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# Challenges Related to Double Criminality in Transnational Human Trafficking Cases

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## Abstract

The principle of double criminality represents a fundamental requirement in international criminal cooperation, particularly in extradition and mutual legal assistance procedures. In the context of transnational human trafficking, however, the application of this principle generates significant legal and practical challenges. Differences in national legal frameworks, variations in the definition of trafficking offences and divergent thresholds for criminal liability often hinder effective cross-border cooperation. While international instruments, such as the Palermo Protocol, have contributed to a degree of normative harmonization, domestic criminal laws continue to reflect distinct legal traditions, policy priorities, and evidentiary standards. As a result, conduct that constitutes human trafficking in one jurisdiction may not be criminalized in an equivalent manner in another, thereby obstructing prosecution, extradition or judicial assistance.

These challenges are further amplified by the complex and evolving nature of trafficking activities, which frequently involve exploitation forms that are interpreted differently across legal systems, including forced labor, sexual exploitation or exploitation of vulnerability. In addition, discrepancies in the criminalization of preparatory acts, attempt, participation, or the liability of legal persons complicate the assessment of double criminality. The strict application of this principle may ultimately undermine victim protection, delay justice and facilitate impunity for traffickers operating across borders.

This paper argues for a more flexible and functional interpretation of the double criminality requirement in transnational human trafficking cases, emphasizing the need to focus on the underlying criminal conduct rather than formal legal classifications. It also highlights the importance of continued legal harmonization, judicial dialogue and the development of cooperative mechanisms that balance state sovereignty with the imperative of combating serious transnational crime and safeguarding human rights.

**Keywords:** double criminality; transnational human trafficking; international criminal cooperation; extradition; legal harmonization; victim protection

## 1. Introduction

Human trafficking represents one of the most complex and pervasive forms of transnational organized crime, affecting millions of individuals worldwide and generating substantial illicit profits for criminal networks. According to the United Nations Office on Drugs and Crime (UNODC), trafficking in persons manifests in multiple forms—including sexual exploitation, forced labour, forced criminality and organ removal—often involving intricate cross-border operations that complicate investigation and prosecution (UNODC, 2022). The inherently transnational nature of trafficking requires robust international cooperation, particularly in matters of extradition and mutual legal assistance. Within this framework, the principle of double criminality emerges as a pivotal, yet often problematic, legal requirement.

The principle of double criminality—according to which a person may only be extradited or subjected to mutual legal assistance if the alleged conduct constitutes an offence in both the requesting and requested states—has long been embedded in international criminal law as a safeguard of state sovereignty and legality. It is reflected in numerous multilateral instruments, including the United Nations Convention against Transnational Organized Crime (UNTOC), particularly in Articles 16 and 18, which regulate extradition and mutual legal assistance. While designed to protect individuals from arbitrary prosecution and ensure reciprocity between states, the requirement of double criminality may hinder effective cooperation in trafficking cases where domestic legal definitions diverge.

Although the Protocol to Prevent, Suppress and Punish Trafficking in Persons (Palermo Protocol) introduced a harmonized international definition of trafficking in persons (Art. 3), national transposition has not been uniform. States differ significantly in their criminalization of specific forms of exploitation, the interpretation of "means" (such as abuse of vulnerability), the treatment of victim consent and the age thresholds for child trafficking (Gallagher, 2010; Piotrowicz, 2012). Moreover, some jurisdictions require proof of cross-border movement, while others do not; some criminalize attempted trafficking broadly, whereas others impose narrower evidentiary standards. These discrepancies can create situations in which conduct clearly falling within the international definition of trafficking may not satisfy the domestic criminal elements in one of the concerned jurisdictions, thereby failing the double criminality test.

Additional challenges arise in cases involving emerging forms of exploitation, such as forced criminal activities or online-facilitated recruitment. Rapid technological developments and the increasing digitalization of trafficking networks often outpace legislative adaptation at the national level. Consequently, disparities in cybercrime legislation, evidentiary rules, and liability frameworks may indirectly affect the assessment of double criminality (Europol, 2023). The result is a fragmented enforcement landscape in which traffickers exploit normative inconsistencies and jurisdictional gaps.

