

THE PROTECTION OF MIGRANT WOMEN

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1. Premise.

Object of analysis of the paper is the migratory question analyzed with a gender perspective. The topic of female migration today is of considerable legal interest. There are various types of immigrant women, a female population that is as diverse in composition as in adaptation and insertion methods. If on the one hand the female migratory phenomenon is going on by making it more quantitative, it reveals new dynamics from the other. The immigrants take on new roles in migratory paths. The expatriation choices are different methods of insertion and integration into the target company. In addition to the traditional female immigration for family reunification, there is a new female migration of the completely independent in which the woman who leaves the country of origin is the bearer of a migratory project autonomous, driven by the possibility of success and career (intellectual migration) or however from the need to keep children, even after divorce. Women therefore become the primary link in the migratory chain or, in any case, an active part in the labor market (economic female migration). Finally, there are migrant women requesting protection international. The sensibility of the jurist woman cannot neglect the question of the protection of the human rights of the latter group of women. The latter represent a category of particularly vulnerable subjects. They arrive in Europe fleeing their countries of origin because they are persecuted, even for the genre, and are victims of violence, external, linked to contexts of war (for example rape), but also domestic (for example female genital mutilation, forced marriages etc.). Furthermore, these women often enter the trafficking human market. In the next the theme of violence on the category of migrant women will be explored. It constitutes a heterogeneous vulnerable group. In fact, it belongs to various types of women, such as refugee women and asylum

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seekers, economic migrants, migrants for family reunification and, finally, climate migrants. In addition to an "inherent" vulnerability, related to gender, the latter present a vulnerability related to their objective condition of "migrant"; in doctrine it has been asserted, therefore, that they have a "double vulnerability". In addition to an *inherent* vulnerability related to the genre, it should be noted that the working group of experts on human rights of migrants, appointed by the Human Rights Commission in 1997 (later replaced by the Human Rights Council, set up by General Assembly Resolution Human rights Council, UN Doc A / RES / 60/251 of 3 April 2006) found that "the essential element that determines the weakness of migrants consists in a situation of mere fact (so-called powerlessness) that would characterize the relationship of these both with the sending and / or destination State that with social forces and which is substantiated in a condition of marginalization such as to confine migrants to the periphery of the system of protection of rights up to the point of preventing them from full and effective enjoyment of their subjective positions ".

2. General regulatory framework on the international protection of migrants (outline) and UNHCR practice for a gender approach.

International protection includes both refugee status (so-called asylum) and subsidiary protection. Specifically, refugee status is recognized by the UN Geneva Convention of 28 July 1951, ratified by Italy with Law n. 722 of 24 July 1954, which together with its 1967 Protocol, was also incorporated into the law of the EU, with Directive 2011/95 / EU (so-called Qualification Directive). According to the Convention, refugees are those who "for fear of being persecuted for reasons of race, religion, nationality, belonging to a particular social group or for their political opinions, are outside the country of which they are citizens and cannot or does not want, because of this fear, to make use of the protection of this country; or that having no citizenship or being outside the country in which he habitually resides as a result of such events, he cannot or does not want to return therebecause of the aforementioned fear "(art. 1). However, as emerges from the definition of refugee, at the international level, the original condition of the migrant woman was not taken into account, declining the term "refugee" to the male and excluding any reference to gender violence among the reasons for persecution . As anticipated, in fact, only recently, in the study of international law, is emerging a debate about the need for a specific "gender" protection for the migrant woman. A part of the doctrine has also advanced the proposal to modify the Geneva Convention, introducing the gender cause as the sixth ground for the recognition of refugee status. A significant role has been played by ad hoc bodies responsible for the protection of human rights, such as the United Nations High Commissioner for Refugees. UNHCR, among other things, since 1995, periodically publishes guidelines on the prevention and combating of sexual violence against refugees that have helped to raise awareness and make clear the need for a targeted approach for the protection of vulnerable people migrants. Following the Geneva Conference, in March 2001, the 1995 guidelines were revised

