the international level.298 The notion of independent women, responsible
for themselves, prevalent in the Finnish society, may, then, sometimes paint an erroneous
picture of the actions of the trafficked women, if authorities are not able to grasp the
difference in their cultural background.

To widen the scope outside Finland for a final example, there seems to be a common belief
among authorities worldwide that “‘real’ victims of human trafficking”, as Dina Francesca
Haynes notes, in the context of the United States, “will be found when they are liberated
from their exploitation by law enforcement officials.”299 She continues by stating that, “the
practice of the [U.S. authorities] demonstrates their belief that a victim of human trafficking
is more legitimately a victim […] if she happens to be rescued by U.S. government
officials”, and that “[s]ometimes victims not rescued by officials are even susceptible to
being viewed as criminals […] worthy of deportation.”300 This de facto division between
real, or good, and bad victims of THB links up with the stories heard of THB in the mass
media: as already noted, it is often only the most horrendous stories that reach the media. In

297 Grewcock 2007 at 184.
298 See Roth 2010a at 249-250.
300 Ibid. at 350.
the context of THB, this means that it is the stories about sex trafficking that gain attention, while stories about domestic servitude or labor exploitation do not.\textsuperscript{301}

Together, these different general and particular discourses, beliefs and stories discussed in this section combine to create a very powerful myth of trafficking. As Jo Doezema notes, the mythical victim of THB is a white, innocent woman, abused in prostitution in the hands of brutes.\textsuperscript{302} This picture consists of several parts. First, the victim is abducted or severely lured or deceived. By no means can the mythical victim of trafficking have been aware of ending up working in prostitution, even if she would have been unaware of the actual conditions of her work. As Sally Engle Merry explains: “Those who are selected [as victims] are typically those who are in some way helpless, powerless, unable to make choices for themselves”, whereas “[t]hose who choose to put themselves in a dangerous situation are less deserving of the status of victim […]”\textsuperscript{303} Secondly, to establish the innocence of the victim, her youth and virginity, or alternatively her beauty, are emphasized. Thirdly, repetition of horror stories of violence and abuse serve to reinforce the victimization of the trafficked women. All of these factors distinguish the ‘true victims’ from ‘guilty’ prostitutes.\textsuperscript{304} The whiteness of the victims is also emphasized, in stark contrast to the dark, terrifying ‘otherness’ of the mythical trafficker, who is usually pictured as a dark, eastern brute.\textsuperscript{305} One commentator even compares traffickers to the ‘Dementors’ from the Harry Potter saga: horror creatures that “glory in decay and despair [and] drain peace, hope, and happiness out of the air... long enough to reduce you to something like itself... soulless and evil.”\textsuperscript{306}

This creation of stereotypes, of course, corresponds to the more general paternalistic symbolism criticized in international law.\textsuperscript{307} It is not uncommon, especially in the context of human rights, to picture the perpetrators as vicious savages, the victims as innocent, yet helpless creatures, and the saviors as the virtuous white knights who save the day. David

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\textsuperscript{302} Doezema 2000. See also Berman, Jacqueline, (Un)Popular Strangers and Crises (Un)Bounded: Discourses of Sex-Trafficking, the European Political Community and the Panicked State of the Modern State, 9 European Journal of International Relations 2003, 37-86.


\textsuperscript{304} Doezema 2000 at 34-37.

\textsuperscript{305} Berman 2003 at 54.

\textsuperscript{306} Jones 2009 at 334-335. The extract is from J.K. Rowling, Harry Potter and the Prisoner of Azkaban (Scholastic Inc, 1999) at 187.

Kennedy warns us about the consequences of the use of these kinds of metaphors, writing that:

Coming into awareness of oneself as the representative of something else — heroic agent for an authentic suffering elsewhere — mutes one’s capacity for empathy or solidarity with those cast as victims, violators, and bystanders, and stills the habit of understanding oneself to inhabit the world one seeks to affect.  

More specifically in the context of THB, Fransesca Haynes regrets that:

[b]y failing to understand enough about the people who are trafficked, and focusing media attention on the sex and victimization aspects of the crime, we risk “essentializing” and “othering” the victims. That is, we are reducing the victims, usually women from the southern or eastern hemispheres, to stereotypes based on race and gender, and those stereotypes are conflated with the sexualized nature of the crime. Then we are setting “them” at a distance from “us.”

It should be remembered, however, that a myth is not necessarily negative. As Jo Doezema explains, leaning on Laclau, a myth operates as “a model of how society should be” and as “a surface on which social demands are inscribed”. It can, therefore, “also encode hopes for emancipatory social change.” ‘White slavery’, for example, she explains, “was also used to point to injustices towards migrants, exploitative working conditions, and discrimination against women.” So too the myth of trafficking, then, “can express concerns about actually existing injustices.”

The myth is, then, not only a consequence of the panic language utilized by the security discourse, although this may be its loudest source. It is, in fact, almost as prevalent between the humanitarians. But though providing emancipatory potential, it may also turn out to be the humanitarians’ largest pitfall, for it is consequently through this myth that the seemingly opposite discourses of THB start to intertwine. Although the myth may have been created by the discourses surrounding THB, its relationship to these seems to be mutually reinforcing: the discourses feed the myth, but the myth simultaneously backs up arguments used in the THB discourse. And, importantly, the same myth is used to back completely differing views. For example, the repetition of the most extreme cases of trafficking serves to arouse fear, and therefore justify stricter border controls, just as well as it raises pity towards the victims of THB. Similarly, the myth of innocent, white, young victims does not only inspire people

308 Kennedy 2004 at 15.
311 Ibid. at 81.
to fight for the rights of trafficked persons, but also provides material for sensational newspaper articles concerning THB.

Even the most opposing poles of the THB discourse are not, then, really contradictory. In fact, these poles are firmly connected through the other discourses that operate somewhere in the gray area between them. For example, the victim discourse that was presented earlier as some kind of by-product of the humanitarian discourse serves an important function in the security discourse as well. It is important for the security paradigm that it is seen to protect individuals from the danger of trafficking, even as it excludes threats from the society. The myth of innocent victims turns out, then, to be an important tool also for the security paradigm. When only a very small proportion of trafficked persons meet the criteria of the mythical victim, authorities easily concentrate all their efforts on these persons, and to expose them to increased surveillance and control, while excluding all the other, ‘guilty’, victims from the scope of victim assistance. Tolerance discourse, too, though avoiding the trap of presenting a stereotyped picture of the victim, can be used to justify interventionist policies and security/control mechanisms. Asking for tolerance, the discourse “establishes a hierarchy in which some people are marked out as different from the norm, and therefore as potential objects of tolerance, whereas others, through their (self-) ascribed ability to tolerate that difference, constitute the norm.” The state is, then, presented as a neutral arbiter between different groups, governing and controlling difference through the very same techniques that are used in the security paradigm.