This article examines the legal and practical challenges associated with the application of the double criminality requirement in transnational human trafficking cases. It analyses doctrinal interpretations of the principle, evaluates its operation within extradition and mutual legal assistance procedures, and assesses the extent to which divergences in national trafficking legislation undermine international cooperation. By situating the discussion within the broader framework of transnational criminal justice and victim protection, the paper seeks to identify pathways toward greater normative convergence and more effective cross-border enforcement, while preserving fundamental rights guarantees.

Although the analysis is primarily focused on European and transnational cooperation frameworks, particularly within the context of the European Union and the Council of Europe system, the discussion also considers broader international dimensions of trafficking-related cooperation where relevant. The article therefore adopts a predominantly EU-centered perspective while acknowledging that significant variations exist across non-European jurisdictions.

## 2. The normative foundations and functional rationale of double criminality

The principle of double criminality is traditionally grounded in the doctrines of legality (*nullum crimen sine lege*) and sovereign equality of states. It functions as a procedural filter in extradition and mutual legal assistance (MLA), ensuring that states are not compelled to enforce foreign penal norms that are inconsistent with their own legal order (Bassiouni, 2014). In trafficking cases, however, this safeguard may operate as an obstacle where domestic criminal provisions diverge in scope, structure or terminology.

Article 16(1) of the United Nations Convention against Transnational Organized Crime explicitly conditions extradition on the offence being punishable under the laws of both States Parties, unless otherwise agreed. Similarly, Article 18(9) allows States to refuse mutual legal assistance in the absence of double criminality, although it encourages flexibility where possible. While the Convention promotes cooperation "to the widest extent possible," it leaves substantial discretion to domestic legal systems (UNTOC, 2000).

Scholarly commentary emphasizes that the double criminality test is not concerned with identical legal classification, but rather with the underlying conduct (*in abstracto* approach) (Shearer, 1971; Bassiouni, 2014). Courts in several jurisdictions have adopted a conduct-based interpretation, assessing whether the factual allegations would constitute a criminal offence under domestic law, regardless of formal nomenclature. Nonetheless, divergences in the constituent elements of trafficking offences may still generate interpretative uncertainty, particularly where domestic law fragments exploitation into separate offences (e.g., pimping, unlawful confinement, labour law violations) rather than codifying trafficking as a composite crime.

Recent developments in European case law have significantly refined the legal understanding of trafficking-related obligations and their interaction with transnational cooperation mechanisms, including the application of the double criminality principle.

Comparable challenges have also been identified outside the European context. In the United States, trafficking-related extradition and mutual legal assistance cases have highlighted tensions between federal trafficking legislation and differing state-level evidentiary approaches. Similarly, several Asian jurisdictions have encountered difficulties related to divergent definitions of exploitation, particularly concerning forced labour and migration-related trafficking.

The jurisprudence of the European Court of Human Rights has played a central role in consolidating trafficking as a human rights violation falling within the scope of Article 4 of the European Convention on Human Rights (prohibition of slavery, servitude and forced labour). The significance of Chowdury and Others v. Greece extends beyond the recognition of severe labour exploitation as a form of forced labour under Article 4 ECHR. The judgment illustrates how trafficking-related conduct may receive broader human rights protection at the supranational level than under certain domestic criminal law frameworks. This discrepancy is relevant for double criminality assessments because conduct considered trafficking-related by the ECtHR may not always correspond to equivalent criminal provisions in national legislation.

Subsequent case law has reinforced this trajectory. In cases such as S.M. v. Croatia, the Court confirmed that trafficking may occur in contexts of sexual exploitation even where elements of consent are present, provided that vulnerability and abuse are established. These developments highlight a substantive, victim-centered interpretation of exploitation, which may not always align with narrower domestic criminal law definitions. Consequently, discrepancies between national legal frameworks risk undermining both human rights protection and the effectiveness of transnational cooperation, particularly where double criminality is assessed rigidly.) (Van Zyl Smit, 2024).