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and replaced by the new guidelines for the prevention and response to sexual and gender-based violence against refugees, returnees and displaced persons, who are used by UNHCR staff and other UN agencies and other governmental and non-governmental organizations in host countries that provide refugee protection and assistance. They are a valid legal interpretative guide for governments, legal professionals, the judiciary and those carrying out refugee status determination activities. With reference, in particular, to sexual violence and rape, it is clarified that when these acts are committed for reasons based on race, religion, nationality, political opinion or belonging to a particular social group, they can be considered "persecution", meaning of the definition of the refugee term of the 1951 Geneva Convention. Moreover, the same category of women could be considered, for the purposes of gender persecution, as belonging to a social group in itself. Therefore, the operators are encouraged to use a particular sensitivity and an attitude of openness in the guidelines. It is clarified that the questions relating to gender concern - but the cases do not exhaust them - acts of sexual violence, family / domestic violence, female genital mutilation and forced family planning. For the substantive analysis in the investigation of a gender persecution, it is necessary that there is a "well-founded fear of persecution" related to one of the reasons provided for by the Geneva Convention (reasons of race, religion, nationality, belonging to a particular social group or political opinion). What then consists of a "well-founded fear of persecution" depends on the individual circumstances of the case. For example, there may be a persecutory law in the country of origin of an asylum seeker, an expression of traditional or cultural practices that do not comply with international human rights standards. However, even if a state may have prohibited a persecutory practice (such as female genital mutilation), the state may in fact continue to justify or tolerate the practice and even in these cases the practice would be tantamount to persecution. Even a less favourable system of discrimination or treatment, if adopted on a cumulative basis, could constitute a persecution and thus justify international protection. It has also been pointed out that agents of persecution may not necessarily be States. In fact, non-State actors, such as local populations or individuals, often commit serious discriminatory and offensive actions. In these cases these acts must be considered as persecution if they are knowingly tolerated by the authorities or if they refuse or are unable to protect the victims. In these cases, an indirect responsibility of the State would actually be created. In examining an asylum application by a woman who is a victim of violence, the health certifications could also be of documentary importance. However, it is not enough to ascertain the existence of the well-founded fear of gender persecution. It is necessary, in fact, to prove the causal link by which the well-founded fear exists for reasons of race, religion, nationality, belonging to a particular social group or political opinion. Precisely with regard to the proof of causality, in ascertaining gender persecution, there are indeed considerable difficulties. In addition to international protection, it also recognizes subsidiary protection, which is residual with respect to the former, and which is used more heavily for migrant women. It is defined in Directive 2011/95

/ EU as the protection of a third country national or stateless person who does not meet the requirements to be recognized as a refugee but where there are reasonable grounds to believe that if he returned to his country of origin or in the case of a stateless person, if he returns to the country in which he previously had his habitual abode, he would run the real risk of suffering serious harm and cannot or does not want to take advantage of the protection of that country.

3. The protection of migrant women in the Council of Europe's regional human rights protection system and internal implementation profiles.

There is no doubt that the 2011 Istanbul European Convention on preventing and combating violence against women and against domestic violence is now an essential reference point for international cooperation on the protection of migrant women, especially with regard to about women who are victims of violence. In fact, Chapter VII of the Convention, entitled "migration and asylum", pays particular attention to the issue of international protection of women victims of violence and represents a fundamental source for the interpretation of the 1951 Geneva Convention on the Status of Refugees, with reference to at risk of gender-related persecution. It incorporates the practices of the United Nations High Commissioner for Refugees on preventing and combating gender-based violence on refugees . As it was mentioned in paragraph 1, for the purposes of recognition of refugee status, art.1, letter A, n.2) of the Geneva Convention provides that there should be a "fear of persecution" based on one of the five reasons indicated by the Convention (race, religion, nationality, belonging to a particular social group or for political opinions). However, under the Istanbul Convention, the parties have undertaken to take all necessary measures to ensure that gender-based violence against women can be recognized as a form of persecution, pursuant to art. 1, letter A, n. 2 of the Geneva Convention and for a gender sensitive interpretation to be applied to each of the reasons for granting refugee status (art. 60). Furthermore, pursuant to art. 59 of the same Convention, the Parties undertake to adopt legislative or other measures to ensure that victims whose resident status depends on that of their spouse or partner, can obtain, upon request, in the event of dissolution of marriage or report, in particularly difficult situations, an independent residence permit, regardless of the duration of the marriage and the relationship. Moreover, in order to free the migrant woman victim of violence from the family context in which she perpetrates her, this provision also takes into consideration the situation of the victims of forced marriage. To this end, the Parties undertake to adopt measures, both legislative and non, necessary to ensure that victims of a forced marriage who are brought to another country for the purpose of marrying, and who have consequently lost their status as a resident of the country where they normally reside, they can then recover this status. Finally art. 61 reaffirms the respect of the principle of non-refoulement. In fact, "the parties adopt the legislative or other measures necessary to ensure that women in need of protection, regardless of their status or place of residence, can in no case be expelled to a country