Finally, the war discourse, as noted earlier, seems to act as some kind of glue between all of these other discourses, blurring them in an inevitable way. It suffices to mention the fight against THB to enforce this discourse, even if one would do so in a critical context. Besides, it is quite difficult not to be willing to combat the horrible practice that is trafficking. Indeed, an important consequence of the new kind of war against “indefinite, immaterial enemies” is, according to Hardt and Negri, that “[a]ll of humanity can in principle be united against an abstract concept or practice”, such as THB, marking the re-emergence of the concepts of just war and hostis humanis generis that have in the past lead to some very regrettable results. This birth of a universal mission is reinforced by two other consequences of the new kind of war. First, these wars have “no definite spatial or temporal boundaries”.

313 Hardt & Negri 2006 at 15.
meaning that they can exist anywhere and anytime, and that they have to be “won again every day.”

Secondly, international relations and domestic politics start to intertwine, since “[t]he ‘enemy’, which has traditionally been conceived outside, and the ‘dangerous classes’, which have traditionally been inside, are […] increasingly indistinguishable from one another and serve together as the object of the war effort.” Taking all of these elements into consideration, it must be concluded that it is quite difficult, whatever one’s intentions are, not to be absorbed into this discourse and therefore to act as a conduit of biopower.

Another connecting element seems to be a commitment to liberalism. The humanitarian discourse, lead by feminists, in the case of anti-trafficking, is certainly firmly based on liberal values, operating through liberal precepts, such as choice and coercion and utilizing human rights “to argue for liberatory ideals around gender, sexuality, and a host of other concerns”, but the more conservative securitization paradigm and liberalism are not opposites either, as one may be tempted to believe, “but the same process”, as put by Didier Bigo. In fact, Bigo (although concentrating on the immigration, instead of THB, discourse) is ready to go as far as to claim that the humanitarian discourse is “a by-product of the securitization process.” According to him “discourses concerning the human rights of asylum seekers are de facto part of securitization process if they play the game of differentiating between genuine asylum seekers and illegal migrants, helping the first and condemning the second and justifying border controls”, which is almost directly correlative to the distinction between victims of THB and illegal immigrants.

A concrete example of how the security and humanitarian discourses may end up intertwining in a biopolitical society, without the will or knowledge of the participant in these discourses, is provided by Claudia Aradau. She demonstrates how, in order minimize the threat of trafficking of the potential victims, NGOs engaged in the humanitarian discourse — or the “politics of pity”, as Aradau puts it — emphasize that it is important to disentangle background reasons that lead to trafficking and “to consider the predispositions

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316 Ibid. at 14-15.
317 Doezema 2005 at 69.
319 Ibid. at 79. Interestingly, according to Claudia Aradua, it is the other way around: “the security regime appears as a symptom of the humanitarian one” (Aradua 2004 at 254). In the light of my study, this controversy is not very relevant, however. What matters is that the discourses intertwine in the pressure of biopower and end up reinforcing each other.
320 Bigo 2002 at 79.
that exist in the personal history of women and girls.” In other words, the victims must be profiled. This, of course, leads to the examination of the past biographical details of the victims of trafficking and to the utilization of expert knowledge. It is usually noted that victimization is a repetition of earlier traumas (for example in the family), rendering the victims as double traumatized (by THB and earlier traumas). We can see here how the politics of pity and the politics of risk — as Aradau calls the security approach — start to merge. Humanitarians raise the pictures of childhood traumas to evoke pity and to doom the criminalizing actions of the state authorities, while unintentionally providing material for the biopolitical risk-calculations. “The expert knowledge mobilized by NGOs with the purpose of helping trafficking [sic] women”, writes Aradau, “becomes ‘hijacked’ by a politics of risk, which is based on risk minimization and containment.” The emotional promise of the politics of pity is turned into a suspicion of risk.

We can, therefore, start to observe how biopower silently operates in all parts of the society, finding links even between seemingly opposite paradigms. The humanitarian discourse is an immensely important counter-power to the biopolitics of the security paradigm, challenging governmental mechanisms and control techniques. Yet, if we are not careful, biopower may start to control this protest, too, despite our pure intentions and without anyone even noticing.

The same kinds of forces operate also through various everyday practices, decisions, and mistakes. There is no doubt, for example, that the anti-THB legislation has been prepared in good faith, in order to stop a serious criminal activity and to help its victims. Yet, small problems appear here and there in the legislation, because of conflicting political interests and differing opinions in the drafting process or other everyday problems. A prime example is that of the Trafficking Protocol where the conflicting notions of sex work between the structuralist and individualist feminists led into an extremely indeterminate definition of THB, as explained in Chapter 2.3.1. When faced with the radical feminist notion of sex work as ‘violence’, the liberals, viewing sex work as ‘choice’ had no choice but to make all references of sex work disappear, creating a compromise where the link between prostitution and trafficking remains undecided, and enforcing the myth of suffering victims of THB.

The myth, the product of all the discourses surrounding THB, is (unsurprisingly) the only thing connecting the radicals and the liberals. For the radicals, Doezema explains,

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321 Aradau 2004 at 271.
322 Ibid. at 271-273.
323 Ibid. at 274.
324 See Doezema 2005.
the ‘suffering body’ of the sex worker becomes a mythical metaphor for the condition of the imagined ‘ideal society’. Her function as a symbol condemns her to suffer; because she must suffer, she cannot consent.325

The liberal feminist approach, on the other hand,

entails an investment in the continued importance of sexuality as a ‘site of violence’. Thus, the continued importance of the suffering, violated body of the sex worker remains even for ‘consensual prostitution’ supporting feminists. Without this body, the subject of liberal feminist concern ‘disappears’. 326

The vagueness in the definition of trafficking and the yet again emerging myth of trafficking is then reflected in the national level in overlapping of penal law provisions concerning THB with those of pandering. The problematic attempt of the Committee of Legal Affairs for the Parliament to distinguish between these provisions by restricting the application of the THB provisions for the benefit of pandering provisions is also understandable, taking in consideration the more vague definition of THB, the stricter scale of punishment in the case of THB, and the principle in dubio pro reo 327, extremely important in criminal law. Finally, the narrow scope of the Aliens Act, in fear of misuse, is not that surprising, considering the clear distinction in peoples’ minds between trafficking, represented by the myth, and smuggling.

