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The Phenomenon of

H U M A N
TRAFFICKING

Through the Prism of
Institute of Justice
RESEARCH

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1

Introduction

The present paper has been developed for the purpose of achieving two objectives. Firstly, it seeks to delineate the scope of human trafficking research conducted by a specific division of The Institute of Justice.¹ It is also the objective of this paper to present the key conclusions of the aforementioned research. The second objective is to identify subjects related to human trafficking that necessitate additional investigation.

Research on human trafficking has been conducted within the framework of the IJ in the following sections: the sections of Criminal Law and Criminal Process, Fundamental Rights, and Family Law. The reports published in paper form since 2002 were included. Subsequently, the author will expound upon the publication prepared by:

1. Section of Criminal Law and Criminal Process:

- a. K. Burdziak, P. Banaszak, *Przestępstwo handlu ludźmi – wykładnia terminu „handel ludźmi”, sposób przeprowadzania przesłuchań i innych dowodów w celu uzyskania materiału potwierdzającego popełnienie tego przestępstwa, charakterystyka jego ofiar i sprawców* (The crime of human trafficking – interpretation of the term ‘human trafficking’ the manner in which interrogations were conducted and other evidence was gathered to obtain material confirming the commission of this crime; the characteristics of its victims and perpetrators), Warsaw 2016;
- b. K. Karsznicki, *Analiza polskiego prawa pod kątem efektywności ścigania handlu ludźmi do pracy przymusowej* (The analysis of the Polish law in terms of effectiveness of combating trafficking human beings for forced labour), Warsaw 2008;
- c. K. Karsznicki, *Analiza postępowań przygotowawczych w sprawach dotyczących handlu ludźmi zakończonych w latach 2005–2007 decyzją o umorzeniu* (The analysis of the pre-trial proceedings in cases of human trafficking terminated by dismissal decisions in years 2005–2007), Warsaw 2008;

¹ In Polish: Instytut Wymiaru Sprawiedliwości, hereinafter: the IJ.

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- d. B. Namysłowska-Gabrysiak, *Handel ludźmi. Analiza orzeczeń sądowych pod kątem zgodności z definicją zawartą w aktach międzynarodowych w szczególności w protokole z Palermo* (The human trafficking. The analysis of court resolution in terms of accordance with definition from international acts, especially in the Palermo Protocol), Warsaw 2006;
- e. B. Namysłowska-Gabrysiak, *Analiza orzeczeń sądowych za lata 1999–2009 w sprawach dotyczących handlu ludźmi z art. 253 k.k oraz wybranych losowo spraw z Article 204 § 4 of CC* (The analysis of court resolutions from 1999–2009 in cases of the crime of human trafficking of Article 253 of CC and random chosen cases of the crimes of Article 204 § 4 of CC), Warsaw 2010;
- f. Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek polskiego prawa karnego do zjawiska pracy przymusowej (aspekty interpretacyjne, zarys orzecznictwa oraz problematyka działalności wykrywczej służb)* (The attitude of Polish criminal law towards the phenomenon of forced labour (interpretative aspects, outline of jurisprudence, and issues of detection activities of services)), Warsaw 2018;
- g. Ł. Pohl, *Definicja pracy przymusowej w prawie polskim (ujęcie w kontekście handlu ludźmi)* (The definition of the forced labour in the Polish law (in the context of human trafficking)), Warsaw 2021;
- h. Ł. Pohl, P. Banaszak-Grzechowiak, K. Burdziak, Ł. Buczek, R. Mroczek, *Handel ludźmi – raport z badań* (Human trafficking – research report), Warsaw 2022;
- i. A. Skowron, *Handel dziećmi – trudności w zapobieganiu przestępstwom i ich zwalczaniu* (Child trafficking – constraints in preventing of crimes and its combating), Warsaw 2022;
- j. E. Zielińska, *O potrzebie zmian Kodeksu karnego w związku z ratyfikacją Protokołu o Zapobieganiu oraz karaniu handlu ludźmi* (Regarding the necessity of amending of the Criminal Code by reason of ratifying of the Protocol to prevent and punish trafficking in persons), Warsaw 2006;
- k. E. Zielińska, B. Namysłowska-Gabrysiak, *Transpozycja do prawa polskiego art. 8 Dyrektywy 2011/36/UE Parlamentu Europejskiego i Rady w sprawie zapobiegania handlowi ludźmi i zwalczania tego procederu oraz ochrony ofiar* (Transposition to the Polish Law Article 8 of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims), Warsaw 2013.

Moreover, the results of Section research were published as scientific paper in the IJ journal 'Prawo w Działaniu' (Law in Action): K. Burdziak, P. Banaszak, *Przestępstwo handlu ludźmi w świetle wyników badań aktowych* (The crime of human trafficking in the light of the case files research results), 'Prawo w Działaniu' (Law in Action) 2016, nr 28, pp. 220–247.

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2. Section of Fundamental Rights:

- a. M. Mikluszka, *Zagraniczne procesy tzw. macierzyństwa zastępczego (surrogacy motherhood) w świetle zasady handlu ludźmi – zagrożenia węzłowe* (Foreign processes of so-called surrogacy motherhood in the light of human trafficking principle – key issues), Warsaw 2017;

3. Section of Family Law:

- a. M. Domański, J. Słyk, *Odnalezienie skutecznych narzędzi w walce z handlem dziećmi; próba odnalezienia luk prawnych umożliwiających bądź ułatwiających występowanie procederu handlu dziećmi i znalezienie skutecznych narzędzi utrudniających bądź uniemożliwiających proceder* (Finding Effective Tools in the Fight Against Child Trafficking; An Attempt to Identify Legal Gaps Facilitating or Enabling the Occurrence of Child Trafficking and to Find Effective Tools to Hinder or Prevent the Practice), Warsaw 2023.

In anticipation of the ensuing deliberations, it is imperative to articulate the research findings of the IJ, particularly those sections that pertain to the following issues related to the phenomenon of human trafficking:

1. the definition of human trafficking;
2. the criminalization of human trafficking in the context of Polish criminal law;
3. the issues connected with forced labour;
4. the issue of child trafficking, including surrogacy and motherhood;
5. the identification and mitigation of the human trafficking phenomenon;
6. the analysis of case files related to Polish criminal cases involving human trafficking.

These considerations will be made in accordance with the aforementioned research fields. Given that the majority of IJ reports pertain to criminal law issues, the primary subject of analysis will be issues related to criminal law in the broadest sense. Consequently, issues related to family law or fundamental rights will be exclusively highlighted.

2

Definition of

HUMAN TRAFFICKING

Nowadays the notion of human trafficking is defined in the Article 115 § 22 of the CC.² Pursuant to this provision:

Human trafficking is recruitment, transportation, delivery, transferring, forwarding, keeping or taking the person with the use of:

1. coercion or unlawful threat;
2. kidnapping;
3. deception;
4. misleading or taking advantage of an error or inability to properly understand the action taken;
5. abuse of a relationship of dependence, exploitation of a critical situation or a state of helplessness;
6. granting or accepting a financial or personal benefit or a promise thereof to a person exercising care or supervision over another person to be used, even with its consent, in particular in prostitution, pornography or other forms of sexual exploitation, in forced labour or services, in begging, slavery or other forms of exploitation degrading human dignity, or for the purpose of obtaining cells, tissues or organs contrary to the provisions of the law. If the perpetrator's conduct concerns a minor, it constitutes trafficking in human beings, even if the methods or means listed in points 1 to 6 have not been used.

Its own legal definition has the notion of slavery as well. Pursuant to Article 115 § 23 of CC: 'Slavery is the state of dependence in which the human is treated as subject of property.'

The aforementioned human trafficking definition was not in effect at the time of the enactment of CC (specifically, from June 1, 1998). The definition was introduced by the Act

² The Act of 6 June 1997 – the Criminal Code (Journal of Laws 2024, item 17, as amended), hereinafter: the CC.

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of 20 May 2010, which amended the Criminal Code, the Police Act, and the Provisions Introducing the Criminal code and the Criminal Procedure Code.³ These provisions have been in effect since 8 September 2010. Prior to the enactment of the aforementioned legal act, a lack of clarity persisted in the Polish legal framework regarding the definition of human trafficking. This ambiguity has been noted in IJ reports. Prior to the enactment of the Act of May 20, 2010, and subsequent to its enactment, the definition of human trafficking exhibited significant variability in the reports.

Prior to the adoption of Article 115 § 22 of the CC, IJ reports acknowledged the issues associated with the absence of a legal definition for the term in question. Initially, the possibility of adopting the legal definition from Article 3 of the Palermo Protocol was proposed.⁴ It was initially posited that the adoption of the legal definition stipulated in Article 3 of the Palermo Protocol was a conceivable course of action. Pursuant to mentioned definition human trafficking⁵ the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a)⁶ of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used. According to Article 4 of Palermo Protocol this Protocol shall apply (hence as well as legal definition stemming from this legal act), except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences. In the Polish legal scholarly community, two divergent views emerged concerning the potential application of the legal definition from the Palermo Protocol under the provisions of the CC. The first viewpoint asserts the applicability of the Palermo Protocol definition to the CC. Conversely, under a different perspective, the aforementioned definition was not con-

³ Act of 20 May 2010 amending the Criminal Code, the Police Act, the Provisions Introducing the Criminal Code and the Code of Criminal Procedure (Journal of Laws 2010, No. 98, item 626).

⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000 (Journal of Laws 2005, No. 18, item 160), hereinafter: Palermo Protocol.

⁵ It should be noted that the legislator in mentioned provision defines the synonymous term 'trafficking in person'.

⁶ Subparagraph (a) is a legal definition of trafficking in human.

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sidered obligatory under the CC.⁷ In the cases where the initial perspective was endorsed by B. Namysłowska-Gabrysiak, the definition stipulated in Article 3 of the Palermo Protocol was not considered obligatory in all instances. This limitation is attributed to the implementation of Article 4, which restricts the application of the aforementioned definition to cases involving international human trafficking perpetrated as part of an organized criminal group.⁸ The application of this definition has the potential to impact the exclusion from the scope of criminalization cases of human trafficking that occur exclusively within the territorial boundaries of Poland. This exclusion applies regardless of whether the trafficking is perpetrated by organized criminal groups or not. Additionally, it pertains to international human trafficking that does not involve the involvement of organized criminal groups. It is noteworthy that the aforementioned definition does not encompass child trafficking, defined as the sale of children in the Optional Protocol to the Convention on the Rights of the Child.⁹ It is imperative to note that the aforementioned definitions do not pertain to child trafficking, specifically the sale of children, as delineated in the Optional Protocol to the Convention on the Rights of the Child. Prior to Article 2 of the mentioned protocol, the sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration. E. Zielińska indicates that definition of human trafficking cannot be based on provision of EU framework decisions because of the impossibility of its directed application.¹⁰ The cited scholar paid attention to interpretative problems associated with the lack of a legal definition of human trafficking, which created problems with the practical application of Article 204 § 4 of the CC and Article 253 of the CC.¹¹ Hence, the cited academic proposed introducing into the CC the legal definition of human trafficking.¹²

According to the definition stipulated in Article 115 § 22 of the CC, the scholar demonstrated that the definition in question pertains to elements that are considered integral to all international acts concerning human trafficking.¹³ Nevertheless, as K. Burdziak and P. Banaszak have observed:

⁷ B. Namysłowska-Gabrysiak, *Handel ludźmi. Analiza orzeczeń sądowych pod kątem zgodności z definicją zawartą w aktach międzynarodowych w szczególności w protokole z Palermo*, Warsaw 2006, pp. 6–8.

⁸ B. Namysłowska-Gabrysiak, *Handel...*, p. 9.

⁹ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted in New York on 25 May 2000 (Journal of Laws 2000, No. 76, item 494), hereinafter: Optional Protocol to the Convention on the Rights of the Child.

¹⁰ E. Zielińska, *O potrzebie zmian Kodeksu karnego w związku z ratyfikacją Protokołu o Zapobieganiu oraz karaniu handlu ludźmi*, Warsaw 2006, p. 4.

¹¹ E. Zielińska, *O potrzebie...*, pp. 6–7.

¹² E. Zielińska, *O potrzebie...*, pp. 9–10. Similar: K. Karsznicki, *Analiza polskiego prawa pod kątem efektywności ścigania handlu ludźmi do pracy przymusowej*, Warsaw 2008, p. 1.

¹³ E. Zielińska, B. Namysłowska-Gabrysiak, *Transpozycja do prawa polskiego art. 8 Dyrektywy 2011/36/UE Parlamentu Europejskiego i Rady w sprawie zapobiegania handlowi ludźmi i zwalczania tego procederu oraz ochrony ofiar*, Warsaw 2013, p. 8.

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However, it should be emphasized that it does not fully overlap with them, because, unlike in the case of regulations from the Penal Code, the catalogue of measures applied by the perpetrator which, in the light of these acts of international law, fulfil the elements of trafficking in human beings, is an open catalogue.¹⁴

The mentioned academics indicates on shortcomings of this definition. Researchers have asserted that the incorporation of the definition of human trafficking in Article 189a of the CC has been demonstrated to impose limitations on the scope of human trafficking criminalization. This assertion is founded on the establishment of a closed catalogue of behaviours constituting human trafficking, thereby confining the range of criminal actions that can be classified as human trafficking under the CC.¹⁵ According to K. Burdziak and P. Banaszak,

The incorporation of the phrase ‘in particular’ would transform this catalogue, as stipulated in Article 115 § 22 of the CC, into an illustrative catalogue. It is challenging to predict all potential scenarios and behaviours that, while not explicitly mentioned in this provision, align with the elements of the offence of trafficking in human beings.¹⁶

Conversely, the aforementioned authors observed that the formulation of a definition remains contingent upon the principle of *nullum crimen sine lege certa*. This is due to the explicit articulation of the feature of causal activity, which remains ambiguous as to which activities constitute the offence of trafficking in human beings.¹⁷ Secondly, the definition does not encompass the phenomenon of forced labour (see Part 4 for further elaboration).¹⁸ Another controversial issue is the usage of the plural form in the future of causative acts, such as human trafficking (in Polish: *handel ludźmi*).¹⁹ This engenders uncertainty regarding whether, in specific cases, the subject of offence delineated in Article 189a § 1 of the CC is limited to a single individual, and whether the perpetrator can be penalized for their criminal actions.²⁰ Referring to this issue, K. Burdziak and P. Banaszak have correctly observed

¹⁴ K. Burdziak, P. Banaszak, *Przestępstwo handlu ludźmi – wykładnia terminu „handel ludźmi”, sposób przeprowadzania przesłuchań i innych dowodów w celu uzyskania materiału potwierdzającego popełnienie tego przestępstwa, charakterystyka jego ofiar i sprawców*, Warsaw 2016, p. 3.