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where their life could be in danger or where they could be exposed to the risk of torture or inhuman and degrading treatment and punishment". In the internal system, Italy has implemented the aforementioned Convention, introducing art. 18 bis, in the legislative decree n. 280/1998, with the art. 4 of the dl 14 August 2013 n.93. The provision provides for an autonomous title of residence permit for victims of domestic violence. This is a humanitarian residence permit in cases where the Quaestor deems subsisting "a concrete and current danger for his safety, as a result of the choice to escape the same violence or as a result of statements made during the preliminary investigation or trial ". This provision applies to victims of crimes pursuant to ex art. 572, 582, 583 bis, 605, 609 bis and 612 bis of the criminal code or one of the offenses pursuant to art. 380 cpp, where the residence permit, pursuant to article 18, is applied to victims of crimes related to the exploitation of prostitution and crimes for which arrest in the fragrance is expected. It has therefore been observed that for some crimes such as family mistreatment, stalking and sexual violence there can be an overlap of discipline of the two residence permits. In order to obtain the permit, the art. 18 bis provides for a double track, consisting of a twofold and alternative start of the administrative procedure and in the conduct of the investigation, based on the path followed. In fact, it is possible to follow a judicial path, pursuant to art. 18 bis, paragraph 1 or a social path activated by the social welfare services of the anti-violence centers. However, a lack of discipline emerged. In fact, the Quaestor's discretion in assessing the risk of life was challenged in the absence of objective criteria expressed. Furthermore, the legislator has included, among the requirements for obtaining the residence permit, the non-episodicity of the violence. In the opinion of some authors, the Istanbul Convention would not be properly implemented, making no reference to the non-episodic character of violence. Article 18 bis, therefore, would expel all the foreign victims of violence who are victims of a single act of violence, even if serious or of episodic acts of violence. Furthermore, the Italian Legislator has not provided for a specific duration of the permit to be applied, which will have to apply the general regime pursuant to art. 5, paragraph 3, lett. and, according to which "the duration of the residence permit not issued for work purposes is that envisaged by the entry visa, within the limits established by this consolidated text or in implementation of the agreements and international conventions in force". As far as judicial protection is concerned, since it is a residence permit expressing an authoritative power of the PA, the subjective legal position of the foreigner is of legitimate interest so that the jurisdiction is of the administrative judge. Therefore it will be possible to appeal against the denial of obtaining the residence permit. On the other hand, compared to the requests for the assessment of the right to humanitarian protection, as per articles 5, paragraph 6 and 19 of the legislative decree n. 286/1998, the jurisdiction is of the ordinary judge. In this sense, the Supreme Court of Cassation expressed itself, with the sentence, made to the United Sections n. 19393 of 9 September 2009. The jurisprudence of legitimacy has brought back the right to humanitarian protection, such as the right to refugee status and the right to asylum, to the category of fundamental human rights

and therefore this legal situation has consistency of subjective right and constitutional coverage with art. 2 of the Constitution. By virtue of the constitutional guarantee mentioned, "it is excluded that these situations may be degraded to a legitimate interest, as a result of discretionary assessments entrusted to the administrative power to which it can be entrusted only with the verification of the factual conditions that legitimize international protection, in the exercise of a mere technical discretion ". In conclusion, the Supreme Court has held that the jurisdiction over human rights rests with the ordinary judge.