All of these small details start to cumulate on the authorities that are trying to make decisions on the field. It does not seem very convincing to suggest that the police or the immigration authorities would consciously discriminate against victims of trafficking (or at least the ‘guilty’ ones), but in the pressure of all these discourses, myths and practices, and taking in consideration the function, or structural bias, of these authorities (arresting criminals or combating illegal immigration), this outcome is quite difficult to escape. This is highlighted, of course, in the court decisions regarding THB. There is nothing scandalous in these decisions. In fact, almost all of them are reasonably well argued, and legally completely plausible. Yet, there are some details, especially in the two cases concerning Estonian women forced into prostitution (the first and third Finnish THB cases), that have been the object of well pointed criticism in the Finnish academic literature, and lead to quite interesting results.

325 Ibid. at 74.
326 Ibid. at 81.
327 “When in doubt, for the accused”, meaning that that a defendant may not be convicted by the court when doubts about his or her guilt remain.
Regarding the first case, attention has been directed to the weight of consent in the court’s decision. Referring to the aforementioned problematic opinion of the parliamentary Legal Affairs Committee in Report LaVM 4/2004, the District court stated that the requirement of dependence is higher in trafficking than in procuring. Therefore, although the procured women were acknowledged to have been in a vulnerable state, the dependent status was not met, since the women had known that they would have to offer intimate services when they entered Finland, and since they had earned money through prostitution. The facts that the women had not known what their working conditions would be like, that some of the women had reported threats of violence against them and against family members, and that their freedom of movement was restricted, did not change this interpretation, leading the National Rapporteur on Trafficking in Human Beings to state that “the District Court did not adequately examine the conditions in which the women were selling sexual services.” The outcome was that “attention was only paid to violations of the rights of the disabled woman, who was an injured party.” The other women were treated only as witnesses to the case and the violations of their rights as evidence of procuring (not as true violations). Nothing changed in this respect in the Court of Appeal.

In the other case subject to criticism (the third THB, as it has been called in this thesis) the topic of discussion has been the Court’s inadequate interpretation of the means and the manner of trafficking. In this case, the District Court considered that the defendants were guilty of procuring, but not of trafficking the Estonian woman whom they had deceived to stay in prostitution, against her decision to quit the profession, by falsely promising her a different job in Sweden (once she had made them enough money in prostitution). Admittedly, the evidence of trafficking in this case was debatable. The National Rapporteur on Trafficking in Human Beings, however, considers that the court’s decision was faulty, stating that:

> When assessing the case [...] the District Court confused the means and the manner of committing a human trafficking office. Consequently, it required in its decision the fulfillment of two different means, or exploitation of a dependent status and vulnerable state as well as deception, and failed to look at the manner of committing the offence defined in the Criminal Code, or taking control of another person, recruiting, transferring, transporting, receiving, and harboring.

328 Helsinki District Court 20.7.2006, R 06/5204, 06/6857.
330 Ibid.
331 Helsinki Court of Appeal 1.3.2007, R 06/2317, decision no. 722.
332 Helsinki District Court 28.11.2008, R 08/10613, 08/11690.
333 Report 2010 at 118.
She points out that the court had considered that the defendants had managed to deceive the woman into continuing in prostitution by the promises of a job in Sweden, and continues that abusing a mistake made by another person also meets the criteria for the means required for trafficking.\textsuperscript{334} She also adds that “[a]ccording to Government proposal 34/2004, the dependent status may be caused by family relationships.”\textsuperscript{335} Since the injured party had previously had a relationship with one of the defendants and since the so-called ‘lover boy' recruitment technique\textsuperscript{336} is widely used in trafficking business, the court should have reconsidered its decision. The vulnerable state of the injured party was further emphasized by the facts that psychiatrists had confirmed in the court that the injured party was exposed to exploitation because of her development and previous experiences and that the defendants had rendered the injured part into a poor financial situation by asking her to take fast loans that were never paid back.

These facts were, indeed, taken into consideration by the Court of Appeal that altered the District Courts decision and sentenced the defendants for trafficking.\textsuperscript{337} The Court of Appeal’s decision, although a significant improvement, raises some questions, too, however. The biggest difference to the District Court decision was that the Court of Appeal found that the defendants had subjected the victim to sexual abuse by abusing her vulnerable state and dependent status. In coming to this conclusion, the court pointed out the lack of language skills of the injured party, her indebtedness and her psychological properties. The decision is, then, comparable to the first case dealing with Estonian prostitutes. The confusions of the District Court decision are solved, but the decision still seems to be based on the disabled state of the victim. In light of the court’s arguments, it seems likely that had the victim not been disabled, her initial consent to work in prostitution would have trumped the false promises of the traffickers and rendered the offence that of procuring.

The results and the small problems in the court decisions are extremely interesting from a biopolitical perspective. Foucault certainly would not have been surprised to notice that the most criticized decisions are those dealing with foreign prostitutes. Especially the first one of these is telling. Although there is no reason to doubt the sincerity of the judges, the outcome was that only the girl that could be deemed completely innocent (and therefore fitting the myth of trafficking) was recognized as a true victim of trafficking, while the other women

\textsuperscript{334} Ibid. at 118.
\textsuperscript{335} Ibid. at 118.
\textsuperscript{336} The ‘lover boy’ technique refers to a method where the victim is lured to trust the traffickers and accompany them by seducing her to fall in love with one of the traffickers.
\textsuperscript{337} Helsinki Court of Appeal 29.12.2009, R 09/385, decision no. 3420.
were cast out of governmental protection — as criminals or dangerous risks worthy of exclusion, it is implied by the Foucauldian interpretation. In the second case, too, the pandered girl became a true victim of trafficking only after the Court of Appeal decided that she was psychologically disabled, and therefore innocent in the sense of being incapable of consenting to prostitution. Interestingly, in the final sex trafficking case, describing a Finnish girl — easily believed to be someone not engaging willingly in prostitution, and already a part of the Finnish national body — no major problems appeared.

It is also important to remember that only two cases dealing with trafficking to labor exploitation have appeared in Finnish courts, even though it is estimated that this practice is not that uncommon in Finland. And even in these cases the accusations of trafficking were overruled — although a different judgment would have been quite impossible to form, taking into consideration the suddenly changed statements of the victim and the witnesses in court, in the first case, and the lack of clear evidence, in the second. In any case, this absence of cases, compared to the estimated frequency of the crime, seems to suggest that the myth of trafficking is strong also in Finland. Apart from innocent girls, abused in prostitution, victims of trafficking remain unidentified and therefore excluded from the society or treated as illegal immigrants.