¹⁵ A. Skowron, *Handel dziećmi – trudności w zapobieganiu przestępstwo i ich zwalczaniu*, Warsaw 2022, pp. 22–23; K. Burdziak, P. Banaszak, *Przestępstwo...*, pp. 4–5.

¹⁶ K. Burdziak, P. Banaszak, *Przestępstwo handlu ludźmi w świetle wyników badań aktowych*, „Prawo w Działaniu” 2016, nr 28, p. 223.

¹⁷ K. Burdziak, P. Banaszak, *Przestępstwo...*, pp. 223–224 and cited literature.

¹⁸ Ł. Pohl, *Definicja pracy przymusowej w prawie polskim (ujęcie w kontekście handlu ludźmi)*, Warsaw 2021, p. 5 and further; Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek polskiego prawa karnego do zjawiska pracy przymusowej (aspekty interpretacyjne, zarys orzecznictwa oraz problematyka wykrywczej działalności służb)*, Warsaw 2018, p. 5 and further

¹⁹ In Polish language the word ‘ludzie’ (human) are plural from the word ‘człowiek’ (men).

²⁰ This doubt was more relevant at the time of Article 253 § 1 CC, which referred to human trafficking in the plural, while lacking a legal definition of the term.

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that the establishment of a legal definition for trafficking in human beings has effectively addressed this issue. As K. Burdziak and P. Banaszak accurately observe,

the legislator specified that trafficking in human beings encompasses the recruitment, transport, supply, harbouring, or receipt of a person by means enumerated. Given the legislator's use of the term 'person' it can be deduced that the use of any of the enumerated means, as outlined in Article 115 § 22, by a single individual, constitutes the offence of trafficking in human beings. Consequently, the plurality of the subjects is not a prerequisite for the commission of this offence.²¹

²¹ K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 224.

3

Criminalisation of

HUMAN TRAFFICKING

in the Polish Criminal Law

Prior to the entry into force of Article 189a § 1 of the CC on the ground, previous legal states penalized human trafficking through several provisions. Prior to the indication of the CC provision, it is imperative to pay close attention to Article 8 of the p.i.²² Prior to the implementation of this provision, the following circumstances prevailed: ‘Who causing putting or keeping a person in a state of slavery or practicing the slave trade, shall be liable to a term of imprisonment of between 3 and 20 years.’²³ As B. Namysłowska-Gabrysiak astutely observes, placing this crime in the act introducing the Polish criminal act, may impose constraints on the delineation between crime of human trafficking and the crime of putting of person in a state of slavery.²⁴

The latter regulations penalising the human trafficking were – now repealed – Article 253 § 1 of the CC and Article 204 § 4 of the CC. Pursuant to Article 253 § 1 of the CC: ‘Who practises human trafficking even with their consent, shall be liable to a term of imprisonment of not less than 3 years.’ In the context of mentioned provision, concerns have been raised regarding conceiving the feature of human trafficking (see Part 2). As noted by E. Zielińska and E. Namysłowska-Gabrysiak:

The provision of Article 253 § 1 of the CC in force at the time, already after a preliminary analysis, showed many imperfections and gave rise to serious difficulties of interpretation. Firstly, the regulation of the statutory elements of Article 253 § 1 of the CC did not meet the criterion of compliance with the principle of *nullum crimen sine lege certa*.

²² Act of 6 July 1997 – Provisions introducing of the Criminal Code (Journal of Law 1997, No. 88, item 554 as amended), hereinafter: p.i.

²³ The original wording of the provision: ‘Who causing putting or keeping a person in a state of slavery or practicing the slave trade, shall be liable to a term of imprisonment up to 3 years.’

²⁴ B. Namysłowska-Gabrysiak, *Analiza orzeczeń sądowych za lata 1999–2009 w sprawach dotyczących handlu ludźmi z art. 253 k.k. oraz wybranych losowo spraw z art. 204 § 4 k.k.*, Warsaw 2010, p. 8.

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Secondly, the lack of definition of the term 'human trafficking' caused discrepancies in the application of this provision in practice. Thirdly, the issue of the possibility of direct and indirect application of regulations contained in international acts by Polish courts was inconsistently interpreted in the doctrine.²⁵

According to Article 204 § 4 of the CC: 'The penalty specified in § 3 [from one to 10 years imprisonment – note M.G.] shall be imposed on anyone who lures or abducts another person for the purpose of prostitution abroad.'

In the scope of the sanction of committing of aforementioned crimes, should be cited the following outlook of B. Namysłowska-Gabrysiak:

Another point worth mentioning is the threat of punishment provided for in Article 204 § 4 of the CC in relation to Article 253 § 1 of the CC. Well, for the crime of luring or abducting another person abroad for the purpose of prostitution, the Criminal Code provides for a penalty of imprisonment from 1 to 10 years. Whereas the crime of trafficking in human beings, even with their consent, is a crime, punishable by 3 years of imprisonment. The above regulation of the dangers provided for in both these offences should be assessed critically. Indeed, the statutory dangers provided for in both of the above offences show a lack of statutory consistency in that, in a sense, the statutory elements contained in Article 204 § 4 are a qualified form of the offence in Article 253 § 1 of the CC. As a consequence, such a situation may lead to solutions in which an offender who sells a woman with her consent will be punished more severely than an offender who abducts a woman, which may involve, e.g., using violence against her.²⁶

Pursuant to Article 189a § 1 of the CC: 'Who commits human trafficking, shall be punished for imprisonment of between 3 and 20 years.' According to § 2: 'Who made preparations for the offence specifies in § 1, shall be punished for imprisonment of between 3 months and 5 years.' Referring to act from Article 189a § 1 of the CC, reference should be made to the comments made in Part Two. It should be mentioned that the legal scholar indicates the multidimensional nature and the factlessness of the offence.²⁷ The key issue associated with the abovementioned provision is the issue of its relationship to crime from Article 8 of the p.i. In IJ reports, researchers indicates that:

²⁵ E. Zielińska, E. Namysłowska-Gabrysiak, *Transpozycja...*, pp. 4–5.

²⁶ B. Namysłowska-Gabrysiak, *Analiza orzeczeń sądowych za lata 1999–2009 w sprawach dotyczących handlu ludźmi z art. 253 CC oraz wybranych losowo spraw z art. 204 § 4 CC*, Warsaw 2010, p. 7.

²⁷ A. Skowron, *Handel dziećmi – trudności w zapobieganiu przestępstwo i ich zwalczaniu*, Warsaw 2022, p. 21 and cited literature.

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The question arises as to the limit of the material elements constituting the offence under Article 189a § 1 of the CC and Article 8 of the p.i. If we assume that slavery is a state of dependency in which a person is treated as an object of property, and that the offence is putting another person into a state of slavery, a concept that certainly includes ‘services of a forced nature’, not to mention the fact that slavery is explicitly mentioned among the purposes of child trafficking, it must be concluded that there is a complete overlap in the scope of the constitutive elements of the type of offence under Article 189a § 1 of the CC and Article 8 of the p.i. Each of the purposes indicated in Article 115 § 22 of the CC results in the child being treated as an ‘object’. It should be added that, in this respect, the judicial case law treats this purpose very broadly. Even before the 2019 amendment, The SA [Court of Appeal – note M.G.] in Gdańsk stated that ‘the purpose of exploiting the victim, as one of the constitutive features of “trafficking in human beings”, includes, e.g., taking someone else’s child into one’s home in order to provide him/her with better living conditions than those he/she would have had in a biological family (...). However, if such a purpose was only declared and the actual purpose (planned by the perpetrator) was to use the child in work, e.g., on a farm, then it is difficult to deny that in the current state of the law such behaviour realises the elements of a crime from Article 189a § 1 of the CC in connection with Article 115 § 22 of the CC. It is, as well a crime from Article 8 of the p.i. in connection with Article 115 § 23 of the CC, and it is no possible to indicate the border line between these two types of criminal act. The determination of the mutual relation of the provisions of Article 253 § 1 of the CC and Article 8 of the p.i. has also raised some doubts in the literature. For example, M. Mozgawa was of the opinion that it should be assumed that the latter constituted a *lex specialis* in relation to Article 253. In his opinion, ‘the provision of Article 8 of the p.i. could be regarded as a kind of anachronism – it is precisely the phenomena related to trafficking in human beings that constitute a modern version of slavery’. He argued that ‘it would be possible to dispense with it altogether, as its role could be fulfilled – after appropriate modification – by the provision criminalising trafficking in human beings (which is currently Article 189a).’²⁸

The issue of criminalization of trafficking in human beings is inextricably linked to the criminalization of the behaviour of victims of trafficking. Indeed, it is conceivable that victims of trafficking in human beings may, for example, under the influence of a non-excludable coercive act, commit intentional prohibited acts.²⁹ In light of the circumstances surrounding the commission of the criminal act, it is deemed appropriate to exclude the criminalization

²⁸ A. Skowron, *Handel...*, p. 24.

²⁹ As illustrated by the following example, the crime of illegal border crossing, stipulated in Article 264 § 1 of the CC, encompasses instances where victims of human trafficking are transported across state borders.

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of the parties in question, based on the prevailing national legal frameworks. In this regard, the seminal contributions of E. Zielińska and B. Namysłowska-Gabrysiak are of particular significance. The authors make reference to the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005.³⁰ According to the aforementioned authors,

One of the fundamental tenets of the victim protection system is the non-punishment clause for victims. The Council of Europe Convention stands as a pioneering legal instrument in its incorporation of a non-punishment clause for victims directly into its legislation. According to Article 26 of the Convention, each Party is obligated, in accordance with the fundamental principles of its domestic legal system, to ensure the possibility of non-punishment of victims for their participation in unlawful acts to the extent that they were compelled to do so. This regulation implies that the provision of Article 26 of the Convention imposes a clear obligation on States to ensure the possibility of non-punishment of victims in their domestic systems, when the element of 'coercion' is present. The interpretation of this obligation is further delineated in the explanatory memorandum to the Council of Europe Convention (the so-called Explanatory Memorandum). Specifically, in paragraph 274, it is elucidated that each Party has the option to fulfil the obligation stipulated in Article 26 by implementing a provision of substantive criminal law or criminal procedure, or alternatively, any other measure that would ensure the non-punishment of victims under certain legal stipulations. These stipulations include the requirement that the offence committed by the victim is a direct result of or is inextricably linked to their trafficking experience. According to this rationale, State's discretion is limited only to the manner in which they implement the non-punishment requirement. It is imperative to underscore that the non-punishment clause encompasses the imperative to safeguard victims of trafficking, not only from the imposition of sanctions, but also from prosecution and detention. Moreover, in the context of Article 26, the non-criminality clause must be interpreted in conjunction with the definition of trafficking in human beings, particularly with regard to the notion of coercion, which encompasses all forms of trafficking encompassed by the definition of the term. The concept of being 'coerced' into perpetrating a criminal act signifies the comprehensive array of factual circumstances in which victims of trafficking forgo their autonomy, thereby compromising their capacity to act in accordance with their free will.³¹

³⁰ Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005 (Journal of Laws 2009, No. 20, item 107).

³¹ E. Zielińska, E. Namysłowska-Gabrysiak, *Transpozycja...*, pp. 14–15.

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The authors presented examples of non-punishment clauses that are currently in effect in the criminal laws of various countries, including, among others, France, Georgia, and Belgium. The authors noted that certain states rely on preexisting constructs for this purpose, such as the state of superior necessity.³² In their analysis of the Polish legal context, E. Zielińska and B. Namysłowska-Gabrysiak, drawing upon a comprehensive review of the extant Polish scholarship, arrived at the following conclusion:

The regulations of Polish criminal law presented above lead to the conclusion that Poland has only partially fulfilled the requirement to introduce an irresponsibility clause into its legal system, as provided for in Article 8 of the EU Directive and Article 26 of the CoE Convention. In light of these observations, the demand for a revision of the legal framework in this regard appears to be well-founded. The resolution to the impunity clause, established in a separate act, ought to be founded on the causation model. The following formulation has been proposed for the relevant provision: ‘The perpetrator of an offence shall not be subject to retribution where he or she is a victim of trafficking in human beings committed to his or her detriment (or a person who has been the victim of an offence of trafficking in human beings) and the offence committed by him or her is in relation to that offence.’ This proposed model aligns with contemporary trends in the regulation of this issue and would offer victims of trafficking a higher standard of protection than the minimum standard stipulated by the aforementioned EU Directive and the CoE Convention on Trafficking in Human Beings. However, the notion of regulating the comprehensive anti-trafficking issue, encompassing the protection system for victims of this crime, within a separate legislative framework that has not yet garnered approval, is currently under consideration. In this regard, we propose the adoption of an alternative solution that entails the introduction of multiple non-punishment clauses into the prevailing Criminal Code. Firstly, we propose the introduction of specific clauses for offences in the specific part of the CC that are most often committed by victims, in relation to trafficking in human beings. These clauses, which are introduced in the following paragraphs (e.g., Article 189a of the CC, Article 264, and Article 271 of the CC), should provide that ‘The offender shall not be punished if he is a victim of trafficking in human beings and the offence committed by him is in relation to the offence of trafficking in human beings committed against him.’ Additionally, we propose the establishment of an additional general ground for the forfeiture of punishment in the general part of the CC. This provision is intended as a supplement to the existing specific and general grounds for the privilege of certain offenders, as outlined in the substantive law provisions (par-

³² E. Zielińska, E. Namysłowska-Gabrysiak, *Transpozycja...*, pp. 22–28.