In addition to the Palermo Protocol, the Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw Convention, 2005) has played a significant role in promoting a human rights-based approach to trafficking. The Convention establishes comprehensive obligations concerning prevention, victim protection, investigation, prosecution and international cooperation. Its monitoring mechanism, implemented through the Group of Experts on Action against Trafficking in Human Beings (GRETA), has repeatedly identified shortcomings in national anti-trafficking frameworks, including inconsistencies in the interpretation of exploitation, victim identification procedures and prosecutorial practices. GRETA evaluations demonstrate that, despite increasing legislative convergence, important divergences remain among States Parties, which may indirectly affect the application of the double criminality requirement in transnational cooperation.

At the level of the Court of Justice of the European Union, jurisprudence has focused more directly on the operational dimensions of judicial cooperation, especially under instruments such as the European Arrest Warrant (EAW). While trafficking in human beings is included among the offences for which verification of double criminality may be waived within the EU framework, the Court has consistently emphasized the principles of mutual trust and mutual recognition. In cases such as Aranyosi and Căldăraru, the CJEU established that cooperation may be limited where fundamental rights risks are identified, thereby illustrating that efficiency in surrender procedures must be balanced against rights-based safeguards. Although not trafficking-specific, such jurisprudence has indirect implications for trafficking cases by shaping the legal environment in which cross-border cooperation operates.

Recent European Commission implementation reports on Directive 2011/36/EU further confirm that Member States continue to differ in their treatment of specific forms of exploitation, including forced criminality, forced begging, and corporate liability. The Commission has also highlighted uneven levels of victim protection and disparities in investigative and prosecutorial capacity. These findings are particularly relevant for double criminality assessments, as they demonstrate that formal harmonization has not eliminated substantive legal differences capable of influencing extradition and mutual legal assistance procedures.

Furthermore, the interpretation and implementation of Directive 2011/36/EU have been continuously monitored and assessed through reports issued by the European Commission. These reports highlight persistent disparities among Member States in transposing key elements of the trafficking definition, particularly regarding forms of exploitation such as forced criminality and the liability of legal persons. They also underline uneven levels of victim protection and prosecutorial effectiveness. Such findings confirm that, despite formal harmonization at the EU level, substantive divergences remain, which may indirectly affect the application of double criminality in both extradition and mutual legal assistance contexts.

Taken together, these developments indicate a broader shift toward a functional and human rights-oriented understanding of trafficking, which prioritizes the protection of victims and the effectiveness of enforcement over strict formal equivalence between legal systems. However, they also reveal an enduring tension: while supranational jurisprudence promotes convergence and flexibility, domestic legal diversity continues to shape the practical limits of transnational cooperation.

### 2.1 Divergent domestic definitions and their impact

Although the Protocol to Prevent, Suppress and Punish Trafficking in Persons provides a tripartite definition of trafficking (act–means–purpose), its implementation has not produced full legislative harmonization (Gallagher, 2010). States vary in how they interpret "abuse of a position of vulnerability," whether they require proof of coercion in cases involving adults, and how they conceptualize exploitation. For example, some jurisdictions recognize forced begging and forced criminality explicitly, while others subsume such conduct under broader labour or exploitation offences (Piotrowicz, 2012).

These differences become particularly consequential in extradition proceedings. A requesting state may characterize conduct as trafficking due to the presence of recruitment and exploitation through vulnerability, whereas the requested state may require evidence of physical coercion or deception as indispensable elements of the offence. In such circumstances, the conduct may not satisfy the domestic threshold for trafficking, leading to refusal of extradition on double criminality grounds.

The problem is exacerbated when trafficking intersects with migration control regimes. In certain legal systems, irregular entry or stay may be criminalized more prominently than exploitative practices themselves, thereby distorting prosecutorial priorities (UNODC, 2022). If trafficking-related conduct is reclassified domestically as a lesser administrative or labour violation, cooperation requests framed under anti-trafficking legislation may encounter resistance.