Perhaps even more alarming, from a Foucauldian perspective, than the debatable court cases, however, is the extremely wide margin of discretion afforded to different authorities relating to trafficking victims and illegal immigration (exactly what biopower requires to operate properly, as we witnessed in the previous Chapter). This problem is also directly connected to the operation of the courts, since the courts rely on the authorities to bring them cases and evidence. And vice versa: courts can provide legitimization for jurisdictional claims of the authorities, and wider social recognition for their measures. The facts regarding the widening margin of discretion were already dealt with earlier, but to recap, the so-called reflection period, that allows victims of trafficking to stay in Finland for a certain amount of time, is granted by district police or the border control authorities, not courts, and may be suspended by the same authorities if the victim has voluntarily and on his/her own initiative re-established relations with the traffickers or if (s)he is considered a danger to public order.

340 Österbotten District Court 30.4.2010, R 09/528/737, 10/74.  
security, health or international relations\textsuperscript{342} — a familiar clause of exception for any jurist from countless laws and treaties, but one that cannot be left without a mention form a Foucauldian perspective, not least if we combine it with the section of the Aliens Act under which an alien may be refused to enter the country if there are reasonable grounds to suspect that he or she may sell sexual services.\textsuperscript{343} The fact that the same authorities that are supposed to indentify victims of THB on the field also grant them the reflection periods and decide on their suspension is also worth of attention,\textsuperscript{344} especially if we recall the facts that neither decision is subject to appeal and that there is insufficient information available on what ground these decisions should be made.\textsuperscript{345} The residence permit also depends on the victim’s willingness to co-operate with the authorities in the investigation of the crime (unless the victim is in a particularly vulnerable position),\textsuperscript{346} not only raising more questions of the margin of discretion of the authorities and their impartiality, but also providing another example of the biopolitical control techniques operating in the frames of THB. The willingness to cooperate with authorities distinguishes ‘good’ victims from the ‘bad’ ones and shapes their subjectivity so that they better fit the mainstream society. Only the most vulnerable victims, those that best fit the myth of trafficking, and constitute the smallest risk to the society, are saved from this sieve, although it must, again, be stressed that this is surely not a master plan of the legislators, but a consequence of the operation of the legal system, the will to effectively combat trafficking and the humane wish to protect the most vulnerable persons.

The victim assistance — constituting in large part from psychological treatment, a biopolitical control technique \textit{par excellence}, although certainly very important for rehabilitation in many cases — is another area where power is transformed from legislators and courts to authorities with wider mandate. The decision to apply the provisions on assistance, and to stop applying them, is made by the director of the specific reception center,\textsuperscript{347} assisted by a multi-professional expert group.\textsuperscript{348} Without any clear standards, the decision seems to be wholly in the discretion of these experts. The locations of the victim assistance centers, at the outskirts of Joutseno and Oulu (far from the densely populated Helsinki metropolitan area, where the main anti-trafficking have their headquarters), also

\textsuperscript{343} Section 148, \textit{ibid.}
\textsuperscript{344} Section 52, \textit{ibid.}
\textsuperscript{345} Section 191, \textit{ibid.}
\textsuperscript{346} Section 52a, \textit{ibid.}
\textsuperscript{348} Section 25e, \textit{ibid.}
raises some questions. Not only are the centers far from the watchful eyes of other authorities and NGOs, but the victims — the potentially dangerous subjects — are also quite excluded from the rest of the society.

There is, then, a clear shift detectable in the case of THB from strict rules to indeterminate norms and individual (expert) discretion. As noted earlier, this move to open-ended regulation, wide margin of discretion and expert power is absolutely necessary for biopower to function, and the most of fundamental element governmentality. It is, therefore, no wonder that similar development is detectable outside of Finland, too — everywhere in the global North, in fact. In Italy, for example, “irregular migrants, in respect of whom an expulsion order has been issued, are kept in centres of assistance and their personal freedom is limited, although they have not committed a crime”\textsuperscript{349}, reports Matilde Ventrella McCreight. This ambiguity is problematic, she explains, for

the legislator should specify if illegal immigration is a crime or an administrative infringement. If it is an administrative infringement, the legislator should not then transform it into a crime by the application of a penalty which is fundamentally penal in nature.\textsuperscript{350}

To take another example, in Canada, the practice of offering residency on humanitarian grounds is, according to Constance McIntosh, “highly discretionary” and is “only granted if the Minister of Immigration ‘is of the opinion that it is justified by humanitarian and compassionate considerations [...]’”\textsuperscript{351} Similar examples as these two could be found in almost any state, but I shall only take one, particularly interesting, example more: the privatization of removal centers. According to Mary Bosworth, private companies run more than one half of the these centers in UK, a number that is especially interesting in comparison to the fact that actual prisons are still mostly in the control of the state. Private companies are also often used to move individuals to the centers and to the border.\textsuperscript{352} The message seems quite clear. As Bosworth explains, the state-citizen relationship at the heart of the prison management debate does not concern the immigration detention, since the detainees in these centers are not citizens of the host country.\textsuperscript{353} She concludes, therefore, that privatization is extremely useful in the case immigration, since “in this corporate take-


\textsuperscript{350} McCreight 2006 at 168.

\textsuperscript{351} McIntosh 2006 at 420.

\textsuperscript{352} Ibid. 165.

\textsuperscript{353} Bosworth, Mary, Immigration detention in Britain, in Human Trafficking (Maggy Lee ed.), Willan Publishing, Cullompton, Devon, 2007, 159-177 at 172.
over [...] certain elements of state responsibility and more complex questions of justice and morality are erased”, and adds that “[t]he particularity of these institutions [...] disappears as they become just one of a variety of kinds of ‘managed care’.”

Detention centers “provide both a symbolic and a physical exclusion zone [:] Detention excludes non-citizens from the society while their appeals are processed or they await removal or deportation.”

3.5 Victims of trafficking as homines sacri: Can human rights bring salvation?

Now that we have determined how biopower operates within the trafficking conundrum, it is finally time to turn our attention back to the primary concern of this thesis and study whether human rights can bring relief to the victims of trafficking. To be able to provide an answer this question, we must first locate the victims in the biopolitical terrain. This is more easily said than done, however. As the centerpiece of the quagmire, the victims seem to suffer from a kind of split identity, as lives necessary of saving to make life live, on the one hand, and potential threats worthy of exclusion, on the other. The confusing situation of the victims is further highlighted by the fact that it is very difficult to locate a specific source of their plight. As we have come to understand, the conventional picture where the victims, protected by different humanitarian actors, are discriminated against and mistreated by state actors, although true in many parts, is too simplistic to be able to adequately illustrate the whole situation. Despite the opposition between the two blocks, it seems that both state authorities and the humanitarians are sincerely willing to help the victims, yet they both also unintentionally contribute to their hardship. The problem of the victims is not, then, a specific actor or a group of actors, nor is it a troublesome law or treaty or the misapplication of such, but rather a complicated web of seemingly harmless or insignificant discourses, practices, beliefs, knowledges and mistakes.