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ticularly concerning active repentance and the possibility of extraordinary mitigation of punishment), and in the procedural law provisions contained in Article 17 of the CC (mentioned in the methodological guidelines for prosecutors). The new clause, which belongs to the principles of sentencing, should be inserted in Article 59 of the CC as paragraph 3 with the following wording: 'The court shall waive punishment if the perpetrator of the offence is a victim of trafficking in human beings and the offence committed by the victim is related to that offence, unless the conditions for exclusion of liability under another provision are fulfilled.' In such a case, the waiver of punishment would be considered subsidiary. Its application would be permissible under circumstances in which there is an absence of a specific non-punishment clause pertaining to the offence committed by the victim of trafficking in human beings, and in instances where the grounds for the application of the general clause have not been fulfilled. In such circumstances, the court is obligated to impose a sentence. This determination would be made subsequent to the determination of the perpetrators' guilt in the trafficking in human beings case, and subsequent to the demonstration of the perpetrators' culpability for the victim's harm or the harm of a victim's family member. The court's role would be to ascertain the existence of a causal relationship between the victim's offence and the harm sustained.³³

With regard to the criminal activities perpetrated by victims of human trafficking, E. Zielińska and B. Namysłowska-Gabrysiak's criminological analyses, apart from the dogmatic and legal aspects, offer a novel perspective. The aforementioned authors have indicated that:

These include, as previously mentioned: violations of immigration laws, the provision of false information to obtain travel documents, work permits, residence permits, illegal crossing of a national border, and overstaying after the expiration of a visa. These infractions may also be associated with the form of exploitation that motivates the trafficking of individuals. For instance, victims who have been trafficked for the purpose of prostitution may lack the necessary permits to perform such services, if applicable, or may be engaged in work environments that contravene the legal prostitution statutes of the nation. An analogous situation can be observed in the context of workers who lack the necessary work permits, or in instances where beggars operate in contravention of local policing regulations. There have been documented cases of human traffickers compelling their victims to engage in illicit activities, such as the production of narcotics, and to perpetrate additional criminal acts. In certain instances, traffickers have deliberately exposed victims to the risk of criminal involvement, such as by providing them with fraudulent

³³ E. Zielińska, E. Namysłowska-Gabrysiak, *Transpozycja...*, pp. 37-39.

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identification documents upon release, which the victims have subsequently utilized, erroneously believing their authenticity. However, there have also been, and continue to be, situations where victims have resumed their criminal activities even after breaking free from the traffickers' control. However, the criminal acts perpetrated by these individuals are often associated with the depressive experience they have endured. In their perspective, this path is perceived as the sole means of securing their livelihood without falling prey to exploitation once more. Finally, relatively frequent situations include those in which a person who was previously a victim of trafficking starts to participate in trafficking himself or herself at a later stage, e.g., by recruiting others. This phenomenon is referred to in the extant literature as a 'cycle of abuse'. In such cases, traffickers employ manipulative tactics to exploit their victims, effectively turning them into accomplices in the perpetration of further exploitation. This is a deliberate strategy to maintain control over the other victims while retaining control over the victim-perpetrator. In such cases, it is particularly challenging to obtain evidence that this conversion of roles from victim-trafficker to perpetrator-co-offender was coerced by one or more of the means listed in the definition of trafficking in human beings.³⁴

In the context of IJ reports, the issue of the non-criminalization of victims of human trafficking was also raised by Ł. Buczek. The mentioned author posits the following postulate: that Article 31a, containing a non-criminality clause with the following wording, should be introduced into the Polish-language CC: 'The perpetrator of an offence shall not be liable to punishment if he has committed the offence as a direct consequence of having been the victim of trafficking in human beings within the meaning of Article 115 § 22.'³⁵

³⁴ E. Zielińska, E. Namysłowska-Gabrysiak, *Transpozycja...*, pp. 20–22.

³⁵ Ł. Buczek, *Przestępstwo handlu ludźmi z perspektywy Kodeksu karnego i Kodeksu postępowania karnego. Wybrane zagadnienia problemowe wraz z postulatami de lege ferenda* [in:] Ł. Pohl (ed.), *Handel ludźmi – raport z badań*, Warsaw 2022, p. 16.

4

FORCED LABOUR

Pursuant to Article 2 section 1 of the Geneva Convention:³⁶

For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'

According to Article 2 section 2:

Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include –

- (a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
- (b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
- (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
- (d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

³⁶ Convention Concerning Forced or Compulsory Labour, 1930 (No. 29) adopted in Geneva on 28 June 1930 (Journal of Laws 1959, No. 20, item 122), hereinafter: Geneva Convention.

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(e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.’

The problematic of forced labour was the subject of IJ reports several times.

K. Karsznicki noted that:

On the basis of some criminal cases conducted by Polish law enforcement authorities, doubts have arisen as to whether the aforementioned definition covers the behaviour of persons who are not a party to the transaction of trafficking in human beings, but benefit from the work provided to them by victims of trafficking, who are still in close dependence on the traffickers collecting remuneration for this work. In other words, it is a situation where the beneficiary of the victims’ labour does not have sovereignty over them and does not settle accounts with them directly, but pays money for the labour provided to those who have organised the ‘labour force’.³⁷

In the opinion of the cited author:

Forced labour includes any action that takes away the value of voluntariness from the work performed. It is not forced labour, for example, to fail to provide an employee with the statutory minimum wage. However, actions to prevent an employee from leaving the workplace would fall within the concept of forced labour. Accordingly, the following criteria should be taken into account when assessing specific conduct:

- whether physical or sexual violence occurred,
- whether the employee had his or her mobility restricted,
- whether there has been work for alleged debts (the person becomes security for the payment of the debt), - whether there has been a delay in payment of wages or refusal of payment,
- whether passports or other identification documents have been withheld,
- whether threats have been made against the employee by the employer (including threats to report illegal residence to the authorities)?³⁸

³⁷ K. Karsznicki, *Analiza...*, p. 2.

³⁸ K. Karsznicki, *Analiza...*, pp. 2-3.

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Within the context of forced labour, the term ‘forced labour’ holds particular significance. Ł. Pohl’s consideration regarding the inclusion of forced labour as defined by Article 115 § 22 of the CC. Initially, it may appear that these considerations are superfluous because the Polish legislator employed the term ‘labour or services of forced character’ (*praca lub usługi o charakterze przymusowym*) in the aforementioned provision. However, as noted by the cited scholar, while the distinction between ‘forced labour’ (*praca przymusowa*) and ‘labour of forced character’ may appear to be merely semantic, it cannot be disregarded.³⁹ In the opinion of Ł. Pohl, the assessment of the absence of a definition of forced labour within the Polish legal system is unfavourable. The definition of forced labour from the Geneva Convention, as understood by the cited scholar, does not constitute a definition of forced labour. Rather, it is a definition of forced or compulsory labour. The Convention legislator did not adequately indicate the distinction between forced and compulsory labour. Furthermore, considering the prevailing doctrine on the binding force of legal definitions, it is important to note that these definitions are only applicable within the specific legal act in which they are incorporated, unless they pertain to fundamental laws within a particular legal branch, in which case they cannot be attributed to the Geneva Convention.⁴⁰ This has led to questions regarding its applicability under the CC.⁴¹ Moreover, as Ł. Pohl observed:

The considered justification could result in a result that contradicts the rationality of the legislator’s language. It should be noted that Article 115 § 22 of the CC indicates that the trafficking in human beings defined in this provision is not eliminated by the consent of the person subjected to it to exploitation degrading human dignity. However, the definition derived from the Convention assumes as a constitutive condition of forced or compulsory labour the fact that the person used to perform such labour did not volunteer for it, which could be interpreted by some – although it should be clearly reiterated that such an interpretation would have to be considered erroneous – as the absence of the consent in question, i.e., its absence in the form of involuntary undertaking of any form of the indicated exploitation. This interpretation is erroneous because, as noted in the doctrine, consent to a use degrading human dignity does not imply that the person who has given it has thereby given it voluntarily. Following the literature, let us recall that consent to the indicated use may be the result of both a fully sovereign decision and a decision that is essentially non-sovereign, having its origin in an influence external to the decision-maker coming from another person or in an equally external influence on him or her by his or her life situation, in particular material circumstances. In the case

³⁹ Ł. Pohl, *Definicja...*, p. 5; Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek...*, p. 7.

⁴⁰ M. Zieliński, *Wykładnia prawa. Zasady – reguły – wskazówki*, Warsaw 2019, p. 212.

⁴¹ Ł. Pohl, *Definicja...*, p. 6.

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of a non-sovereign decision – due to the triggering factors – it cannot therefore be said to be the expression of the free, because unfettered, will of its subject. In a word, in the case of a voluntarily non-sovereign consent, we are not dealing with the fulfilment of the condition of voluntariness, since such consent is not the result of the free will of its subject, but the consequence of an external influence resulting in an excessive constraint on the will of the decision-maker. Hence, it is fully justified to qualify the influence in question as coercive. It should be noted here that in the case of coercion originating from a human being, this coercion is in fact a compulsive (psychological) coercion, i.e., one that criminal law theory claims that, under its conditions, the coerced cannot be required to undertake behaviour different from that which is a component of the coercive content. Here, i.e., in the context of the interpretation of consent, which is dealt with in Article 115 § 22 of the CC, the doctrine rightly calls for the liberalisation of the indicated requirement of impossibility of this requirement and consequently adopts in its place a less stringent condition, assuming that the consent in question will also take place when it is difficult to require the decision-maker not to give it. According to the literature, the reference to circumstances in the form of psychological coercion also has the advantage of making it clear that under the conditions of such coercion, it is often the case that the coerced person even wants to undertake the behaviour expected by the coercer, which is excellently expressed by the phrase *coactus tamen voluit*, neatly translated by W. Wolter as ‘forced, in spite of the fact that the coerced person is not a coerced person’. It is even claimed in doctrine that these words fully correspond to the majority of cases of consent to undertake forced labour, as they perfectly illustrate the situation in which it is all too often the case that a person agrees to undertake the work in question or to carry out the activity constituting it.⁴²

In the opinion of Ł. Pohl: ‘The above also means that the expression “forced labour” is therefore subject to an interpretation carried out in accordance with the principles developed in the science of interpretation of the legal text.’⁴³ After the interpretation of the notion ‘labour of forced character’, Ł. Pohl, K. Burdziak and P. Banaszak state:

Labour of forced character within the meaning of Article 115 § 22 of the CC will therefore be – in the opinion of the authors, an opinion that must be shared – any work performed under conditions of subordination (subordination) and coercion (compulsive or internal) in a manner degrading human dignity.⁴⁴

⁴² Ł. Pohl, *Definicja...*, pp. 6–7.

⁴³ Ł. Pohl, *Definicja...*, p. 7.

⁴⁴ Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek...*, p. 15.

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The mentioned authors reach the conclusion that such understand labour of forced character does not align in scope with the definition of forced or compulsory labour within the meaning of the Geneva Convention.⁴⁵ As Ł. Pohl noted: ‘The Code approach does not require the existence of a sanction in the broad sense, and the Convention approach does not require that the work performed be a form of exploitation degrading the dignity of the worker.’⁴⁶

Referring in turn to the relationship between forced labour and trafficking in human beings, Ł. Pohl, K. Burdziak and P. Banaszak state:

An analysis of Article 115 § 22 of the CC makes it apparent that there is such a relationship between the title terms that trafficking in human beings is an area of behaviour that in fact precedes the performance of forced labour. This is because, as indicated in the aforementioned provision, conduct consisting of the recruitment, transport, supply, transfer, harbouring or receipt of a person – using violence or unlawful threats, abduction, deception, misrepresentation or exploitation of a mistake or incapacity to grasp the intended action, abuse of a position of dependence, exploitation of a critical situation or helplessness, giving or accepting financial or personal benefit or the promise thereof to a person having the care or supervision of another person – are to be undertaken with a view to exploitation in a labour of forced character. In a word, they are conduct lying in the foreground of that labour, as conduct intended only to make it possible.⁴⁷

In view of the above, Ł. Pohl, K. Burdziak and P. Banaszak propose to introduce the following definition of legal forced labour into the CC (e.g., by adding § 22a to Article 115 of the CC): ‘Forced labour is human labour performed under the influence of coercion that degrades human dignity.’⁴⁸

Furthermore, the aforementioned scholars have proposed an extension to Article 189a of the CC, which would include the following provisions:

§ 3. Whoever compels a person, with his or her consent, to perform work degrading human dignity or to render a service degrading such dignity, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

⁴⁵ Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek...*, pp. 15–16.

⁴⁶ Ł. Pohl, *Definicja...*, p. 13.

⁴⁷ Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek...*, pp. 16–17.

⁴⁸ Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek...*, p. 16.

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§ 4. If the act referred to in § 3 has been committed to the detriment of a minor, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

§ 5. If the act referred to in § 3 has been committed to the detriment of a person who is incapable of discerning the meaning of the act as a result of a mental disability or mental illness, the perpetrator shall be subject to the penalty specified in § 4.

§ 6. Whoever forces a person, without his consent, to perform work degrading human dignity or to render a service degrading such dignity, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

§ 7. If the act referred to in § 6 has been committed to the detriment of a minor, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

§ 8. If the act referred to in § 6 has been committed to the detriment of a person who is incapable of understanding the meaning of the act as a result of a mental disability or mental illness, the perpetrator shall be subject to the penalty specified in § 7.