### 2.2 Double criminality in mutual legal assistance: flexibility and limits

While extradition traditionally applies a strict double criminality requirement, mutual legal assistance mechanisms sometimes allow greater flexibility. Article 18(9) of the United Nations Convention against Transnational Organized Crime encourages States Parties to provide assistance even in the absence of double criminality, particularly for non-coercive measures. This reflects an emerging recognition that rigid adherence to formal equivalence may undermine transnational justice objectives.

Regional instruments have adopted more progressive models. Within the European Union, for example, the Framework Decision on the European Arrest Warrant abolished the verification of double criminality for a list of 32 serious offences, including trafficking in human beings, provided that the offence is punishable by a custodial sentence of at least three years in the issuing state (Mitsilegas, 2016). This model prioritizes mutual recognition over classical reciprocity, reflecting a higher degree of normative trust among Member States.

Nevertheless, outside such integrated systems, double criminality remains a frequent ground for refusal. Even when formally satisfied, discrepancies in evidentiary standards or procedural safeguards may indirectly affect cooperation. For instance, differences in corporate criminal liability regimes may complicate requests involving trafficking conducted through legal entities, especially where the requested state does not recognize criminal liability of corporations (Bantekas & Nash, 2020).

### 2.3 Emerging forms of exploitation and digital facilitation

Contemporary trafficking increasingly relies on digital platforms for recruitment, advertising, and control of victims. Europol (2023) reports a significant expansion of online-facilitated trafficking networks, including the use of encrypted communication tools and social media. Yet national legislation addressing cyber-enabled exploitation varies considerably. In some jurisdictions, online recruitment without physical transportation may not meet traditional trafficking thresholds, particularly if "harbouring" or "receipt" are interpreted narrowly.

Such disparities may result in inconsistent application of double criminality. If the requesting state prosecutes digital grooming and remote exploitation as trafficking, while the requested state treats such conduct as a lesser cybercrime or does not criminalize it at all, cooperation may be impeded. The principle, originally designed to protect against excessive extraterritorial penal reach, thus risks becoming a structural vulnerability in combating technologically mediated trafficking.

### 2.4 Human Rights Considerations and Victim Protection

The interaction between double criminality and human rights law introduces additional complexity. International human rights bodies have increasingly framed trafficking as a violation of fundamental rights, triggering positive obligations of prevention, investigation, and prosecution (European Court of Human Rights, *Rantsev v. Cyprus and Russia*, 2010). A rigid application of double criminality that frustrates effective cross-border prosecution may, in certain circumstances, undermine these obligations.

At the same time, the principle safeguards individual rights by preventing extradition for conduct not recognized as criminal domestically. Balancing these competing imperatives—effective repression of trafficking and protection of legality—remains a central doctrinal tension. As Gallagher (2010) notes, international anti-trafficking law must be interpreted consistently with broader human rights standards, ensuring that procedural cooperation mechanisms do not compromise fundamental guarantees.

### 2.5 Toward greater convergence

Addressing the challenges posed by double criminality in trafficking cases requires both normative and practical strategies. Legislative harmonization aligned with the Palermo definition, clearer guidance on conduct-based interpretation and enhanced judicial dialogue may reduce interpretative fragmentation. Moreover, incorporating trafficking offences into lists exempt from double criminality—where sufficient mutual trust exists—could strengthen enforcement in regional contexts (Mitsilegas, 2016).
Ultimately, the effectiveness of transnational anti-trafficking efforts depends not only on formal criminalization, but on the degree of substantive convergence and cooperative willingness among states. While the principle of double criminality continues to serve as an important safeguard of legality and sovereignty, its application in the context of human trafficking must evolve to reflect the realities of increasingly complex, transnational exploitation networks. (Pasat,2023).

## 3. Methodology of the Research

### 3.1. Research Question

This study is guided by the following central research question:

*To what extent does the application of the double criminality requirement in extradition and mutual legal assistance proceedings hinder the effective prosecution of transnational human trafficking cases in light of divergences in national trafficking legislation?*

To operationalize this inquiry, the article also addresses the following sub-questions:

1. How is the double criminality test interpreted and applied in trafficking-related extradition and mutual legal assistance procedures?
2. Which divergences in domestic trafficking definitions (act, means, purpose of exploitation) most frequently generate incompatibility?
3. Does the conduct-based (*in abstracto*) approach mitigate the restrictive effects of double criminality in practice?