The first problem that the victims willing to invoke their human rights face is, therefore, what rights to invoke and, more fundamentally, against whom or what. This dilemma is reinforced by the fact that most of these victims are aliens, which of course raises the philosophically much studied distinction between human and citizen, sometimes claimed to be the “main characteristic of modern law.” As Costas Douzinas explains, the aliens

354 Ibid. at 173.
356 Douzinas 2002, the End(s) of HR at 449.
do not have rights because they are not part of the state and they are lesser human beings because they are not citizens. One is a human to greater or lesser degree because one is or is not a citizen to a greater or lesser degree. The alien is the gap between human and citizen. We become human through citizenship, and subjectivity is based on the gap, the difference between universal man and state citizen. Modern subjectivity is based on those others whose existence is evidence of the universality of human nature but whose exclusion is absolutely crucial for concrete personhood, in other words, for citizenship.357

This separation can be claimed to mean that, despite their acclaimed universality, human rights have not, in fact, upgraded the nation bound rights of man in any significant way. This is framed best by Hannah Arendt, who famously stated that:

The conception of human rights based upon the assumed existence of a human being as such broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships except that they were still human.358

There is not a long step from this notion to Giorgio Agamben’s concept of homo sacer — a term borrowed from archaic Roman law where it described someone who could not be sacrificed, yet (s)he who killed this person was not condemned for homicide359 — meaning a human being reduced to bare life.360 Bare life is another Agambenian key concept. Although used sometimes “as a synonym for biological life as opposed to political life, bare life is strictly neither natural nor political life, neither the public life of a citizen nor the natural life of an animal”,361 as put by Johanna Oksala. Exemplified by the homo sacer, that could not be officially sacrificed, yet did not enjoy any protection from the society, “[b]are life is thus something that cannot be clearly demarcated and then simply negated. It is biological life that has been politicised in being included in the political community, but only through its exclusion.”362 It is therefore a result of sovereign ban, but instead of distinguishing the inside from the outside, “it is the tracing of a threshold between the two, a location where inside and outside enter into a zone of indistinction”,363 where the rule and the exception become blurred.

Agamben’s examples of bare life include brain dead patients, refugees detained in refugee centers and death row inmates. Adding the unidentified victims of trafficking to the list

357 Douzinas 2002 at 449-450.
359 Agamben 1998 at 71.
360 Ibid. at 8-9.
361 Oksala 2010 at 30.
362 Ibid. at 30. According to Agamben, this exclusion is what constitutes sovereignty by creating a zone of indistinction where the sovereign power can operate as the one who decides on the exception.
would not seem to be a very far reach. As aliens whose faith is completely in the hands of the authorities with indeterminate powers and nearly unlimited margin of discretion, their life is not truly political, for they are not a part of the society (most of the victims, in fact, avoid any contact with authorities in fear of being deported or being treated as criminals) or have any of the rights granted to citizens, nor is it merely natural animal life since it must be rescued from panderers, traffickers or other exploiters, to save the spark of life. It is, rather, the politicized form of natural life, the bare life in the strict Agambenian sense, politicized only through its exclusion.

If we were to take this Agambenian notion to its logical end, we would have to conclude that human rights cannot offer any help to the victims of trafficking. As Agamben states, in a similar vein as Arendt, "the so-called sacred and inalienable rights of man prove to be completely unprotected at the very moment it is no longer possible to characterize them as rights of the citizens of a state." Rights do not, then, provide universal emancipatory potential, according to Agamben, but instead tie bare life to the state: bare life “becomes the earthly foundation of the state’s legitimacy and sovereignty”, meaning that “the very natural life that, inaugurating the biopolitics of modernity, is placed at the foundation of the order vanishes into the figure of the citizen […]” Declarations of right represent, then, for Agamben, “the place in which the passage from divinely authorized royal sovereignty to national sovereignty is accomplished.” This means that “[r]ights are attributed to man (or originate in him) solely to the extent that man is the immediately vanishing ground (who must never come to light as such) of the citizen.”

This Agambenian notion of bare life and human rights is, then, as Jacques Rancière writes, a kind of cul-de-sac in which all doors of escape are already locked in advance. As Slavoj Žižek explains:

[[Agamben’s] notion of ‘biopolitics’ as the culmination of Western thought ends up getting caught in a kind of ‘ontological trap’, in which concentration camps appear as ontological destiny: ‘each of us would be in the situation of the refugee in a camp. Any difference grows

366 Agamben 1998 at 127.
367 Ibid. 127.
368 Ibid. at 128.
369 Ibid. at 128.
faint between democracy and totalitarianism and any political practice proves to be already ensnared in the biopolitical trap.\footnote{Žižek, Slavoj, Against Human Rights, 34 New Left Review 2005, 115-131 at 128.}

We have to conclude, then, that as ingenious as the Agambenian concept of *homo sacer* is, it has the downside of becoming itself an exclusive discourse that prevents progress. Am I not, indeed, in picturing the victims of trafficking (following Agamben) in purely negative terms — as persons determined by their lack and exclusion — doing exactly what I criticized the humanitarians of earlier, that is, rendering, in a sincere will to help, the victims into powerless creatures, the perfect (mythical) victims with no capacity of choosing or helping themselves?