§ 9. Whoever accepts a person to perform work degrading human dignity or to render a service degrading such dignity shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.⁴⁹

⁴⁹ Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek...*, pp. 17–18. It is worth adding that P. Banaszak proposed another version of § 3 with the following wording: ‘Whoever exploits a human being, with his/her consent, to perform work degrading human dignity or to render a service degrading such dignity shall be subject to a fine, the penalty of restriction of liberty or deprivation of liberty for up to 2 years’ and § 6: ‘Whoever forces a human being to perform work degrading human dignity or to render a service degrading such dignity shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.’ K. Burdziak, on the other hand, proposed criminalising trafficking in human beings by introducing a new provision to the special part of the CC with the following wording: ‘§ 1. Whoever, by coercion or deception, induces a person to perform work degrading human dignity or to render a service degrading such dignity, shall be punished....’

§ 2. Whoever, by abuse of a relationship of dependence or exploitation of a critical position, induces a person to perform work degrading human dignity or to render a service degrading such dignity, shall be punished....

§ 3. Whoever induces a minor to perform work degrading human dignity or to provide a service degrading such dignity shall be punished....

§ 4. Whoever leads to perform work degrading human dignity or to provide a service degrading such dignity a person incapable of recognizing the meaning of his act due to mental disability or mental illness, shall be punished....

§ 5. Whoever takes part in arranging for a person to perform work degrading human dignity or to provide a service degrading such dignity shall be punished...’. Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek...*, p. 18.

5

CHILD TRAFFICKING

(Including Surrogacy
Motherhood)

The matter of child trafficking in IJ research was addressed both from a criminal law perspective and from the perspective of civil law and, more precisely, family law. In addition, M. Mikluszka under the Section of Fundamental Rights made important considerations.

In the context of criminal law, it has been posited that the trafficking of children could be construed as a form of trafficking in human beings, as delineated in Article 115 § 22 of the CC. Consequently, under Article 189a of the CC, it is possible to hold a perpetrator of child trafficking criminally liable. It is also noted that an individual who perpetrates an illegal adoption (which, under certain circumstances, may be considered *de facto* trafficking in a child) may be subject to prosecution under Article 211a⁵⁰ of the CC.⁵¹

In the context of crimes stipulated in Article 189a of the CC, particularly those pertaining to child trafficking, A. Skowron states:

However, the legislator differentiates the elements defining the causal act depending on the characteristics of the trafficked person. It has decided that if the recruitment, transport, delivery, transfer, harbouring or receipt of a person for the purpose referred to in Article 115 § 22 of CC involves a child, it is not necessary for the existence of the

⁵⁰ It reads as follows: ‘§ 1. Whoever, for the purpose of financial gain, is engaged in arranging the adoption of children contrary to the provisions of the Act, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

§ 2. The same punishment shall be imposed on anyone who, being a person with parental authority over a child, consents to the adoption of that child by another person:

1) for the purpose of gaining a pecuniary or personal benefit, concealing this purpose from the court deciding in the adoption proceedings, and, if the parent consents to the adoption of the child in the future without naming the adopter, from the court receiving the statement of consent,

2) with the omission of the adoption proceedings.

§ 3. The same penalty shall be imposed on anyone who consents to the adoption of a child by himself under the conditions referred to in § 2.’

⁵¹ A. Skowron, *Handel...*, pp. 21–29.

5. Child Trafficking (Including Surrogacy Motherhood)

offence under Article 189a § 1 of the CC to use the means and methods listed in Article 115 § 22 points 1 to 6 of the CC. The law in Article 115 § 22 of the CC singles out a minor as the object of the executive act also in the sense that it has the effect of actually creating a separate type of criminal act within Article 189a of the CC from the type of criminal act whose 'object' is an adult. An in-depth analysis shows that, unlike the adult trafficking act type, which derives its criminal illegality from the behaviour of the perpetrator, e.g., recruiting the victim by means of deception in order to then use her in prostitution, the criminalisation of child trafficking is mainly justified by the purpose for which the perpetrator, e.g., transports a minor. It should also be noted that in the case of the type of criminal act in Article 189a § 1 of the CC, when the 'object' of trafficking is a child, there is no narrowing of the field of criminalisation, as in the case of trafficking in adults. It is even possible to express the view that, with the exception of 'recruitment', the other activities, i.e., transporting, supplying, transferring, storing or receiving a child, are not in themselves something reprehensible.⁵²

In the context of family law, deliberations were held concerning the institutions of acknowledgement of paternity and adoption. According to M. Domański and J. Słyk, the recognition of paternity based exclusively on the statements of the parties involved (as is currently practiced in the Polish legal system) may serve as a conduit for the trafficking of children. As the aforementioned authors note: 'This possibility is immanent in the construction of recognition and its elimination would have to entail its complete modification.'⁵³ According to the aforementioned authors:

Such a solution could be to base the acknowledgement on proof of paternity and to link the effectiveness of the declarations of the man and the child's mother to the performance of DNA analysis evidence confirming that the acknowledging man is the child's father. Such a mechanism would make it far more difficult for a man who is not the child's biological father to 'obtain rights to the child'. However, several aspects should be noted.⁵⁴

With regard to the matter of adoption, M. Domański and J. Słyk observe that the Polish legislator, in 2014, recognized the potential for the institution of adoption to be utilized in the context of child trafficking. In response, the legislator endeavoured to forestall such occurrences by establishing the adoption by indication institution. However, as the aforementioned

⁵² A. Skowron, *Handel...*, p. 23.

⁵³ M. Domański, J. Słyk, *Odnalezienie skutecznych narzędzi w walce z handlem dziećmi; próba odzyskania luk prawnych umożliwiających bądź ułatwiających występowanie procederu handlu dziećmi i znalezienie skutecznych narzędzi utrudniających bądź uniemożliwiających proceder*, Warsaw 2023, p. 11.

⁵⁴ M. Domański, J. Słyk, *Odnalezienie...*, p. 11.

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authors point out, this attempt was misguided for the following reasons: ‘It was based on questionable factual findings and its normative construction does not safeguard against the possibility of obtaining financial benefits in exchange for a parent’s consent to adoption.’⁵⁵

The issue of surrogacy motherhood in the context of human trafficking was the subject of M. Mikluszka’s report.⁵⁶ It should be noted that the analysis of the phenomenon of surrogacy motherhood in the context of its potential qualification as human trafficking constitutes merely a fraction of the report.

As M. Mikluszka points out:

The concept of surrogacy, which is referred to in Polish as *macierzyństwo zastępcze*, in French as *maternité de substitution*, in German as *Leihmutterschaft*, and in Russian as *суррогатное материнство*, is not understood as a medically distinct technique for the artificial conception of a child. Surrogate motherhood is defined as the ‘rental’ of the womb of a woman who carries the pregnancy to term and, after birth, gives the child to another woman, usually the genetic mother, i.e., the one from whom the egg fertilized by her husband’s sperm comes. The fundamental aspect of surrogacy is the agreement between a couple who are unable to conceive a child of their own, and another woman who agrees to undergo pregnancy and childbirth for the benefit of the first couple. The practice of surrogate motherhood encompasses a range of methodologies, including artificial insemination and in vitro fertilization, among various other variants. A distinguishing feature of surrogate motherhood is that a woman becomes pregnant and subsequently gives birth to a child without intending to raise the child or assume parental responsibilities. The objective of the surrogate mother is to carry and deliver a child for another person(s), as stipulated in the contract. In exchange for her services, the surrogate mother is entitled to compensation. The legal agreement frequently takes a highly detailed form, delineating the actions permissible and prohibited for the gestating individual.⁵⁷

According to the cited scholar, the allowance of surrogacy varies among countries. Some countries do not permit surrogacy (e.g., Italy), some permit it solely for commercial purposes (e.g., Canada excluding the Quebec province; South Africa), and some permit it for both commercial and non-commercial purposes (e.g., Israel, Russia).⁵⁸

In this section of the paper, the issue of the legal status of the surrogate mother in Poland is to be presented. M. Mikluszka’s observations on this subject are as follows:

⁵⁵ M. Domański, J. Słyk, *Odnalezienie...*, pp. 14–15.

⁵⁶ M. Mikluszka, *Zagraniczne procesy tzw. macierzyństwa zastępczego (surrogacy motherhood) w świetle zasady handlu ludźmi – zagadnienia węzłowe*, Warsaw 2017.

⁵⁷ M. Mikluszka, *Macierzyństwo...*, p. 5.

⁵⁸ M. Mikluszka, *Macierzyństwo...*, p. 11–12.

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Polish legislation does not explicitly refer to the institution of surrogacy. Article 619 of the Family and Guardianship Code stipulates that the mother of a child is defined as the woman who gave birth to the child. Moreover, the extant literature advocates for the recognition of the genetic and biological motherhood of the woman who gave birth to the child in the event of the separation of these two types of motherhood. It is emphasized that the biological process of pregnancy and childbirth is a natural occurrence that is legally easier to prove than the donation of a germ cell for further medical treatment. Conversely, in the context of gamete donation from anonymous donors, the parent-child relationship is founded on the individuals' deliberate choice to procreate, rather than on the biological origins of the child.⁵⁹

Conversely, A. Skowron advances a divergent perspective, asserting that Article 211a of the CC penalizes all forms of surrogacy motherhood.⁶⁰ This perspective is not an isolated one in the academic literature; it has been referenced by numerous scholars in their IJ research. K. Burdziak and P. Banaszak have indicated: 'A contentious issue is whether the transfer of a child's custody by parents to other individuals for the purpose of raising the child as their own can be classified as human trafficking.'⁶¹ The aforementioned authors indicated two cases in which extreme rulings were reached. Specifically, in one case, the court determined that the payment to a woman for childbirth and the subsequent delivery of the child to the perpetrator constitutes the crime of human trafficking under Article 189a of the CC. In contrast, in another case, the court concluded that such an arrangement cannot be classified as human trafficking. In reference to the aforementioned situation, K. Burdziak and P. Banaszak have indicated:

In examining these two cases, it is crucial to emphasize that even if it is assumed that there was a delivery and transfer of minors by their parents to other individuals, who then took the children in, using the giving of a pecuniary or personal benefit or the promise thereof to a person having the care or supervision of another person, this cannot be considered to have taken place with the intention of their exploitation as outlined in Article 115 § 22 of the CC. Consequently, the defendants' actions do not align with any of the objectives specified in this provision. It must be acknowledged that the transfer of children by their parents does not occur with the objective of exploiting them through prostitution, pornography, forced labour or services, begging, slavery, or other forms of exploitation that violate human dignity. Furthermore, it is essential to emphasize that

⁵⁹ M. Mikluszka, *Macierzyństwo...*, p. 12-13.

⁶⁰ A. Skowron, *Handel...*, p. 28.

⁶¹ K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 224.

5. Child Trafficking (Including Surrogacy Motherhood)

the transfer of children does not occur with the intention of obtaining cells, tissues, or organs through unlawful means. It is noteworthy that the legislator employs the term ‘in particular’ in this context, thereby signifying that the enumeration of these criminal purposes is not exhaustive. However, it is imperative to deliberate whether Article 115 § 22 should explicitly delineate that trafficking in human beings also transpires when a child is entrusted to another individual for monetary compensation, who is then expected to provide care for the child. From an ethical standpoint, such actions are clearly objectionable, as they result in the deprivation of an individual’s subjectivity and their right to determine their own identity. This, in turn, constitutes a violation of human dignity. However, given that the prevailing regulatory framework does not categorize such actions as trafficking in human beings, a pertinent question emerges concerning the appropriate legal qualification of such actions. It is frequently presumed in such instances that the elements of the offence delineated in Article 211a of the CC are satisfied. According to this provision: ‘Whoever, for the purpose of financial gain, is engaged in organising the adoption of children contrary to the provisions of the law, shall be punished with imprisonment from 3 months to 5 years.’ However, it is important to note that such actions are more indicative of trafficking in human beings than of the illegal adoption of children. Therefore, it would be beneficial to explicitly address this type of activity in Article 115 § 22. Organizing the illegal adoption of children is a distinct behaviour that involves more complex actions than merely transferring a child to another individual in exchange for financial gain.⁶²

As indicated by the aforementioned passage, it can be posited that K. Burdziak and P. Banaszak are proponents of the penalization of surrogacy motherhood under Polish law.

In the context of human trafficking, surrogacy ‘tourism’ – defined as travel to another country for the purpose of utilizing the services of a surrogate mother – is a salient phenomenon.⁶³ According to the aforementioned author, the definitions of trafficking in human beings do not encompass surrogacy within their scope. However, as M. Mikluszka points out:

Illegal adoption (as well as the illegal use of surrogacy in the absence of a valid adoption agreement), in disregard of international procedures, could be considered in the context of ‘exploitation’ as defined in Article 2, Section 3 of the Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting Victims, and ‘exploitation of vulnerability’, as defined in Article 3 of the Palermo Protocol and Article 4(a) of the Council of Europe Convention on Action against

⁶² K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 226; K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 10.

⁶³ M. Mikluszka, *Macierzyństwo...*, p. 15.