4. Are there viable normative models that reconcile effective cooperation with the principles of legality and state sovereignty?

**3.2. Research Design**

The study adopts a qualitative doctrinal and comparative legal methodology, complemented by elements of normative analysis. Given that the research problem concerns the interpretation and operationalization of a legal principle within transnational criminal cooperation, the primary method employed is doctrinal legal analysis. This involves systematic examination of international instruments, domestic legislation, judicial decisions, and academic commentary.

**3.3 Sources of Law and Materials**

The analysis is structured around three normative layers:

**(a) International Legal Framework**

The study examines the provisions governing extradition and mutual legal assistance under the United Nations Convention against Transnational Organized Crime (Articles 16 and 18), as well as the definition of trafficking contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons (Article 3).

Interpretative materials, including travaux préparatoires and guidance issued by the United Nations Office on Drugs and Crime, are also considered to clarify the intended scope of cooperation obligations.

**(b) Regional Cooperation Instruments**

Where relevant, the research considers regional mutual recognition regimes—particularly the European Arrest Warrant framework within the European Union—as a comparative model illustrating partial abolition of double criminality verification for trafficking offences.

**(c) Domestic Legal Systems**

A comparative review of selected national criminal codes is undertaken to identify divergences in:

- Definition of exploitation;
- Interpretation of "abuse of vulnerability";
- Criminalization of forced criminality and forced begging;
- Corporate criminal liability;
- Requirement (or absence) of cross-border movement.

The selection of jurisdictions is based on representativeness of different legal traditions (civil law and common law systems) and documented involvement in cross-border trafficking cases.

**3.4. Domestic Legal Systems**

A targeted comparative analysis of selected national legal systems is undertaken in order to identify structural divergences relevant to the application of the double criminality requirement in trafficking cases. The jurisdictions included in this study are Romania, Germany and the United Kingdom, chosen for their representativeness of different legal traditions and legislative approaches within the European context.

Romania criminalizes trafficking in persons under Article 210 of the Criminal Code, which closely follows the Palermo Protocol by defining trafficking through recruitment, transportation, transfer, harbouring or receipt of a person for the purpose of exploitation, where coercion, deception, abuse of authority or abuse of a position of vulnerability is involved.

In Germany, trafficking in human beings is regulated under Section 232 of the German Criminal Code (Strafgesetzbuch – StGB), which criminalizes the exploitation of a person through the abuse of a personal or economic predicament or helplessness associated with residence in a foreign country.

By contrast, the United Kingdom represents a common law system, where trafficking is addressed through the Modern Slavery Act 2015. This legislative framework adopts a broader and more flexible approach, consolidating trafficking, slavery and forced labour into a unified structure, while placing less emphasis on rigid doctrinal categorization and more on the factual circumstances of exploitation.

These jurisdictions were selected not only for their doctrinal diversity, but also for their practical relevance in transnational cooperation within Europe. Each has been actively involved in cross-border trafficking investigations, thereby providing a meaningful basis for assessing how differences in legal definitions, evidentiary thresholds and liability frameworks may affect the operation of the double criminality test.

The comparative review focuses on several key dimensions:

- the definition and scope of exploitation;
- the interpretation of "abuse of a position of vulnerability";
- the criminalization of forced criminality and forced begging;
- the existence and scope of corporate criminal liability;
- the role of consent and evidentiary thresholds;
- the requirement (or absence) of cross-border elements in defining trafficking.

By examining these elements across the selected jurisdictions, the study aims to identify whether divergences are merely terminological or reflect substantive incompatibilities capable of affecting extradition or mutual legal assistance outcomes.

## 4. Analytical Approach

This research employs a multi-layered analytical framework combining doctrinal, comparative, functional, and normative methods in order to capture both the legal architecture and the practical implications of the double criminality requirement in transnational human trafficking cases.