Having detected the drawback of Agamben’s theory, we have to, therefore, find a way out of this ‘ontological trap’. We could simply deny that the notion of *homo sacer* applies to the victims of trafficking, of course, but this does not make much sense, for the concept seems to fit very well, as we already observed. Instead, we should try to understand better the situation that these victims are in and try to find escape this way. To do this, we should remind ourselves of the Foucauldian notion of power. What is central to this concept of power, is that it operates through subjects: it is not possessed, but acts through social relationships. As Foucault puts it:

> Power is not something that is acquired, seized, or shared, something that one holds on to or allows to slip away; power is exercised through innumerable points, in the interplay of nonegalitarian and mobile relations.\footnote{Foucault 1978 at 94.}

This means that “where there is power, there is resistance”\footnote{Ibid, at 95.}. We can deduce, therefore, that power can only be exercised in relationships between free subjects: relations, where the governed are not free, cannot be power relations in their true sense. The zone of indistinction producing bare life, exemplified in Agamben’s texts on the Camp, is not, then, a relationship of power. Instead, in this zone we witness a relation of violence — a relationship that acts “‘immediately and directly on others’, whereas a relationship of power ‘acts upon their actions’.”\footnote{Edkins, Jenny & Pin-Fat, Véronique, Through the Wire: Relations of Power and Relations of Violence, 34 Millennium: Journal of International Studies 2005, 1-24 at 10, quoting Foucault. It should be noted, however, that a clear distinction between relations of power and relations of violence is a crude simplification. Power always requires violence and power is at the root of every use of violence. See Žižek 2005 at 125.}

As Jenny Edkins and Veronique Pin-Fat explain:

> The camp […] is an example of where power relations vanish. What we have in the camps is not a power relation. All we have is the administration of bare life. In the
camps, for those inmates who reached the depths, who faced the Gorgon, there were no relations of power, only relations of violence.  

What we need to do, then (as paradoxical as this may seem), is to return the victims of trafficking to the sphere of political power relations: “[w]ithout power relations there is no possibility of resistance and no freedom.” According to Edkins and Pin-Fat, this can be accomplished in two ways: either “through a refusal to draw lines” or “through the assumption of bare life”. Of these two, the latter is out of the scope of this thesis, having nothing to do with human rights, but consisting instead of such actions as hunger strikes and refugees sewing their mouths, eyes and ears in refugee camps. Moreover, it has already been the topic of some excellent studies. The former, however — the refusal to draw lines — seems to offer some interesting paths (although I might be using it in quite a different sense than Edkins and Pin-Fat were suggesting), for is not the *raison d’être* of universal human rights exactly this kind notion of equality?

Here Rancière’s critique of Agamben and Arendt and his understanding of the “Rights of Man” — a term which he, quite confusingly, for an international lawyer, uses as a synonym for human rights — becomes relevant again. While Rancière can be criticized of misreading Arendt’s critique of human rights and failing to understand the fundamental differences between Arendt and Agamben, his concept of the subject of the ‘Rights of Man’ can challenge the distinction between bare life and political life. Rancière denies that human rights are the rights of those without rights. He asserts, instead, that “the Rights of Man are the rights of those that have not the rights that they have and have the rights that they have not.” Thus, even though it is an illusion that there would exist rights as ‘given’, or that abstract rights could mean the same thing to different people universally, independently of material conditions, subjects of rights nevertheless make these rights real by invoking them. Or, as Jessica Whyte explains:

[Rancière] means that those who are deprived of rights — the immigrant, the woman, the worker — simultaneously *have* these rights to the extent that they seize the right that are

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375 Edkins & Pin-Fat 2005 at 11.
376 Ibid. 2005 at 10.
377 Ibid. at 12.
380 Rancière 2004 at 302.
inscribed as supposedly belonging to them, and use them as the basis for a political
contestation.\footnote{Whyte 2009 at 154. Emphasis on the original.}

What human rights provide, then, for Rancière, is formal equality, something to base
substantive claims on. As Rancière notes, they are, as written rights, more than just
“predicates of a nonexisting being.” They are not only “an abstract ideal”, but also “part of
the configuration of the given”, and therefore provide “a form of visibility of equality”.\footnote{Rancière 2004 at 302-303.}

Human rights open a space for contesting the borders of the political and turn their
acclaimed subjects (potentially everyone) into political subjects, capable of forming political
claims — or, as Rancière would put it, ‘political predicates’. “Political predicates”, Rancière
writes, “are open predicates: they open up a dispute about what they exactly entail and whom
they concern in these cases.”\footnote{Ibid. at 303.} Human rights, enabling political predicates, can therefore,
despite their inadequacy, transform bare life back into political life — to bring politics into
the zone of indistinction. With the help of human rights, political subjects “put together the
world where those rights are valid and the world where they are not. They put together a
relation of inclusion and a relation of exclusion.”\footnote{Ibid. at 304.} We could, perhaps, claim that bare life
can use the political spark created by its exclusion (previously of no use to it) to formulate
human rights claims and therefore find its way back into the political life.

Through human rights, then, we can accomplish what Edkins and Pin-Fat were demanding:
we can stop drawing lines. Or rather, we can negotiate the lines again and again with those
formerly excluded and therefore render them nonexistent. In contrast to Arendt and
Agamben, and the distinction between the man and the citizen, we can conclude, as Rancière
does, that:

There is no man of the Rights of Man, but there is no need for such a man. The strength of
those rights lies in the back-and-forth movement between the first inscription of the right
[rights as written and providing formal equality] and the dissensual stage on which it is put to
test [the politics] […] This is […] why […] the clandestine immigrants [or potential victims of
trafficking] in the zones of transit of our countries or the populations in the camps of refugees,
can invoke them. These rights are theirs when they can do something with them to construct a
dissensus against the denial of rights they suffer.\footnote{Ibid. at 305-306.}
But now the question raises again: am I not (yet again) doing exactly what the humanitarians are doing, that is invoking human rights to somehow miraculously save all those poor souls excluded from the society and turned into slaves in the hands of the traffickers, albeit with fancier words? This is not the case, however, for there is a slight, although important difference between these views. Where the humanitarians are demanding that the victims of trafficking should be given these and those (more and more specified) rights (to make them wholly human again), my claim is more modest and more comprehensive at the same time. I am simply asserting that human rights (in their most general sense, instead of as rights tailor-made for the victims of THB), and far from salvaging the lives of the victims, can return the victims (whoever they may be, exactly) from a certain state of exception back into the realm of the political. This is crucial, for the problem with the humanitarian approach is that, instead of invoking the potential of human rights in breaking (or endlessly re-negotiating) lines and challenging existing categories, such as ‘illegal’ immigrants and prostitutes, it accidentally maintains, even fortifies, the distinction between victims of trafficking and other, ‘illegal’ immigrants. This distinction is arguable, for unlike the immigrants, the victims of trafficking have been moved by force (or so it is claimed, at least), but it is, paradoxically, exactly what allows (by accident) the exclusion of all the ‘victims’ that do not fit the myth of the victims of trafficking.