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Trafficking in Human Beings. A study by the United Nations Office on Drugs and Crime (UNODC) and the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) has identified several factors relevant to the issue. The study, which was conducted by the United Nations Office on Drugs and Crime (UNODC) with the objective of providing assistance to States Parties in implementing the provisions of the United Nations Convention against Transnational Organized Crime and its supplementary protocols, indicates that forced pregnancy and the use of surrogate mothers in certain circumstances may be considered as exploitation (work in conditions incompatible with human dignity). These factors should be taken into consideration when legislating to punish trafficking in human beings. In contrast, the Council of Europe Convention of May 16, 2005, the European Parliament and Council Directive on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and the Polish Criminal Code indicate that if the perpetrator's behaviour involves a child, it constitutes trafficking in human beings, even if the methods or means explicitly mentioned in these legal acts have not been used. Article 2(a) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography explicitly indicates that trafficking in children is defined as 'any act or transaction whereby a child is transferred by any person or group of persons to another person or group for remuneration or any other compensation. According to Article 2(a) of the Optional Protocol to the Convention on the Rights of the Child, the definition of 'trafficking' in children is as follows: 'Any act or transaction whereby a child is transferred by any person or group of persons to another person or group for remuneration or any other compensation.'⁶⁴

According to the aforementioned scholarly perspective on the legal implications of surrogacy motherhood under a specific legal system, such actions are deemed lawful.⁶⁵ Consequently, it is not considered to be a form of human trafficking or other exploitation. The issue, as posited by the cited scholar, emerges when a state prohibits the formation of such contracts and spouses proceed to enter into a surrogacy agreement in a state where such agreements are legally recognized, yet they themselves are citizens of a state where such contracts are not permitted. The author posits that this predicament is exacerbated by the absence of adequate supranational regulation in this domain. However, M. Mikluszka does not propose any supranational regulations, and she merely alludes to the jurisprudence of the European Court of Human Rights.⁶⁶ This jurisprudence establishes that the non-recog-

⁶⁴ M. Mikluszka, *Macierzyństwo...*, p. 21.

⁶⁵ M. Mikluszka, *Macierzyństwo...*, p. 21.

⁶⁶ Judgments of the European Court of Human Rights: of 26 June 2014 in *Mennesson v. France* (Application no. 65192/11), of 26 June 2014 in *Labassee v. France* (Application no. 65941/11) and of 24 January 2017 in *Paradiso and Campanelli v. Italy* (Application no. 25458/12).

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tion of birth certificates for children conceived through surrogacy in other states constitutes a violation of Article 8 of the European Convention on Human Rights.⁶⁷ The cited author also indicates the necessity of considering all of the pros and cons of surrogacy motherhood. Ultimately, the author posits that the absolute prohibition of such agreements will have deleterious consequences, as it will not eliminate the contracts from society. The aforementioned prohibition merely relocates it to a domain beyond the purview of public oversight.⁶⁸

⁶⁷ Convention for the Protection of Human Rights and Fundamental Freedoms adopted at Rome on 4 November 1950, as subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws 1993, No. 61, item 284), hereinafter: the European Convention on Human Rights.

⁶⁸ M. Mikluszka, *Macierzyństwo...*, p. 21 and further.

6

Detection and Counteracting of

HUMAN TRAFFICKING

In IJ reports, the topic is primarily discussed in the context of specific activities undertaken by particular organs and state institutions.

At the state level, the Ministry of the Interior and Administration, in conjunction with its subordinate Unit for the European Migration Network and Anti-Trafficking in Human Beings, serves as the primary agency responsible for counteracting human trafficking. European Migration Network and Anti-Trafficking in Human Beings. Additionally, an Anti-Trafficking Team has been established within the Ministry of the Interior and Administration. The central organs of the Ministry concentrate on programming and the execution of projects aimed at combating and preventing trafficking in human beings. They also commission public security and public order tasks concerning the problem of trafficking to entities outside the public finance sector that carry out public benefit activities. In addition, the central organs assess the implementation of programs aimed at combating and preventing trafficking in human beings. They also monitor the feasibility of the planned tasks and prepare annual reports on the implementation of the plans in question.⁶⁹

Another body is formed by voivodships, which have anti-trafficking teams. As R. Mroczek observed:

Voivodeships anti-trafficking teams have been established to facilitate effective cooperation between representatives of public administration, law enforcement agencies, and non-governmental organizations within the framework of the implementation of the National Action Plan against Trafficking in Human Beings for 2013–2015. The establishment of counter-trafficking in human beings units has also been implemented. The operation of these teams is guided by the legal mandate outlined in Article 22, paragraph 15 of the Act

⁶⁹ R. Mroczek, *Rola Straży Granicznej i innych służb w zakresie zwalczania i przeciwdziałania handlowi ludźmi. Wybrane zagadnienia problemowe wraz z postulatami de lege ferenda* [in:] Ł. Pohl (ed.), *Handel...*, pp. 41–42.

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of 12 March 2004 on social assistance, and Article 17 and Article 18, paragraph 2 of the Act of 23 January 2009 on the voivode and government administration in the voivodship. These teams serve as an advisory and opinion-forming body of voivodes within the scope of coordinating activities within the social welfare system. In this capacity, they play a pivotal role in preventing human trafficking and providing support to victims of this practice. They function as a platform for the effective exchange of information on counteracting human trafficking within the territory of 16 voivodeships. The primary objective of these entities is twofold: first, to enhance the coordination of prevention initiatives, and second, to provide support and facilitate the reintegration of individuals who have been victimized by human trafficking. Additionally, these entities seek to encourage the involvement of local governments, foundations, and associations within this domain. Provincial teams base their activities on two pillars. The first is the promotion of public awareness regarding the contemporary risks associated with the exploitation of individuals for the purpose of trafficking. To this end, the teams engage in awareness-raising activities aimed at potential victims, including seasonal workers, the unemployed, job seekers, migrants, those coming from dysfunctional families, and the professionally awkward. Additionally, they educate the general public, particularly those with debts or family and personal problems, who may also be at risk of human trafficking. The second pillar of the teams' activities is the support and reintegration of victims.⁷⁰

The Border Guard plays a pivotal role in the detection and counteraction of human trafficking. R. Mroczek expounds on the role of this formation in combating human trafficking as follows:

The Border Guard, a uniformed and armed formation intended for the protection of the state border, the control of border traffic, and the prevention and detection of illegal migration, is of particular importance with regard to the recognition, prevention, and detection of the crime of trafficking in human beings. A comprehensive regulation delineating the jurisdiction of the aforementioned Border Guard in conducting, identifying, preventing, and detecting human trafficking offences is codified in Article 1 section 2-4 point j of the Competence Act. The Border Guard, in its capacity as a primary actor in the anti-trafficking effort, is instrumental in the initiatives outlined in the National Action Plans against Trafficking in Human Beings. Specifically, within the Operational and Investigative Board of the National Border Guard Headquarters (ZOŚ KG Border Guard), Section I for Combating Organised Crime oversees activities related to the supervision

⁷⁰ R. Mroczek, *Rola...*, p. 48.

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of cases pertaining to human trafficking. This section is further responsible for addressing issues of illegal migration and human trafficking. Concurrently, within the ERO of the Border Guard Headquarters, as well as in all nine Border Guard Divisions, there are non-staff coordinators for combating and preventing trafficking in human beings and their deputies. These coordinators are placed in the Operational and Investigative Departments or Foreigners' The extant literature on the subject often argues the special role of the Border Guard in combating human trafficking in relation to foreigners and the increasing number of identified foreign victims of human trafficking. (...) Concurrently, the scope of control activities extends beyond mere examination of the legality of a foreigner's stay or work, encompassing the conduct of business activities by foreigners and the entrustment of work to foreigners. In accordance with the prevailing provisions of the Border Guard Act, officers are legally obligated to respond to any violations of regulations that are brought to light during the course of these control activities. In addition to notifying other authorities of the violations, the control activities should be included in the protocol drawn up from the control. This protocol establishes an administrative basis for the disclosure of the crime of trafficking in human beings within the context of administrative actions concerning the control of the legality of employment of foreigners on the territory of Poland. (...) At the level of international cooperation aimed at combating and counteracting the phenomenon of trafficking in human beings, the Border Guard participates in numerous projects at the strategic level.⁷¹

Another organ counteracting human trafficking is the police. Within the scope of this organization, operational full-time anti-trafficking teams are in place at the voivodeship police headquarters and the capital headquarters of the police. As R. Mroczek further elaborates,

The Police is also part of the scheme for effective counter-trafficking in human beings, as its officers are part of each provincial anti-trafficking team. In 2016, the methods and forms of the Police's performance of certain tasks in the detection of human trafficking and identification of victims of this crime were described and detailed in Order No. 14 of the Police Chief of 22 September 2016 on the Police's performance of certain tasks in the detection of human trafficking. On an international level, the Police have participated in the Human Trafficking Working Group since 1999, in accordance with a resolution of the Interpol General Assembly. This group is comprised of police officers from 45 countries, as well as prosecutors and judges. The aforementioned group's mandate is twofold: first, to establish novel legal frameworks addressing human trafficking; and second, to devise

⁷¹ R. Mroczek, *Rola...*, pp. 42–44.

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innovative strategies for combating this global scourge across various regions. Additionally, the group facilitates international cooperation, fostering collaborative investigations among participating nations. In the European context, law enforcement agencies are integral components of the activities undertaken by the Task Force on Organised Crime, which operates within the Baltic Sea Region under the aegis of 'Baltcom' and within the Council of Baltic Sea States. Within the framework of this cooperative endeavour, an Expert Group on Combating Trafficking in Human Beings has been constituted to oversee the operations of the services of the Baltic Sea States.⁷² The measures granted to police by legislators have proven to play a crucial role in detection activities. The following measures, outlined under the Police Act, are specifically designed to combat human trafficking.⁷³ One such measure is police provocation.⁷⁴ The clandestine observation of the fabrication, circulation, and other activities related to objects.⁷⁵ The implementation of covert surveillance is a critical component of operational control, encompassing the monitoring and oversight of specific assets or activities. This surveillance involves the collection of information through surreptitious observation, clandestine recordings, or other covert methods. The objective of this surveillance is to gain insights into the activities, locations, and interactions of the subjects being monitored. The surveillance may be conducted in real-time or in a retrospective manner, depending on the nature of the operation and the desired information.⁷⁶ In contradistinction, the implementation of a controlled purchase is not a possibility, as it can only be applied to objects in the strict sense. Consequently, it cannot be applied to people.⁷⁷

In the context of forced labour, scholars have indicated crucial entitlements of the State Labour Inspectorate. The aforementioned authority is vested with the powers stipulated in the Act of 13 April 2007, which pertains to the State Labour Inspectorate.⁷⁸ This body possesses a wide range of crucial competencies in the realm of combating forced labour. As K. Karsznicki observes:

The present Act enables oversight of not only legally authorized labour but also that engaged in illicitly ('in the black economy'). The law stipulates provisions for the monitoring

⁷² R. Mroczek, *Rola...*, pp. 44–45.

⁷³ Act of 6 April 1990 of the Police (Journal of Laws 2024, item 145, as amended), hereinafter: the Police Act.

⁷⁴ Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek...*, pp. 32–35; K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 231 and further.

⁷⁵ K. Burdziak rightly points out that in the case of this institution, the word 'object' should be understood more broadly than its strictly literal meaning, i.e., including a human being within its scope. Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek...*, pp. 37–38; K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 235.

⁷⁶ K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 235.

⁷⁷ K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 236.

⁷⁸ Act of 13 April 2007 on the State Labour Inspectorate (Journal of Laws 2024, item 1712).

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and supervision of the operations of private intermediaries engaged in the recruitment of labour for foreign employment. This encompasses not only private employment agencies but also undercover agencies, human traffickers, and smugglers operating either individually or in an organized capacity.⁷⁹

However, as the aforementioned author notes, the elimination of bad practices will not be achieved through regulations, but rather through the proactive efforts of the authorities entrusted with the oversight of the entities responsible for employing and intermediating in the employment of individuals. The efficacy of the State Labour Inspectorate could be enhanced by establishing a collaborative model with the police and the Border Guard. Such a model could encompass, among other provisions, the monitoring of private employment recruitment offices and job offers in the press and on the Internet. It is imperative to acknowledge that the implementation of such a model is more effectively achieved through organizational initiatives than legal provisions.⁸⁰

With regard to the detection and counteraction of human trafficking (including child trafficking) in IJ reports, indications are provided on problems associated with such activities. Notable problems include: the identification of victims; the detection of human trafficking manifestations (as previously mentioned); the inadequate engagement of officers in the detection of human trafficking, the duration of court procedures; the absence of a systematic approach to the rights of victims of trafficking in human beings; the lack of harmonization of legal regulations that address trafficking in human beings; the failure to interrogate the victim; the interrogation of the victim by an individual of a different sex; multiple interrogations of the victim; changing the content of testimony by witnesses; failure to interrogate the victim pursuant to Article 316 section 3 of the CCP;⁸¹ lack of appropriate measures to detect trafficking in human beings; lack of use of already existing measures as well as lack of knowledge and skills of some prosecutors and Police or Border Guard officers in conducting cases of trafficking in human beings (mainly in the aspect of proper performance of procedural actions).⁸² It is submitted that the following *de lege ferenda* postulates are formulated by A. Skowron upon the resolution of the aforementioned problems, even in part:⁸³

⁷⁹ K. Karsznicki, *Analiza...*, p. 10.

⁸⁰ K. Karsznicki, *Analiza...*, pp. 10–11.

⁸¹ The Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws 2025, item 46, as amended), hereinafter: the CCP.

⁸² K. Burdziak, P. Banaszak, *Przestępcstwo...*, p. 14 and further; K. Burdziak, P. Banaszak, *Przestępcstwo...*, p. 227 and further; Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek...*, p. 29 and further; A. Skowron, *Handel...*, pp. 13–17 and 32–33.

⁸³ It is imperative to acknowledge the intricacies inherent in the matter at hand, as A. Skowron's postulates extend beyond the realm of detecting and counteracting the phenomenon of human trafficking. These postulates also delve into the domain of dogmatic-legal sphere.