### 4.1 Doctrinal interpretation

The starting point of the analysis is a doctrinal examination of treaty law, focusing primarily on the extradition and mutual legal assistance provisions of the United Nations Convention against Transnational Organized Crime (Articles 16 and 18), read in conjunction with the trafficking definition provided in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons.

The interpretative methodology follows the rules codified in the Vienna Convention on the Law of Treaties, particularly Article 31 (ordinary meaning, context, object and purpose) and Article 32 (supplementary means of interpretation). Accordingly, the study applies:

- **Textual analysis**, examining the precise wording of double criminality clauses, including conditional language ("may refuse") and discretionary formulations.
- **Systematic interpretation**, situating double criminality within the broader architecture of transnational cooperation, including obligations to criminalize trafficking and to facilitate cooperation "to the widest extent possible."

- **Teleological interpretation**, assessing how the object and purpose of UNTOC—enhancing effective suppression of transnational organized crime—should influence the scope and rigidity of the double criminality requirement.

This doctrinal layer clarifies whether treaty law mandates strict equivalence or allows flexible, conduct-based assessments.

**4.2 Comparative Legal Analysis**

The second analytical layer consists of a comparative examination of domestic trafficking legislation across selected jurisdictions representing different legal traditions (civil law and common law systems).

The comparison focuses on structural components of the trafficking offence:

- The definition of the *act* element (recruitment, transportation, harbouring, receipt);
- The interpretation of the *means* element (coercion, deception, abuse of vulnerability);
- The scope of the *purpose of exploitation* (sexual exploitation, forced labour, forced criminality, forced begging, organ removal);
- The treatment of victim consent;
- The existence of corporate criminal liability.
- Rather than merely cataloguing differences, the comparative analysis identifies points of normative divergence that are likely to trigger incompatibility under double criminality review. Particular attention is paid to situations where one jurisdiction codifies trafficking as a composite offence, while another fragments exploitation into separate crimes.

The aim is to determine whether inconsistencies are terminological or substantive and whether they affect the underlying criminalization of conduct.

The comparative analysis builds upon the selected jurisdictions—Romania, Germany, and the United Kingdom—in order to identify concrete points of divergence that may influence the application of the double criminality requirement in trafficking-related cooperation procedures.

These differences are reflected in the statutory construction of trafficking offences. Article 210 of the Romanian Criminal Code expressly incorporates abuse of vulnerability as a trafficking means, whereas Section 232 StGB places greater emphasis on exploitation of a personal or economic predicament. By contrast, Section 2 of the UK Modern Slavery Act 2015 adopts a broader conduct-based formulation centred on arranging or facilitating travel for the purpose of exploitation. These legislative differences may become relevant when judicial authorities assess whether the underlying conduct satisfies the double criminality requirement.

At the structural level, all three jurisdictions formally align with the definition of trafficking provided by the Palermo Protocol. However, significant differences emerge in the interpretation and operationalization of the constituent elements of the offence.

First, with regard to the "means" element, particularly the notion of "abuse of a position of vulnerability," Romanian law explicitly incorporates this concept and tends to interpret it broadly, allowing for a contextual assessment of socio-economic dependency. German law, while recognizing similar elements, often requires a more clearly demonstrable form of coercion or constraint, which may result in a narrower application in practice. In the United Kingdom, courts applying the Modern Slavery Act 2015 adopt a more fact-driven approach, focusing on the overall circumstances of control and exploitation rather than strictly delineated legal categories.

Second, differences arise in the scope of exploitation. While all three systems recognize sexual exploitation and forced labour, the explicit criminalization of forced criminality and forced begging varies. Romanian law includes such forms within the broader concept of exploitation, whereas German law may address them under separate or partially overlapping offences. The UK framework, by contrast, allows these forms to be subsumed under general provisions on slavery and forced labour, thereby offering greater interpretative flexibility.

Third, the treatment of victim consent differs significantly. In line with international standards, Romanian law explicitly provides that consent is irrelevant where any of the prohibited means are used. German law adopts a similar position, but its evidentiary thresholds for establishing coercion may indirectly reintroduce consent-related considerations. The UK system tends to adopt a more pragmatic approach, focusing on the existence of exploitation regardless of formal consent, particularly in light of evolving case law.