Instead of being transformed political, bare life in the humanitarian approach is dressed with the myth of trafficking and expert knowledge (but remains just as bare under these new clothes). As we noticed from the example provided by Claudia Aradau, the humanitarian and security approaches will inevitably merge in biopolitical pressure and the victims of trafficking are thus exposed to the governmental techniques and the rationality of risk. What all the psychological, statistical and medical techniques, applied in order to help the victims and to prevent trafficking, accomplish, instead of emancipation, is the depolitisation of the victim. They draw the borders around the zone of indistinction of the bare life. Just like the ‘sans-papier’ (‘illegal’ immigrant) that is noticed only as a “dark external threat to our way of life”, but becomes even more invisible through normalization once legalized, the trafficking victim also ceases to exist when (s)he is identified and put under the increased disciplinary techniques and surveillance of the victims assistance, and eventually “drowned in the indistinct crowd of citizens.” What is achieved is, as Rancière would put it, consensus instead of dissensus. Where dissensus allows “the dismissal of any difference

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386 See section 3.3 and Aradau 2004.
387 Žižek, Slavoj, First as Tragedy, Then as Farce, Verso, London and New York, 2009 at 118-119.
between those who ‘live’ in such or such sphere of existence, between those who are or are not qualified for political life”, consensus means “the attempt to get rid of politics” by turning conflicts into problems that have to be sorted out by learned expertise” — it means “closing the spaces of dissensus by plugging the intervals and patching over the possible gaps between appearance and reality or law and fact.” In this way, Rancière explains,

the “abstract” and litigious Rights of Man and of the citizen are tentatively turned into real rights, belonging to real groups [like the victims of trafficking], attached to their identity and to recognition of their place in the global population […] In this logic, positive laws and rights must cling increasingly to the diversity of social groups and to the speed of the changes in social life and individual ways of being [and the] law has to become identical to the natural life of society.

In this process, the political space, created by rights, diminishes and diminishes until rights have no use. The category of the victims of trafficking is set in stone and the rights that start to seem emptier and emptier are soon of no use to them anymore. But they do not still become void, for “political names and political places never become merely void.” Instead, “the void is filled with somebody or something else.” Rancière uses an example where rights given to the poor in the Third World are turned into the right of humanitarian intervention and therefore returned to the sender: “the disused rights that had been sent to the rightless are sent back to the senders.” In the case of trafficking the void is filled with state authorities and humanitarian NGOs, and so the rights of the victims become the rights of well-meaning experts to discipline, treat and govern the victims, providing support to Žižek’s statement that the true homo sacer of today is the privileged object of humanitarian help, taken care of, but in an extremely condescending way.

What makes trafficking such a difficult problem to tackle, is its complex and indeterminate nature. Cases where a girl is abducted completely without her will and transported into a brothel to be sexually exploited are, in reality, in a clear minority compared to cases that represent the gray area between trafficking and smuggling. A human right of the victims of trafficking, therefore, would (in practice), mean drawing a definite line between those that are afforded its protection and those that are excluded from its sphere — and those ‘lucky’

388 Rancière 2004 at 304.
389 Ibid. at 306.
390 Ibid. at 306.
391 Ibid. at 307.
392 Ibid. at 307.
393 Ibid. at 308-309. This inspires Slavoj Žižek to declare that Lacan’s formula of communication (“in which the sender gets his own message back from the receiver-addressee in its inverted, i.e. true form”) is in work in the human rights discourse. See Žižek 2005 at 128.
ones that would be defined as victims, and would therefore gain a place in the society, would be depoliticized and subjected to all the biopolitical disciplinary techniques that are included in the assistance systems (psychological profiling and treatment, testifying against traffickers etc.). None of this is to say that the victims should not be afforded assistance, of course, for the biopolitical control would in many case seem like a fairly insignificant drawback compared to the vital help that the victims receive, and the possibility to formulate their claims from the inside, as ‘legitimate’ subjects of the state. But this is true only so far as human rights provide a chance to challenge this practice, if need be. If these rights are promoted into human rights, and therefore made equal with those other rights that were used to challenge them, we lose the chance of protest, or of politics, and have only “‘post-political play of negotiation of particular interests.”

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Human rights are, then, crucially important for the victims of trafficking, but only if we resist the temptation to make them the human rights of the trafficking victims. For those that are identified as victims of trafficking have already found a place in the society: those that are really in need of human rights are those excluded aliens that have not been identified as victims of trafficking, and are therefore not in the sphere of the rights of the trafficking victims — in other words those that represent the truly universal because they have no place (something particular) in the society. What they need are the ‘truly universal’ human rights that belong to ‘man as such’, something that makes returns them to the sphere of politics (paradoxically) through the claim of universality.

4. Conclusion

The translation process of the anti-trafficking campaign into human rights language can be described as a success story, the language already starting to get mainstreamed and bureaucratized. Trafficking has been recognized as a human rights issue in an international treaty, the ECAT, and in the European Court of Human Rights’ case law. In Finland the office of National Rapporteur on Trafficking has been established to ensure that the human rights of the victims are respected, and in the United States “[m]any organizations within the anti-prostitution and anti-trafficking movement are now official partners with U.S. government agencies.”

396 Weitzer 2007 at 459.

395 Žižek 2005 at 131.
human trafficking having become one of the most talked about criminal law and human rights problems of the 21st century.

Like it is always the case, the translation of the anti-trafficking campaign into human rights has been a very particular project with its own quirks, surprises and characteristics. Nevertheless, it should be noted that it is also directly linked to the expansion of the human rights phenomenon in general. The prevalence that the human rights language has received in general has been a huge factor behind the success of the human rights approach to trafficking, providing unexpected possibilities, on the one hand, but also forcing the process, on the other. The mainstreaming of the human rights language and policies has allowed human rights and feminist organizations to gain a foothold in global governance and embed their human rights aims with legislative and policy-making processes. Yet, simultaneously, the ability to translate one’s claims into human rights language has become a vital condition for various activists, organization and movements, guiding their actions.

The reasons behind the translation process and its success are, therefore, manifold — although we should not lose sight of the fact that the cohesive element linking projects in different environments from academic circles to grass root activism has been the will to challenge oppressive practices and to alleviate the suffering of the victims. But this was not the only main question that I set for myself in the Introduction. Perhaps the more fundamental question was, whether human rights are able to provide help for the victims of trafficking, and if so, how?