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1. amendments to the criminal procedure:
 1. amending the Border Guard Act by amending Article 9e section 1 (adding Article 189a of the CC to the catalogue therein);
 2. amending Articles 19a and 19b of the Police Act by removing doubts that covert acquisition, disposal and seizure or proposition of such activities is also possible in relation to persons, not only property. Undertaking work on the creation of common rules for the conduct of operational activities by the Police, Border Guard and other services (CBA, CBŚ, etc.);
 3. amendments to Articles 185a and 185b of the CCP, which will aim to further limit the possibility of re-examining a victim of child trafficking;
 4. amendments to the application of penalties of order. Consideration should be given to introducing in Chapter XXXI of the CCP. specific rules for enforcing procedural obligations in child trafficking cases;
2. amendments to the substantive criminal law:
 1. in Article 189a of the CC in conjunction with Article 115 § 22, a restriction in the definition of child trafficking appears to be necessary, e.g., by introducing an open catalogue of purposes justifying criminalization at the level of the crime and at the level of the offence. Alternatively, the proposal of W. Wróbel⁸⁴ and A. Sakowicz⁸⁵ who, in their opinions on the draft amendment, postulate the introduction of the phrase ‘in particular’ before the indication of the forms of trafficking in human beings, thus making it an exemplary list. At the same time, this would allow for the abandonment of the minor clause;
 2. resignation from the provision of Article 8 p.i. should be considered. This would entail the need to supplement Article 189a of the CC on trafficking in human beings with a provision criminalising the ‘possession’ of victims of this practice, e.g., by adding a paragraph providing for criminalization of behaviour consisting in maintaining victims of trafficking in human beings in a state of ‘slavery’. At the same time, it is worth considering a solution proposed by E. Zielińska – modelled on the German regulation and consisting in the creation of a qualified type of human trafficking crime, in which the qualifying element would be the use by the perpetrator of the means currently listed in the statutory definition;

⁸⁴ W. Wróbel, *Opinia w sprawie rządowego projektu ustawy o zmianie ustawy – Kodeks karny, ustawy – Przepisy wprowadzające Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy o Policji (druk nr 2387)*, <http://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=2387>, access: 26.01.2025.

⁸⁵ A. Sakowicz, *Opinia w sprawie rządowego projektu ustawy o zmianie ustawy – Kodeks karny, ustawy – Przepisy wprowadzające Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy o Policji (druk nr 2387)*, <http://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=2387>, access: 26.01.2025.

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3. it is imperative to consider the criminalization of behaviour that results in indirect profit from human trafficking. This can be illustrated by scenarios where an employer utilizes the labour of victims of human trafficking who are in a state of quasi-dependence, yet fails to remunerate them appropriately. Instead, the employer pays the wages to the individual who claims sole ownership of the workers (i.e., the 'owner');
4. an amendment to Article 211a of the CC is proposed. The punishment depends on the way in which the adoption is carried out. In its current form, the law is overly formalised, with the result that practices aimed at 'circumventing' the adoption rules take place.

K. Burdziak's proposal entails an amendment to the Police Act, which would permit the implementation of controlled sales and purchases in instances pertaining to acts falling under Article 189a of the CC.⁸⁶ Furthermore, the author posits that the socio-cultural status of women, who are disproportionately victimized by trafficking, necessitates modifications.⁸⁷ This entails the provision of support for women to reintegrate into a 'normal' life, that is, a life unencumbered by the circumstances surrounding trafficking, subsequent to their liberation from their perpetrators.⁸⁸ The utilization of the capacity of local government is also imperative.⁸⁹ The medical profession is another potential resource that can be utilized.⁹⁰

⁸⁶ K. Burdziak, *Przeciwdziałanie handlowi ludźmi – ogólne perspektywy przyszłych działań* [in:] Ł. Pohl (ed.), *Handel...*, p. 61; Ł. Pohl, K. Burdziak, P. Banaszak, *Stosunek...*, p. 36.

⁸⁷ K. Burdziak, *Przeciwdziałanie...*, pp. 64–65.

⁸⁸ K. Burdziak's observations on the subject of assistance include the following: '1. accommodation and food; 2. safe and empathetic environment (protection from retaliation by perpetrators; being with other women with similar experiences); 3. timely medical care; 4. psychological assistance (to return to emotional stability and reintegration into society); 5. legal assistance (to understand and protect their rights in the future); 6. recreational activities; 7. education and life skills training and vocational training.' K. Burdziak, *Przeciwdziałanie...*, p. 65.

⁸⁹ K. Burdziak delineates the following steps as the gold standard in North Carolina: 'Build awareness of indicators and basic dynamics of human trafficking across departments (it is suggested in this regard to invite area service providers to provide basic training, describe local resources for intervention, and begin to build relationships across organizational boundaries; it is also suggested to encourage self-education through online resources and training opportunities); 2. Develop protocols for reporting indicators of potential human trafficking (it is suggested in this regard to identify and discuss with staff preferred methods of reporting, e.g., local law enforcement, local rapid response team, as well as expectations for informing departmental supervisors, local government or elected officials); 3. Where there are specific problems in an area with environmental conditions that enable trafficking or with business models that traffickers employ, consider taking specific action (it is suggested in this regard to convene a multi-departmental team to apply existing processes, policies and procedures to the challenges of trafficking and develop prevention or intervention strategies); 4. when trying to address specific issues in the area (e.g., homelessness, food shortages, substance abuse, problems at school), keeping in mind that this is also working to prevent trafficking (it is suggested in this regard to dedicate time in existing working groups to consider the problem through the lens of trafficking.' K. Burdziak, *Przeciwdziałanie...*, p. 66.

⁹⁰ K. Burdziak extend this postulate as follows: 'Victims of trafficking are obviously predisposed to a variety of health problems related to their exploitation by perpetrators. GPs, paramedics, etc. should therefore have adequate knowledge of the potential indicators of trafficking and know how to deal with such circumstances. It is therefore necessary to integrate trafficking in human beings and related circumstances into the curricula of a broadly defined medical study and, moreover, to provide periodic training on the above subject. Such training could even take the form of online training, which would reduce the need for a significant time commitment on the part of future and current members of the medical profession in the broad sense.' K. Burdziak, *Przeciwdziałanie...*, p. 67.

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The integration of the issue of trafficking in human beings into training programs for school personnel, as well as student populations, is imperative. Furthermore, the implementation of community-wide campaigns to raise awareness about trafficking in human beings is crucial.⁹¹ K. Burdziak also alluded to the potential for counteracting this phenomenon through the tightening of sanctions, emphasizing that a straightforward correlation between the magnitude of sanctions and the severity of the offence of trafficking in human beings does not exist. This indicates that solutions must be sought that do not fall within the purview of criminal prohibition.⁹²

Ł. Buczek posits that the existing model of instructions on the rights and obligations of a victim in criminal proceedings should be modified. Specifically, the template should be amended by adding a chapter on information on assistance that can be provided to a person who has been a victim of the crime of trafficking in human beings.⁹³ Furthermore, the aforementioned author posits that the scope of sanctions for the offence of failure to report a crime, as delineated in Article 240 § 1 of the CC, ought to be expanded to encompass cases of human trafficking.⁹⁴

R. Mroczek proposes the creation and passage of a distinct act addressing the combating and counteracting of human trafficking, with the objective of enhancing the effectiveness of countermeasures.⁹⁵

⁹¹ K. Burdziak, *Przeciwdziałanie...*, pp. 68–70.

⁹² K. Burdziak, *Przeciwdziałanie...*, pp. 70–71.

⁹³ Ł. Buczek, *Przestępstwo...*, pp. 17–24.

⁹⁴ Ł. Buczek, *Przestępstwo...*, pp. 24–29.

⁹⁵ R. Mroczek, *Rola...*, p. 54.

7

Analysis of Criminal Cases Pertaining to

HUMAN TRAFFICKING

The imperative aspect of IJ's scientific endeavours entails case file research. The primary objective of case file research conducted by IJ is to ascertain the manner in which specific legal institutions are employed in the administration of justice. The aforementioned research endeavours encompass the scope of human trafficking.

The case file research entailed a comprehensive examination of both forensic and pretrial proceedings files. This investigation focused on analysing the dismissal decisions made in the case under the currently abrogated Article 253 § 1 of the CC.

K. Karsznicki's analysis revealed a notable trend in the dismissal of human trafficking cases. In 2005, 12 cases were dismissed, a figure that increased to 14 in both 2006 and 2007.⁹⁶ The most prevalent reason cited was the absence of data sufficiently substantiating the suspicion of committing a crime, with 16 cases noted, followed by failure to detect the perpetrator, with 8 cases documented.⁹⁷ The research by the aforementioned author has identified a number of inaccuracies in the legal characterization of the perpetrator's actions. Among the 40 cases that were terminated by dismissal, only 20 were qualified under Article 253 of the CC. In some cases, this has an impact on the decision regarding the dismissal proceeding. Furthermore, it is noteworthy that: an analysis of the cases reveals a direct correlation between the duration of the proceedings and the decision to discontinue them. This phenomenon is evident in both cases involving proceedings that were conducted for a brief duration (even spanning two weeks) and those that were protracted over an extended period (extending beyond eight years). A salient feature of proceedings conducted for a very short time was a conspicuous absence of activity in the search for evidence. It appeared that the investigator operated under the assumption that the proceedings would not culminate in an indictment. Conversely, protracted proceedings can result in the deterioration of evidence and a shift in the victims'

⁹⁶ The research of the aforementioned scholar pertains to the period from 2005 to 2007.

⁹⁷ K. Karsznicki, *Analiza...*, pp. 2-3.

7. Analysis of Criminal Cases Pertaining to Human Trafficking

disposition. Over the course of several years, these victims often lose interest in prosecuting the perpetrators, citing a lack of recollection.⁹⁸ Another issue examined by K. Karszewski was that of crimes committed by victims of human trafficking. As the scholar notes:

Victims of human trafficking frequently exhibit behaviours that are indicative of additional criminal activities, such as illegal border crossing and the use of fraudulent documentation. The disclosure of such cases has the potential to prompt prosecutors to initiate legal proceedings against foreign nationals, leading to their indictment in court. Consequently, there is a possibility that actual victims of crimes (sometimes even temporarily arrested) may be charged. This treatment of victims undoubtedly hinders their willingness to report the crime. Therefore, it is recommended that the conditions for issuing an order refusing to initiate (or discontinuing) proceedings against a victim of a trafficking crime be carefully examined. A thorough examination of the cases under review revealed two instances where a charging order was issued against a victim of human trafficking, followed by the submission of indictments to the court. However, these indictments narrowly focused on the assessment of the victim's behaviour, neglecting to address the crucial aspect of identifying and holding accountable the perpetrators involved in the trafficking crime.⁹⁹

K. Karsznicki also alluded to the issue of victims' interrogation. The author observed that:

In 28 cases (out of a total of 52 victims in 40 discontinued cases), female victims of sexual abuse were interviewed by men. In 22 cases (out of 40), the individuals overseeing the preparatory proceedings underwent change. An analysis of the protocols that document the procedural actions reveals that, in many cases, the individuals conducting the interrogations were not privy to the content of the preceding interrogations. In a particular instance, the victim underwent five interrogations by four individuals, despite the explicit recommendation to minimize the number of interrogations and prioritize two comprehensive interrogations with the involvement of an expert psychologist.¹⁰⁰ In the majority of cases (19), the victim was interrogated only once, while 15 individuals were interrogated twice. Five individuals were interrogated on three occasions, and one individual was interrogated on more than three occasions.¹⁰¹ A total of five individuals were subjected to interrogation, while more than three individuals were interrogated on their own.

⁹⁸ K. Karsznicki, *Analiza...*, pp. 4–8.

⁹⁹ K. Karsznicki, *Analiza...*, pp. 12–13.

¹⁰⁰ K. Karsznicki, *Analiza...*, p. 15.

¹⁰¹ K. Karsznicki, *Analiza...*, p. 16.

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K. Karsznicki further elaborates: 'Of the 52 victims disclosed in the 40 discontinued cases, as many as 30 were foreigners, while the remaining 17 were of Ukrainian nationality.'¹⁰²

Forensic files were examined by B. Namysłowska-Gabrysiak. In her preliminary research, the scholar examined 12 criminal cases that were adjudicated in the period from 2000 to 2005. The objective of this research was to assess how courts interpreted the concept of 'human trafficking' as defined in Article 253 § 1 of the CC, including the question of whether courts employed the definition from the Palermo Protocol. In the examined cases, the victims were women who were coerced into prostitution after being misled into believing they would be working legally abroad or that they would be kidnapped. The author of the study posits that judicial bodies frequently fail to thoroughly interpret the elements of the crime delineated in Article 253 § 1 of the CC, or that they do so in a perfunctory manner. In instances where courts do engage in such elaboration, they tend to cite the works of Polish scholars and legal experts, yet they neglect to invoke the definition enshrined in Article 3 of the Palermo Protocol. The aforementioned scholar argued for the introduction of a CC definition of human trafficking.¹⁰³

In the latter instance involving file research, B. Namysłowska-Gabrysiak examined 62 cases that were finalized with a judgment in the years 1999–2009. As the cited scholar has noted:

First, the legal classification of trafficking cases applied by the judicial authorities was assessed. In this context, the focus was on evaluating the courts' interpretation of the legal elements contained in Article 253 § 1 of the CC and Article 204 § 4 of the CC. Concurrently, the courts' engagement with the jurisprudence of the Supreme Court and the emergent doctrinal perspectives within this domain were given consideration. Secondly, the courts' interpretation of the term 'human trafficking' contained in Article 253 § 1 of the CC was analysed, also in terms of whether the authorities refer to definitions contained in acts of international law. In this context, it is also pertinent to ascertain whether the common courts and prosecutor's offices, when confronted with the task of interpreting the provision of Article 253 of the CC, refer to the interpretative models of international law that are binding on the Republic of Poland. The present study examined the interpretation of the concept of trafficking in human beings as delineated in Article 253 § 1 of the CC in relation to the Palermo Protocol and the EU Framework Decision. Thirdly, the research should provide knowledge on the regularity of sentences and sanctions imposed. The analysis encompassed the formulation of sentences by judges within the context of the threats stipulated in the offences delineated in Article 253 § 1 of the CC

¹⁰² K. Karsznicki, *Analiza...*, p. 16.