4. Female genital mutilation

Female genital mutilation (FGM), as was also recognized in the Istanbul Convention and almost simultaneously in the UN General Assembly resolution of 20.12.2012, A / Res / 677146, is a form of gender-based violence. This practice includes all procedures that involve the partial or total removal of external female genitalia or other injuries to the female genital organs for non-medical but cultural and social reasons. FGM has negative effects on women's health and, in some cases, can even lead to death. More recently, the European Parliament itself has adopted a new resolution of 7 February 2018 on zero tolerance for female genital mutilation in order to eliminate harmful practice and achieve the goal of "achieving gender equality and empowering all women" and the girls "of the 2030 Agenda for sustainable development. It has been observed in the doctrine that the issue of female genital mutilation is an expression of a normative conflict between the *customary norms* of a group in which these practices originate and the positive, state and international right in which they detect the rights of individuals. Even Italy, with law 9 January 2006 n.7 ("provisions concerning the prevention and prohibition of female genital mutilation practices") has put faith in international commitments by adopting strategies to address the problem. In particular, articles 583bis and 583 ter were introduced into the penal codes that prohibit the execution of all forms of FGM. In particular, the framing of MFGs as gender violence was a significant contribution also to the recognition of international protection for women. Suffice it to mention some decisions of the relevant jurisprudence on the matter such as the sentence of the Court of Appeal of Catania of 27 November 2012. In the case in point, the rejection of an asylum application against the woman was "against

having suffered persecutory acts linked to belonging to the female gender" such as the MFG. The referring judge upheld the appeal of the migrant woman by granting asylum on the following grounds: "*MFGs constitute a form of gender-based moral and material discrimination, linked to the belonging to the female gender (...) the MFG is inflicted on girls and women because they are female, to assert power over them and to control their sexuality. The practice is therefore part of a broad model of discrimination against girls and women in a specific society*". The jurisprudence of the Court of Strasbourg also addressed this issue by examining several cases of international protection of migrant women who did not want to return to their country

of origin due to the risk of being subjected to the practice of female genital mutilation. In these cases, the principle of non-refoulement was also invoked as a limit to expulsion. It is known that the aforementioned principle has been used repeatedly by the Court of Strasbourg, being considered a corollary of art. 3 ECHR. Therefore, the art. 3 of the ECHR will be violated by any measure of removal from the national territory adopted by a State party to the Convention against a foreigner, when substantial reasons are found to consider that the measure has the effect of exposing the foreigner to the risk of torture or treatment inhuman and degrading in the country of destination, thus integrating indirect responsibility of the state that authorized the expulsion. In *subiecta materia*, it is useful to recall the decision in the Izevbekhai case c. Ireland (appeal No. 43408/2008, ruling of 17 May 2011). In this ruling, the EDU Court has asked the Irish State to suspend the procedure for the expulsion of a woman in application of the principle of non-refoulement, and its daughters to the State of citizenship for the risk of the applicant to be subjected to the practice of FGM that he had already caused the death of the woman's firstborn. The Court of Strasbourg, in essence, called for the adoption of a preventive measure aimed at preventing the occurrence of a practice which violated the right to the physical integrity of women and which was inhuman and degrading treatment, especially if perpetrated against girls.

5. Forced marriages.

The practice of forced marriages is one of the most widespread forms of violence of migrant women.. Even forced marriage can therefore represent a gender persecution. The European Union, within the scope of its objective to remove forms of discrimination and promote equality between men and women (art. 8 TFEU), intervened on the matter, with a resolution of the European Parliament on women's immigration: role and status of immigrant women in the European Union in 2006. More recently, the Committee on Women's Rights and Gender Equality of the European Parliament has proposed to the Committee on Foreign Affairs, as the committee responsible, to present an external strategy of the European Union against early and forced marriages for the purpose to eradicate the practice by 2030 in line with the UN Sustainable Development Goal 5.3. The Charter of Fundamental Rights of Nice itself, besides reiterating the principle of non-discrimination, in art. 21, explicitly recognizes the freedom to contract marriage to art. 9. In Italy, forced marriage, unlike female genital mutilation, which is explicitly recognized as incriminating and, unlike other European states that have already done so, is not yet recognized as a crime. Therefore, in the absence of specific rules of the law, general provisions will have to be used; for example, by applying art. 84 of the Civil Code prohibiting marriage between minors, without prejudice to the possibility for the minor who has completed 16 years to seek authorization from the Juvenile Court. In

this case it will be possible to cancel the marriage. Pursuant to art. 122 of the Civil Code, the marriage is annulled when the consent is extorted violently or determined by the fear of exceptional seriousness deriving from causes external to the spouse. Once the sentence is annulled, the annulment sentence determines the removal of the marital status of the marital status and allows the woman to take back the spouse or other family member who is responsible for the nullity of the marriage (for example the father who forced the woman to marriage) in order to recognize a reasonable indemnity. These rules can indeed be applied only if the marriage is celebrated in Italy but more frequently women return to their countries of origin and do not return to Italy.