So far there is, unfortunately, little evidence that the changed state policies would have had much impact on the field in the form of court practice or altered standards of activity of state authorities, at least in the concrete case of Finland that provided most of the material for my case study. This observation raises some worries, for although the bureaucratization of human rights is absolutely necessary for their more effective implementation and fluent application, there is the risk that if it does not actually increase the position of its alleged subjects in any significant way, it may become an empty governmental practice, a rhetorical tool for biopower and post-political negotiations, echoing Costas Douzinas’ bleak prophecies. But not too much should be read into this yet, however, for it is impossible to draw any far-reaching conclusions, taking in consideration that the human rights approach has been mainstreamed only very recently, and by a limited sphere of actors. Besides, as we came to notice, human rights can prove to be of crucial importance to the victims of trafficking even if their application were entangled with biopolitical practices. Having been
profiled as risks to the society, the victims seem to be made invisible by a nearly
inpenetrable net of biopolitical practices and discourses, and therefore deported, or simply
excluded from the society. In this state of invisibility, the life of the victims becomes bare
life, included in the political community only through its exclusion, and represented by the
homo sacer who could not be sacrificed, yet did not enjoy any protection from the society. In
this space, producing bare life, all power relations vanish, and only relations of violence
remain. In order to escape, human rights become absolutely vital. As Jacques Rancière and
Slavoj Žižek have demonstrated, human rights can, through their universality and formal
equality, provide bare life the tools to formulate political claims and therefore return to the
sphere of power and politics.

But returning to the sphere of power and politics does not mean that we have escaped
biopower, of course. At this point the question rises, however, whether it is necessary to
escape biopower, as long as we can prevent ourselves from being excluded by it. Indeed, in
The Matrix, one of the revolutionaries is ready to betray the others in exchange of being
plugged back into the Matrix. After having lived excluded from the ‘society’ (the Matrix) —
experiencing the life of a homo sacer, we could say — the traitor no longer cares, whether
his life is, in reality, fully controlled, as long as he can once again ‘enjoy’ the benefits that
the Matrix produces. His only conditions are that he does not want to remember anything
from his former life and that he is someone rich and important — “like an actor”. But then
again, if our question was, whether human rights are useful for the victims of trafficking,
leaving things to this does not seem very satisfactory (being returned to the sphere of politics
does not mean that one becomes ‘an actor’, after all), even if it means that human rights have
not become useless for the victims. If the victims get their voices heard, only to get deported
still after court cases or other official measures, since they do not fit the stereotypical picture
of the ‘true’ victim of trafficking, created by biopolitical practices, the advancement seems
very little indeed from their perspective (although it might be a fairly large step from a
theoretical one). Worse yet, human rights can lose their protest function in the process and
become simply tools for balancing and negotiating interests, i.e. standard bureaucracy, that do
not add anything to the process, but at best “obscure the political nature of the task.”397 They
give the false picture that something is actually happening.

It has been my argument throughout this thesis that we are, indeed, facing this kind of
danger. Human rights can be a critically important tool from the victim’s perspective, but if

397 Koskenniemi 1999 at 110.
we establish a specific human right for the victims of trafficking, we simultaneously draw a line that separates those that enjoy the protection of this right from those others that are excluded from its sphere. Since the most fundamental problem regarding anti-trafficking measures is that victims are not identified, this is a serious drawback. Instead of radical changes, we simply reinforce the existing situation, give the (false) impression that significant steps forward have been taken, and legitimize the measures of the authorities. The application of such a right also necessarily depends on expert knowledge, considering how difficult it is to identify the victims of trafficking, entangling trafficking with biopolitical practices. Furthermore, the right to remain in the destination country, absolutely vital for many trafficking victims, seems to come with a heavy price for those that are identified as victims of trafficking, subjecting them to intensified surveillance and disciplinary techniques. Forcing victims to testify against traffickers and otherwise cooperate in the investigation of the crime is the clearest example, and one that has rightly been the object of serious criticism by the advocates of the human rights approach. But such elements are detectable in other measures, too, even ones that are simultaneously of extreme importance to the victims. Since the victims are, as a result of the pervasiveness of the myth of trafficking, pictured as helpless, traumatized persons, they are subjected to all sort of treatment and profiling, and sometimes even confined into institutions (such as the victims assistance centers in Finland). These assistance measures may, indeed, prove to be very useful, even necessary, in many situations, but when they depend on the discretion of experts, instead of the will of the victims, and are applied nearly automatically to all victims, they start to seem more and more like disciplinary techniques, intended to shape the victims so that they fit the needs of the biopolitical society. It is as if we made the victims homines sacri in order to control them; as if we had not learned anything from the example of 19th century England. As Claudia Aradau puts it:

If human rights have become the rights of those that are too weak or too oppressed to actualize and enact them, they are not ‘their’ rights. They are deprived of political agency; the only rights are our rights to practice pity and humanitarian interventions. [Trafficking] Victims are therefore divorced from the very possibility of political agency, turned into spectral presences on the scene of politics.398

We face, therefore, a paradox. Human rights as universal and formally equal are a vital tool for the victims in resisting biopower — not because they reflect some divine power or the core of humanity (at least in their written form), but because they provide us the means to challenge power. Yet, every time the victims invoke their rights, they set in motion

398 Aradau 2004 at 276.
biopolitical practices: every time time a trafficking case is processed by authorities, or a new trafficking treaty drafted, the myth of trafficking is reinforced. Furthermore, when we go through the process, we accept the existing rules and institutions concerning trafficking. Human rights can, therefore, as put by Wendy Brown, “mask, by depoliticizing, the social power of institutions […and organize…] exploitation and regulation, thus functioning as a modality of […] biopower.”

So, what are we to conclude, then? Should we simply discard the human rights approach, because of this paradox? This would seem counterproductive. Human rights have been charged with such energy that it would be foolish not to take advantage of it. They have, after all, fueled countless (often victorious) emancipatory struggles, and have already shown promise in the case of trafficking, as well. It seems reasonable to conclude, instead, that the phrase “[h]uman rights are like love, both necessary and impossible”, provided by Martti Koskenniemi, fits the special case of anti-trafficking campaign, too. We have, therefore, only one possibility: to hold on to rights, but to engage with them critically. We must resist the ideological temptations that more human rights make everything good and ponder every decision carefully. Human rights must be approached as a useful, yet dangerous tool. Man is free, after all, not because we have rights, but “because the being of man precedes politics, citizenship and rights.” We need, therefore, an “ethic of critical engagement with human rights, with-in and against human rights, in the name of an unfinished humanity”: a never-ending cycle of protest, activism and critique for the continuous interrogation of the limits of the human of rights. Perhaps through this process we can approach, step by step, the raw emancipatory potential that human rights promise, and make finally the problematic status of ‘victim of trafficking’ lose its meaning from the trafficked, smuggled or migrated person’s perspective.

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400 Koskenniemi 2001 at 33.
402 Golder, Ben, Foucault and the Unfinished Human of Rights, 6 Law, Culture and the Humanities 2010, 354-374 at 356. It is his claim that this is what Foucault was aiming at, during his last years, instead of rejecting his former views and becoming suddenly a great humanist, as it is often claimed.