¹⁰³ B. Namysłowska-Gabrysiak, *Handel...*, pp. 9–25.

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and Article 204 § 4 of the CC. Additionally, it concentrated on evaluating the application of the institution of extraordinary mitigation of punishment as outlined in Article 60 of the CC. Fourthly, the scope of this research also included the issue of respecting the rights of victims of human trafficking. In order to obtain a reasonably complete picture of the situation of victims throughout the criminal proceedings, the focus was primarily on the institutions used by the prosecution and the courts, as regulated by the Criminal Code. A particular emphasis was placed on the issue of the possibility for victims to benefit from the institution of the reflection period, as introduced in Article 33, sections 1–5, of the Aliens Act and subsequently regulated in Article 53a, sections 2–4, of the same Act. An in-depth analysis was conducted to assess the implementation of all recommendations stemming from the EU Framework Decision on the standing of victims in criminal proceedings. This analysis encompassed the number and manner of interviews with victims, the duration of criminal proceedings, and the utilization of facilities to ensure the protection of victims' privacy.¹⁰⁴

In the matter of interpretation of features of the crime from Article 253 § 1 of the CC, especially the feature of human trafficking, the aforementioned scholar notes:

The subsequent analysis of forensic files reveals that courts interpret the notion of 'Who practises human trafficking' in diverse ways. One judicial body considers 'practicing trafficking' to be exclusively confined to the realm of contracts involving the sale and purchase of goods. Conversely, other courts adopt a more expansive interpretation, encompassing all civil law contracts. A third category of courts adopts a Palermo Protocol-based interpretation of the term. It is noteworthy that certain courts emphasize that the concept of 'practicing' encompasses a specific range of transactions, while others contend that a single transaction suffices to constitute the crime. Consequently, during the resolution of the case, significant challenges arise in the application and interpretation of this provision. Concurrently, the Penal Code exhibits a conspicuous absence of a coherent framework that systematically organizes the array of regulations pertinent to the issue of human trafficking. This absence of uniformity in the case law concerning the crime of human trafficking under Article 253 § 1 of the CC is further underscored by the findings of case file research, which indicate that analogous factual circumstances can result in divergent conclusions being reached by different courts, frequently resulting in conclusions that are often diametrically opposed. For instance, in a case of human trafficking involving the sale of a woman abroad for work in a brothel with her consent, certain

¹⁰⁴ B. Namysłowska-Gabrysiak, *Analiza...*, pp. 30–31.

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courts acquitted the perpetrators by applying the definition contained in international acts. These courts determined that the application of this definition led to the recognition of the perpetrator's innocence. Conversely, other courts convicted the perpetrators, with some relying on the definition and others considering it inapplicable. The provision of Article 253 of the CC has been found to cause significant difficulties in interpretation, leading to considerable variations in its interpretation. Furthermore, it has been observed that the application of this provision often results in the adoption of a particularly narrow linguistic interpretation, which disregards the guidelines established by international law. Conversely, other courts have opted for a broader interpretation, aligning with the principles outlined in international instruments. Additionally, inconsistencies in the doctrine concerning the application of the definition of human trafficking contained in international instruments give rise to discrepancies in case law, resulting in divergent decisions in analogous factual scenarios. The courts' divergent interpretations pertain to the statutory element of 'trafficking in human beings'. Initially, the question arises as to what types of conduct fall within this concept. Most representatives of the doctrine posit that these are only civil law transactions in the form of sale, purchase, exchange, or pledge. However, as indicated by case law, it is also appropriate to apply an interpretation that seems to be broader in terms of purpose and functionality. This broader interpretation would apply to situations such as 'recruitment, delivery, transport, or transfer'.¹⁰⁵

The issue was even raised in the context of assessing whether 'trafficking' may refer to one person, since the provision of Article 253 § 1 of the CC uses the concept of 'people'.

In the context of sanctions imposed by courts, the quoted author states:

Another salient issue is the extent of punishment meted out by courts in cases involving crimes related to this phenomenon, particularly in the context of threats stipulated in the provisions concerning human trafficking. Firstly, it is necessary to indicate the problem of the lack of order in the penal code of all regulations concerning the issue of human trafficking, as well as the mutual relationship of the provisions of Article 253 § 1 of the CC, Article 204 § 4 of the CC, and Article 8 of the p.i. It is necessary to indicate here, for example, the problem related to the threat of sanctions provided for in Article 253 § 1 of the CC and in Article 204 § 4 of the CC. On the one hand, the statutory characteristics of the crime delineated in Article 204 § 4 of the CC, including its international nature and the specific intent of the perpetrators' actions, underscore the severity of the crime. However, on the other hand, it is an offence that carries a penalty of 1 to 10 years of im-

¹⁰⁵ B. Namysłowska-Gabrysiak, *Analiza...*, pp. 93–95.

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prisonment. When examining the crime as delineated in Article 253 § 1 of the CC from this vantage point, the legislator's decision to regulate the act as a criminal offence becomes questionable, given that the statutory features do not explicitly mention an international element or the purpose of the action. In the aforementioned context, it is noteworthy that the Court failed to acknowledge the existing inconsistency resulting from the provisions of the law in the analysed judgments. Consequently, the Court did not address this issue when imposing sentences. Consequently, in the adjudication of cases involving the crime stipulated in Article 204 § 4 of the CC, the court imposed penalties that did not exceed two years of imprisonment, with the exception of a few cases, in which the court imposed conditional suspensions on the execution of the sentence. This prompts the question of the individualization of the sentence, as outlined in Article 55 of the CC, particularly given that the cases examined encompass a wide range of factual circumstances. These circumstances include instances where perpetrators engaged in trade with the consent of victims, situations involving deception or exploitation of the victims' vulnerable state, and most notably, cases of severe exploitation involving psychological and physical violence, coercion, abduction, and multiple instances of rape. An analysis of court records from 1999 to 2009 reveals that none of the aforementioned criteria are used to determine sentence length. The courts consistently imposed prison sentences that approached the lower limit of the statutory penalty. In 51 cases involving 97 individuals convicted under Article 253 § 1 of the CC, a sentence of up to four years of imprisonment was imposed on 95 perpetrators, while a sentence of three years of imprisonment or less (with the application of extraordinary mitigation of punishment) was imposed on 74 perpetrators, constituting 75% of all perpetrators. It is challenging to discern a consistent tendency to impose sentences near the lower limit of the applicable range, as judicial bodies exercise discretion in determining sentences for individual crimes.¹⁰⁶

In the context of the application by courts institutions aimed at the protection of human trafficking victims, B. Namysłowska-Gabrysiak arrived at the following conclusions:

Firstly, courts generally do not apply the applicable institutions provided for in the Criminal Procedure Code to protect victims' rights. Secondly, courts frequently decline to accord credibility to victims regarding their accounts of the events that transpired. Thirdly, female victims are frequently held partially culpable for the crimes committed by the perpetrators. In numerous instances, victims are subjected to subsequent victimization due to the actions of the justice system. For instance, when justifying an excep-

¹⁰⁶ B. Namysłowska-Gabrysiak, *Analiza...*, pp. 98–100.

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tionally lenient sentence, the court may cite the 'victim's culpability' in either performing sexual services or engaging in 'professional prostitution'. The terminology employed by the courts, such as 'professional prostitution', further entrenches this stigmatizing discourse. 'Human trafficking', 'the victim was a professional prostitute', etc., illustrate the stigmatizing attitude of the courts towards women, who are victims of one of the most dangerous crimes of the present times. Consequently, the inquiry emerges regarding the extent to which the judicial apparatus in Poland incorporates an anti-discrimination perspective, emphasizing gender equality, a concept that emerged in the latter half of the 20th century in international legal instruments. Concurrently, legislative developments shifted the focus from the mere criminalization of human trafficking to the provision of comprehensive protection for the rights of victims.¹⁰⁷

Case files research was also conducted by K. Burdziak and P. Banaszak. The initial focus of their inquiry centred on the procedural aspects of interrogations and the utilization of other evidence to substantiate allegations of human trafficking. The authors of the study noted:

In all cases examined as part of the research project, the most significant forms of evidence were found to be the explanations provided by suspects (defendants) and witness testimonies. This finding should not be unexpected. This phenomenon is attributable to the specific nature of the crime of human trafficking, which is characterized by the participation of a limited number of individuals in the activities constituting human trafficking. These individuals often engage in behaviours that impede the detection and prevention of the crime, as well as the collection of substantial evidence. The interviews of suspects (defendants) and witnesses conducted in the analysed cases were assessed from the perspective of the requirements provided for in: 1) Article 171 of the CCP; 2) Chapter 21 of the CCP; 3) 'Methodological guidelines for prosecutors conducting or supervising criminal proceedings in cases concerning human trafficking'; and 4) 'Algorithm of conduct of law enforcement officers in the event of the disclosure of a crime of human trafficking'. The reliability of the interviews conducted in this manner was assessed by the researchers, who determined that they were conducted reliably. This assessment was made with respect to both suspects (accused) and injured parties and other witnesses. However, it was observed that in a mere two instances, not all the necessary persons were interviewed (8% of all cases). However, the prevailing opinion is that the principles of personal questioning of injured parties by the prosecutor and questioning by a person of the same sex are occasionally disregarded. Furthermore, it is often the

¹⁰⁷ B. Namysłowska-Gabrysiak, *Analiza...*, pp. 100–101.

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case that inadequate measures are implemented to prevent the process of the secondary victimization of victims, primarily through repeated questioning. The final point can be illustrated by the statement of an expert psychologist, who, in one of the cases analysed as part of the research project, stated that: 'We can say that at the moment (the injured party—note by K.B.) is most interested in the trial ending. She has repeatedly expressed that testifying, appearing in court, and discussing the matter is a significant imposition. This observation is not unexpected, given that in this particular instance, the injured party was subjected to questioning (or engaged in other activities) up to ten times. It is also imperative to underscore the following point: Firstly, the interrogation was seldom documented through the use of audio or video recording equipment as outlined in Article 147 of the CCP. Secondly, the institution of the crown witness, as defined in the Act of 25 June 1997 concerning the crown witness, was not employed in any of the cases examined. Thirdly, the utilization of an anonymous witness as stipulated in Article 184 § 1 and Article 191 § 3 of the CCP, was employed in a mere 4 instances, constituting 16% of the total cases. In the cases examined as part of the research project, police provocation was not employed, despite the fact that its use could potentially result in the acquisition of evidence that would support the initiation of criminal proceedings or contribute to ongoing proceedings. Consequently, this would enable the foundation of the indictment (and subsequent verdict) not solely on the explanations provided by the suspects (accused) and the testimonies of witnesses, but also on other, more 'tangible' grounds. In the examined cases, no other institution, as outlined in specific acts designed to combat (among other issues) the crime of trafficking in human beings, more specifically the institution outlined in Article 19b section 1 of the Police Act, was utilized. According to this act: 'In order to document crimes referred to in Article 19, section 1, or to establish the identity of persons participating in these crimes or to seize the objects of crime, the Chief Commander of the Police, the Commander of the Central Investigation Bureau, or the provincial commander of the Police may order covert supervision of the production, movement, storage, and trade of objects of crime, if this does not pose a threat to human life or health' (covert supervision). (...) In the cases examined as part of the research project, the institution of operational control was utilized only once (4% of all cases). (...) Finally, in none of the analysed cases were the institutions provided for in Chapter 26 of the CCP employed, i.e., the institution of: 1) Control and recording of conversations, as outlined in Article 237 section 1 of the CCP, which states: 'Upon initiation of proceedings, the court, upon request by the prosecutor, may mandate the control and recording of telephone conversations to detect and obtain evidence for the ongoing proceedings or to prevent the commission of a new crime.' 2) The institution of Article 241 of the CCP, which stipulates: 'The provisions of this chapter shall apply accordingly to the control

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and recording by means of technical means of the content of other conversations or information transfers, including correspondence sent by e-mail.’ However, according to Article 237 § 3 of the CCP, the control and recording of telephone conversations is permissible (among other things) when the ongoing proceedings or a justified fear of committing a new crime concern human trafficking. However, other methods of obtaining evidence enumerated in the CCP were also frequently employed, as would be expected. Specifically: Firstly, items are to be seized and searched. Secondly, control of correspondence, transfer of information, and parcels must be maintained. Thirdly, production and identification are to be carried out. Fourthly, expert opinion must be considered. Fifthly, inspection is to be conducted. Sixthly, procedural experiments are to be carried out. Seventhly, the accused is to be examined and a social interview is to be conducted. It is particularly gratifying to note that the bodies conducting the proceedings utilized legal assistance, both domestic and international, in all cases where it appeared necessary.¹⁰⁸

In the context of subjects conducting pretrial proceedings, the aforementioned scholars observed that in four cases, the proceedings were conducted by the prosecutor; in 20 cases, the police conducted the proceedings; and in one case, the Border Guard conducted the proceedings.¹⁰⁹ In the examined cases, the primary source of information regarding the crime was the victim’s report (15 cases, of which 10 were provided by the victim, 1 by his or her family, acquaintance, state or local institution, and 2 from other entities). The subsequent sources of information were as follows: police findings (5 cases) and other sources (3 cases). A paucity of information regarding the provenance of information about the commission of the crime was observed by scholars in two cases.¹¹⁰ The aforementioned scholars examined the duration of proceedings in the cases for the crime of human trafficking as well. The most prevalent duration of proceedings was from more than 6 months to 1 year (8 cases), and from 1 year to 3 years (7 cases). A shorter duration of proceedings was recorded in four cases, while a longer duration was documented in five cases.¹¹¹ Among the criminological issues described by the authors, the most common characteristic associated with human trafficking should be indicated. The investigation revealed that the majority of the crimes were committed in Poland (21 cases), with the remainder being perpetrated abroad, primarily in Germany (5 cases) and Ukraine (4 cases). The analysis identified that the majority of the perpetrators were between the ages of 30 and 39 (32%), were male (72%), and held Polish nationality (56%). In cases involving perpetrators of a different nationality, the predominant nationa-

¹⁰⁸ K. Burdziak, P. Banaszak, *Przestępstwo...*, pp. 11–25.