From a penal point of view, there are also cases of threat and private violence, abuse of the means of correction, mistreatment up to kidnapping, enslavement, very serious injuries, sexual violence, attempted murder and instigation of homicide, in more serious cases, the refusal of the woman to contract marriage. When the woman flees before marriage, the crime of persecutory acts could also be configured. The jurisprudence of the Supreme Court of Cassation, with a consolidated orientation, reiterated that it is not a matter of culturally oriented crimes, justified by *cultural defence*, but of forms of gender violence. For example, in a case submitted to the Court of Cassation, a father of Indian nationality was convicted because he imposed the minor daughter, who went to marry his compatriot with a forced marriage in Bangladesh, to obey the sexual wishes of her husband. According to the Cassation, the cultural defence of the Indian tradition is not invocable and cannot justify the behaviour of this Indian father. A further case, to the attention of the Supreme Court of Cassation, in the matter of forced marriages, was decided by the first civil section, with the recent sentence n.28152 of 24 November 2017. The jurisprudence of legitimacy upheld the appeal of a Nigerian woman by recognizing her international protection on the basis of the motive of gender persecution. The woman had been forced to leave her country of origin because after her husband's death she refused to undergo the funeral practice imposed on widows, according to local customary law, which consisted in uniting herself in marriage with her brother-in-law, brother of the deceased. As a result of the refusal, she had been removed from the house, had been deprived of parental authority and persecuted by her brother-in-law. The Bologna Local Commission had rejected its request for subsidiary international protection because it had not considered its situation due to a form of persecution. The woman appealed to the Court of Bologna, which upheld the appeal, against the negative administrative provision. Subsequently the Ministry of the Interior proposed an appeal that came from the Court of Appeal accepted. Therefore, the woman challenged the sentence of the second instance court for the Supreme Court for lack of motivation "in relation to the lack of evaluation of the conduct suffered by the applicant as acts of persecution based on gender". In the appeal it was highlighted how the acts suffered were a violation of the fundamental rights of women as the right to parenting and freedom to freely choose with those who contract marriage. The motivation for this ruling is very important and shows how

even in the jurisprudence of national legitimacy emerges a gender sensitivity and takes into account the impact of international law. In fact, the SC recalls the Istanbul Convention of the Council of Europe and asserts that even acts of domestic violence can be traced back to the scope of the conditions for the recognition of international protection. In this regard, the courts of last instance refer to art. 60 of the aforementioned Convention which requires States to consider violence against women based on gender as a form of persecution pursuant to art. 1, lett.A of the Geneva Convention. The SC also recalls the UNHCR guidelines of 2002. Therefore the Court maintains that the affair is fully within the provisions of the Convention and art. 7, c.2, lett, f, d.lgs. N. 251/2007, for the recognition of refugee status. It is asserted, in fact, that "there is no doubt that the applicant was the victim of personal and direct persecution for belonging to a social group (or as a woman) in the form of acts specifically directed against a gender". On the same ridge also the sentence of the Supreme Court n. 12333 of 12 May 2017 in which the legislation on international protection was interpreted in the light of the gender perspective of the Istanbul Convention. In particular, in this specific case, the applicant, a Moroccan citizen, victim in the country of origin of domestic violence by her ex-husband, was afraid of being exposed again to the abuse of her spouse, from whom she had divorced, once she returned to Morocco, following the denial of the request for international protection. The SC accepted the appeal considering the case subsumable in domestic violence, as defined in Article 3. lett. b) of the aforementioned European Convention which is binding on the Italian State (point 2.1 of the grounds).