Fourth, corporate criminal liability represents another area of divergence. While Romania and the United Kingdom recognize forms of liability for legal persons, the scope and application differ, particularly in evidentiary terms. In Germany, the absence of a fully developed system of corporate criminal liability (in the classical sense) may complicate cooperation in cases involving trafficking conducted through corporate structures, potentially affecting the satisfaction of double criminality in such contexts. Germany does not recognize corporate criminal liability in the same manner as many common law jurisdictions. Instead, legal entities may be subject to administrative sanctions under Sections 30 and 130 of the Administrative Offences Act (Ordnungswidrigkeitengesetz – OWiG), while criminal responsibility remains primarily attached to natural persons. This distinction may have practical consequences in trafficking investigations involving corporate structures. Where a requesting state seeks cooperation in proceedings directed against a legal person as a criminally liable entity, German authorities may need to assess whether an equivalent legal basis exists under domestic law. Although such differences do not necessarily preclude mutual legal assistance or extradition, they may complicate the assessment of double criminality and the execution of requests involving corporate sanctions, confiscation measures, or evidentiary cooperation.

These divergences are not merely theoretical. From a functional perspective, they may directly influence the outcome of extradition or mutual legal assistance requests. For instance, conduct characterized as trafficking in Romania due to the presence of vulnerability and exploitation may not meet the threshold for trafficking under German law if coercion cannot be sufficiently demonstrated. Similarly, differences in legal framing may lead authorities to reclassify conduct under alternative offences in order to satisfy the double criminality requirement, thereby fragmenting the legal characterization of trafficking.

The analysis thus demonstrates that, although the selected jurisdictions share a common normative foundation, substantive differences in legal construction and interpretation persist. These differences are particularly relevant when courts apply a formal or element-based approach to double criminality. By contrast, a conduct-based (in abstracto) approach is more likely to accommodate such divergences by focusing on the underlying factual behaviour rather than on doctrinal symmetry.

Ultimately, the comparative findings support the argument that the effectiveness of transnational cooperation in trafficking cases depends not only on formal harmonization, but also on the degree of functional equivalence between legal systems. Where such equivalence is lacking, the double criminality requirement may operate as a barrier, unless interpreted flexibly in light of the broader objectives of combating transnational exploitation.

### 4.3 Functional Analysis of Cooperation Mechanisms

Beyond textual comparison, the study adopts a **functional perspective**, examining how divergences operate in practice within extradition and mutual legal assistance (MLA) procedures.

This analysis evaluates:

- Whether double criminality operates as a formal ground for refusal;
- Whether it functions indirectly through evidentiary thresholds or procedural incompatibilities;
- How prosecutorial framing of charges influences the outcome of cooperation requests;
- Whether certain elements (e.g., abuse of vulnerability or forced criminality) disproportionately generate refusal.

The functional approach treats double criminality not as an abstract doctrine, but as a procedural filter embedded within cooperation systems. It assesses how differences in criminal law structure interact with procedural safeguards, including dual criminality verification in extradition hearings.

Where relevant, reference is made to regional mutual recognition frameworks that partially abolish double criminality verification for trafficking offences, illustrating alternative operational models.

National judicial practice further illustrates these divergences. Romanian courts have generally adopted a broad interpretation of exploitation and abuse of vulnerability in trafficking prosecutions under Article 210 of the Criminal Code. German courts interpreting Section 232 StGB have tended to focus on demonstrable exploitation and coercive circumstances, while UK courts applying the Modern Slavery Act 2015 have generally favoured a conduct-based assessment of exploitation. These differences in judicial interpretation may influence the practical application of the double criminality test in extradition and mutual legal assistance proceedings.

### 4.4 Normative Assessment

The final analytical layer is normative. It evaluates whether reform, reinterpretation, or contextual flexibilization of the double criminality requirement is legally defensible without undermining:

- The principle of legality (*nullum crimen sine lege*);
- The prohibition of retroactive criminalization;
- The sovereign equality of states;
- Fundamental rights guarantees in extradition proceedings.