¹⁰⁹ K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 14.

¹¹⁰ K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 24.

¹¹¹ K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 26.

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lity was Bulgarian (20% of cases). The study further revealed that the majority of the perpetrators had received primary education (40%) and were engaged in casual work (32%; 20% were employed).¹¹² The subject was not a recidivist (60%), and the act did not constitute a source of income (76%).¹¹³ The individual in question was not known to the victim.¹¹⁴ The identity of the perpetrator is not known to the victim. With respect to the victims, the majority were women (87.5%) of Polish nationality (58%), among whom the majority were citizens of Ukraine (20.83%) and aged 20 to 29 years (37.5%), and had received primary education (37.5%).¹¹⁵ In regard to the perpetrator's behaviour, the following conclusions were reached by K. Burdziak and P. Banaszak:

The behaviour of seven offenders consisted exclusively of receiving victims, constituting 29.17% of the total. Three perpetrators were involved in recruitment for transport and transfer, while three perpetrators were involved in recruitment and transport. Conversely, two perpetrators were implicated in delivery and transfer, two perpetrators in recruitment and receipt, and two perpetrators in recruitment and transfer. The behaviour of only two perpetrators consisted of recruiting, one of transferring, one of transporting, delivering, and transferring, and one of recruiting, transporting, and receiving. The predominant modus operandi employed by the perpetrators involved the dissemination of false information to the victim. In five instances, the perpetrators employed the means of offering a pecuniary or personal benefit, or the promise thereof, to an individual with custody or supervision of another person. In three cases, the perpetrator misled the victim and took advantage of the victim's critical position. The perpetrators' actions also encompassed violence and unlawful threats. In nineteen cases, the objective of the perpetrator was to exploit the victims in prostitution, constituting 82.61% of the total. Two victims were subjected to forced labour or services. The objectives of one perpetrator included the exploitation of the victim in begging, while another perpetrator targeted the victim for shoplifting. In fifteen cases, the perpetrators committed the offence as accomplices, nine times as single perpetrators, and once the perpetrator's behaviour

¹¹² As K. Burdziak and P. Banaszak observe, 'Among those with jobs were two drivers, three salesmen, as well as a person importing used cars, a smoker, a person working in the construction industry, a kitchen helper, or a person involved in renovation and gardening. It is noteworthy that the majority of cases (72%) lack data concerning the financial status of the perpetrator. In the case of five offenders, the financial status was characterized as "below average", while in the case of two, it was designated as "above average".' K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 31.

¹¹³ According to the scholars' assertions, a mere 12% of perpetrators committed the crime as part of an organized group or union with the objective of perpetrating criminal acts. K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 30.

¹¹⁴ K. Burdziak, P. Banaszak, *Przestępstwo...*, pp. 27–31.

¹¹⁵ K. Burdziak, P. Banaszak, *Przestępstwo...*, pp. 31–33. The scholars further noted that in seventeen cases, there was an absence of information regarding the victim's occupation, and in seven cases, the victims did not have a documented occupation. K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 33.

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consisted of incitement. It is noteworthy that nearly all cases involved the commission of a criminal act. In a single instance, an attempt was made.¹¹⁶

With regard to the imposition of sanctions for the commission of a crime as delineated in Article 189a § 1 of the CC, the aforementioned scholars have observed the following:

The most prevalent sanction imposed in the cases under scrutiny was a three-year prison term. This particular sanction was imposed on an average of six individuals. In four cases, the sentence imposed was two years of imprisonment. Three perpetrators were sentenced to four years of imprisonment, and one perpetrator was sentenced to six years of imprisonment. It is noteworthy that this was the most severe penalty imposed in the analysed cases. In six cases, the courts imposed a fine in addition to imprisonment. In a total of ten cases, the courts opted to implement a probationary measure, characterized by a conditional suspension of the sentence. In the remaining fifteen cases, custodial sentences were imposed without the aforementioned conditional suspension.¹¹⁷

In the matter of the propriety of legal qualifications granted by the court, K. Burdziak and P. Banaszak articulated the following perspective:

The examiners assessed the legal qualification adopted as justified in eighteen cases and as unjustified in one. In the remaining six cases, by contrast, the examiners indicated that it was difficult to determine whether the legal qualification adopted by the court was justified.¹¹⁸

Moreover, it is noteworthy that:

In ten cases, the courts of second instance made changes to the decisions adopted by the Regional Courts. In certain instances, these modifications were limited to the indication of a different time of the perpetrator's commission of the criminal act. In seven instances, no alterations were made in the second instance. However, in eight cases, there is an absence of data concerning the decisions made during the second instance.¹¹⁹

¹¹⁶ K. Burdziak, P. Banaszak, *Przestępstwo...*, pp. 33–36.

¹¹⁷ K. Burdziak, P. Banaszak, *Przestępstwo...*, pp. 36–37.

¹¹⁸ K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 37.

¹¹⁹ K. Burdziak, P. Banaszak, *Przestępstwo...*, p. 38.

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The second case file research, conducted as part of the scientific project titled 'Level of penalties imposed for the crime of trafficking in human beings as an expression of the implementation of the judicial principles of punishment', focused on the analysis of the number of penalties imposed for the crime of trafficking in human beings and on determining the factors that influence the imposition of these penalties. On the basis of available information contained in the justifications of court judgments, the study sought to determine which circumstances are taken into account when imposing penalties for this crime, in particular what circumstances are considered as mitigating circumstances and what circumstances are considered as aggravating circumstances for the perpetrator. The analysis conducted by P. Banaszak-Grzechowiak encompassed the records of 44 criminal cases.¹²⁰ The study's findings, as outlined by Banaszak-Grzechowiak, are as follows:

'A close examination of the cases examined in this study suggests that courts frequently impose penalties that fall close to the lower limit of the established statutory range for crimes involving trafficking in human beings. In some cases, these courts may exercise the discretion to grant extraordinary mitigation of punishment, resulting in penalties that fall below the lower limit of the statutory range or even lighter penalties than imprisonment. In their justifications for these sentences, courts have indicated various circumstances in favour of the perpetrator, including the absence of a prior criminal record, the youth of the perpetrator, the isolated and incidental nature of the offence, and the perpetrator's admission of guilt or the disclosure of information regarding the involvement of other individuals. Conversely, the rationales for the judgments enumerate various aggravating circumstances, including the accused's prior criminal record, the use of crime as a consistent source of income, the duration and complexity of the offender's actions, the impact on multiple victims, and the use of unjustified violence by the offender against the victims. However, it is crucial to emphasize that while the courts enumerate the aggravating circumstances of the perpetrator in the rationales for their sentences, in the overwhelming majority of cases, these circumstances do not result in the imposition of a more severe penalty than the one that falls just below the upper limit of the statutory maximum. Consequently, one might reach the conclusion that, in the majority of cases, courts impose penalties for trafficking in human beings irrespective of the particulars of the case. This would imply that courts do not take into account the number of victims, the involvement of an organized criminal group, the regularity of the source of income from trafficking, the use of violence against the victims, or the consent of the victims. A review of the cases reveals that the courts appear

¹²⁰ P. Banaszak-Grzechowiak, *Wysokość kar wymierzanych za przestępstwo handlu ludźmi jako wyraz realizacji zasad sądowego wymiaru kary* [in:] Ł. Pohl, *Handel...*, pp. 73–74.

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to have referred to mitigating circumstances with greater frequency. The presence of such circumstances was identified as a key factor in determining the reason for the imposition of the least severe penalty on the offender, and in certain instances, the penalty was significantly mitigated.¹²¹

¹²¹ P. Banaszak-Grzechowiak, *Wysokość...*, pp. 90–91.

8

Summary

The scope of human trafficking is intricate. It encompasses various domains of human existence, thereby necessitating a diverse array of research disciplines. This inherent complexity is reflected in the research conducted within IJ.

A synthesis of the aforementioned findings reveals that the scope of human trafficking encompasses not only adult victims (particularly women) but also children. It is imperative to acknowledge that both victim groups face unique forms of exploitation, with adults being subjected to prostitution or forced labour, and children facing distinct forms of victimization. Conversely, in the case of children, the primary concern is illegal adoption. Prior to 2010, Polish legislation did not adequately address this issue. A significant challenge was the absence of a precise legal definition of human trafficking, compounded by limitations in the implementation of the definition stipulated in Article 3 of the Palermo Protocol. This issue was highlighted by the findings of file surveys, which revealed that courts frequently failed to provide a clear definition of trafficking. The introduction of Article 189a of the CC and Article 211a of the CC (applied in cases of illegal adoption) has introduced certain modifications. However, a thorough examination of the available data reveals that these legal amendments have not led to a discernible enhancement in the detection of human trafficking. Noteworthy is the persistent challenge concerning the substantiation derived from the unavailability of methods such as the facilitated acquisition, along with the evident omissions in executing specific procedural actions. A particularly vexing issue is the non-criminality of human trafficking victims, a topic that remains a subject of considerable controversy. Consequently, scholars have formulated a plethora of *de lege ferenda* proposals with the objective of rectifying the perceived inadequacies.

The aforementioned reports, however, do not permit the acquisition of a comprehensive understanding of the phenomenon of human trafficking from legal, dogmatic, or criminological perspectives. The reports either address general issues or focus exclusively on specific

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aspects of human trafficking. Consequently, it is rational to formulate a comprehensive document that addresses human trafficking in its various forms, particularly in the context of technological advancements, such as artificial intelligence.¹²²

A more thorough elaboration necessitates a definition of the term ‘human trafficking’. To that end, it is imperative to undertake a thorough examination of all the elements that contribute to this definition. In order to comprehend the essence of human trafficking, it is imperative to interpret Article 115 § 22 of the CC in the context of the social environment. This approach enables us to establish a correlation between the legal definition and the actual state of affairs, thereby facilitating a more nuanced understanding of this complex phenomenon.

The matter of operational activities that law enforcement authorities may undertake in criminal cases involving the crime of trafficking in human beings merits further study. This entails not only the analysis of the legitimacy of the aforementioned *de lege ferenda* proposals but also the implementation of alternative measures or the creation of novel ones.

With regard to the issue of child trafficking, criminal law considerations should be considered satisfactory. However, this does not imply the need to abandon research on the criminal law response to this phenomenon. To achieve a more profound comprehension of the phenomenon, further research must be conducted in an integrated manner, incorporating the findings of related scientific disciplines. A modification of the legal definition of trafficking in human beings to include trafficking in children also necessitates profound reflection. In this regard, it may be worthwhile to consider the adoption of measures analogous to those proposed by Ł. Pohl, K. Burdziak, and P. Banaszak’s proposal pertaining to forced labour, namely the establishment of distinct regulatory frameworks for this phenomenon. This framework encompasses not only the formulation of a legal definition but also the legitimacy of penalizing forced labour separately from trafficking in human beings. Analogous issues relate to the question of a separate criminalization of slavery in the act introducing the CC.

The legal status of surrogate motherhood in Poland is another area that necessitates further research. A more profound and comprehensive examination is necessary, extending beyond the confines of family law, particularly with respect to the recognition of paternity and adoption. Given the extensive range of behaviours constituting trafficking in human beings, it is imperative to scrutinize other institutions of Polish and foreign family law to ascertain the potential for facilitating this procedure through loopholes in their framework. The considerations regarding surrogacy as a potential form of trafficking in human beings, as articulated by M. Miklaszka, merit further elaboration.¹²³ A more comprehensive examination

¹²² It should be noted that the complexity of the above issue will require a significant investment of time and effort, and the full realization of this goal may not be feasible.

¹²³ The present discussion pertains to considerations that are distinct from the Polish legal state.

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is necessary, encompassing the fundamental aspects of the agreement, as well as sociological and psychological dimensions. In light of M. Mikluszka's assertion that the legality of a nation's surrogacy contracts does not preclude the occurrence of human trafficking, it is imperative to contemplate whether the legal acceptance of a certain behaviour inherently excludes the element of human trafficking. In other words, it is necessary to determine whether trafficking in human beings can only be a behaviour that is either unacceptable or illegal, or whether it is possible that certain manifestations of trafficking in human beings may be legal behaviours. The treatment of these manifestations as a manifestation of trafficking in human beings under international law does not result from their legal status, but from a certain transnational axiology.

In the context of file research, it is logical to persist in this endeavour to ascertain whether alterations have transpired in the implementation of legal principles within trafficking cases. A more extensive examination of the implementation of the legal definition outlined in Article 115 § 22 of the CC by judicial bodies is merited. The analysis of court records should also address the issue of the practice of non-criminalization of victims of trafficking.¹²⁴

Research conducted by IJ researchers does not extend to the consideration of issues related to the international nature of this procedure. Consequently, it is recommended to undertake a comprehensive analysis of the provisions of international law within the context of the relevance and effectiveness of the measures adopted in international legal instruments. Furthermore, conducting thorough case file research is imperative to assess the application of the provisions of international law by judicial bodies. A further worthwhile pursuit would be the analysis of trafficking cases that have been adjudicated by international courts and tribunals.

The question of whether a separate anti-trafficking act is necessary also needs to be considered. In order to determine the necessity of such legislation, it is imperative to establish the potential scope of the proposed act and to compare it with the existing legal regulations. In the event that the existing legal changes require only punctual additions, there is no justification for creating a new legal act. In such instances, the integration of novel regulations into existing legal instruments is deemed sufficient.

¹²⁴ The aforementioned analysis provides a basis for determining whether Polish law, in its present state, ensures the non-criminalization of such perpetrators or if amendments to the law are necessary.