6. The European protection of migrant women victims of trafficking

The theme of the protection of migrant women victims of violence also intercepts the issue of trafficking in human beings, especially women and minors. In fact, the most recent European statistics show that trafficking affects mainly women and girls who represent 79%, compared to a lower percentage of 21% for men. Trafficking in human beings is defined by art. 3 of the Additional Protocol to the United Nations Convention against Transnational Organized Crime, signed during the Palermo Conference of 15.12.2000, as "the recruitment, transportation, transfer, housing or reception of people with the threat to resort to the use of force or with the effective use of force or other forms of coercion by seizure, fraud, deception, abuse of power or a situation of vulnerability or with the offer or the acceptance of money or other benefits in order to obtain the consent of a person with authority over another for the purpose of exploitation. Exploitation includes, at a minimum, the exploitation of the prostitution of other people or other forms of sexual exploitation, forced labor or services, slavery or practices related to slavery, servitude or organ harvesting ". It distinguishes itself from smuggling and trafficking of migrants because the latter presupposes the consent of the victim and his participation in clandestine traffic from one State to another. At European level, the Council of Europe Convention on Action against Trafficking in Human Beings, adopted in Warsaw on 16 May 2005, ratified by

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Italy with the law of 2 July 2010 no. 108, and entered into force on 1 February 2008. This source assumes a fundamental importance in the matter by adopting a perspective of centrality of human rights in the protection of victims of trafficking. The definition provided of trafficking in person resumes that of the Additional Protocol of Palermo. In fact, it does not recognize relevance to the consent of the victim to exploitation, in the presence of coercive methods. The Convention provides for "a period of reflection" in which the dismissal of persons against whom there are reasonable grounds for believing that a person has been a victim of trafficking (Articles 10-13). States are obliged to introduce measures to assist victims regardless of their willingness to testify in criminal proceedings (Article 12), the obligation of States Parties to issue a renewable residence permit to victims for investigation purposes in criminal proceedings and if this is necessary for the victim's personal condition (art.14). The Convention has also designed a monitoring mechanism by a group of experts called GRETA (Group of experts on action against trafficking in human beings), pursuant to art. 36 of the Convention. The GRETA group periodically publishes reports on the state of implementation of the conventional obligations by each of the countries party to the Convention. On the European Union's legal system, notes Directive 2011/36 / EU on the prevention and repression of trafficking in human beings and the protection of victims, adopted by the Council of the European Union and the European Parliament on 5 April 2011 which represents the first measure of judicial cooperation in criminal matters concerning the fight against transnational crime, adopted after the entry into force of the Lisbon Treaty, in order to realize the Area of Freedom, Security and Justice (art. 83 TFEU). This directive replaces the Framework Decision 2002/629 / JHA of 19 July 2002 on combating trafficking in human beings. In this paper the most relevant European jurisprudence in this area should be reported. It should be pointed out that, although the European Convention for the Protection of Human Rights and Fundamental Freedoms does not expressly mention the prohibition of trafficking in human beings, the European Court of Human Rights has traced many cases of trafficking in women 'art. 4 ECHR on the prohibition of slavery and forced labor, adopting an extensive and teleological interpretation as well as evolutionary of the provision in question. The leading case in this regard is the Rantev case c. Cyprus and Russia (appeal No. 25965/04, ruling of 7 January 2010). The appeal was presented by Mr. Rantev, a Russian citizen, father of Oxana Ranteva, a young woman who had moved to Cyprus to work as an artist in a cabaret and found dead in unclear circumstances. The girl's father believed that her daughter had been a victim of trafficking for prostitution purposes. However, the European courts have questioned the possibility of bringing trafficking within the scope of Article 4, since there is no explicit reference to the text in the provision. However, considering the purposes of the standard and noting that the European Convention for the Protection of Human Rights and Fundamental Freedoms is a "living instrument which is to be interpreted in the light of present day conditions" and which is an expression of a high standard protection of human rights and fundamental freedoms, also included trafficking. within the scope of application of

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art. 2.2. In light of an evolutionary interpretation, therefore, in consideration of the evolution of the traditional concept of slavery (contained in the 1929 Convention on Slavery and which implies a state of total subjugation to one's dominus), the EDU Court recognizes new forms of subjugation and domain on people, even not absolute. The Court asserts that the route is a "modern form of the old world wide slave trade" (par. 280).