This normative assessment weighs two competing imperatives:

1. The need for effective transnational repression of trafficking networks;
2. The preservation of domestic autonomy and legal certainty.

The analysis explores whether a conduct-based interpretation, partial abolition for serious offences or harmonization of trafficking definitions offers a viable equilibrium between these imperatives.

### 4.5 Formal Offence-Based Equivalence vs. Conduct-Based (*In Abstracto*) Equivalence

A central conceptual distinction guiding the research is the difference between:

**(a) Formal offence-based equivalence**

Under this restrictive model, double criminality is satisfied only if the offence in both jurisdictions corresponds in legal classification and essential elements. This approach emphasizes doctrinal symmetry and often results in narrow interpretation.

**(b) Conduct-based (*in abstracto*) equivalence**

Under this broader model, the focus shifts from formal labels to the underlying factual conduct. The requested state examines whether the alleged acts—if committed within its territory—would constitute any criminal offence under domestic law, regardless of nomenclature.
The research critically evaluates which model better aligns with the object and purpose of transnational anti-trafficking law and whether conduct-based equivalence sufficiently safeguards legality while enhancing cooperation efficiency.

## 5.Discussion

The analysis demonstrates that the double criminality requirement occupies an ambivalent position within the architecture of transnational anti-trafficking enforcement. On the one hand, it functions as a classical safeguard rooted in legality and sovereign equality. On the other hand, in the specific context of transnational human trafficking, it may operate as a structural constraint that weakens cross-border cooperation precisely in cases that require it most.

### 5.1. Structural Tension Between Harmonization and Sovereignty

The adoption of a harmonized definition of trafficking under the Protocol to Prevent, Suppress and Punish Trafficking in Persons was intended to reduce normative fragmentation. However, the research confirms that domestic implementation has produced significant divergence in the interpretation of key elements, particularly:

- The scope of "abuse of a position of vulnerability";
- The recognition of forced criminality and forced begging as forms of exploitation;
- The evidentiary threshold for coercion in adult trafficking cases;
- The treatment of victim consent.

These divergences are not merely terminological. They affect the structural composition of the offence and, consequently, the outcome of double criminality assessments. While treaty law under the United Nations Convention against Transnational Organized Crime encourages cooperation "to the widest extent possible," it does not eliminate discretion in extradition and mutual legal assistance proceedings. As a result, the effectiveness of cooperation often depends on interpretative choices made by national courts.
The discussion reveals a fundamental tension: trafficking law aspires to global harmonization, yet the double criminality principle reaffirms domestic autonomy. This tension becomes particularly visible in cases involving emerging or less conventional forms of exploitation.

### 5.2. Formal Equivalence Vs. Conduct-Based Interpretation

The distinction between formal offence-based equivalence and conduct-based (*in abstracto*) equivalence is central to understanding the practical impact of double criminality.

Where courts adopt a strict formal approach, cooperation may fail because of differences in statutory construction or doctrinal classification. Conversely, the conduct-based approach mitigates fragmentation by focusing on the factual matrix rather than on legislative labels.

The research suggests that conduct-based equivalence better reflects the teleological objective of UNTOC—effective suppression of organized crime—while still preserving legality. By asking whether the alleged acts would constitute a criminal offence domestically (even under a different label), this approach reduces the risk of impunity created by legislative asymmetry.

However, even the *in abstracto* model has limits. If a particular form of exploitation is not criminalized at all in the requested state, interpretative flexibility cannot substitute for substantive harmonization.

**5.3. Functional Consequences for Extradition and MLA**

From a functional perspective, double criminality rarely operates as an overt refusal ground in trafficking cases; instead, it often functions indirectly. Divergent evidentiary standards, differing concepts of corporate liability, and varying definitions of exploitation may complicate the drafting and execution of cooperation requests.

In practice, prosecutorial framing plays a decisive role. Authorities may strategically recharacterize conduct under offences more likely to satisfy dual criminality requirements. While this pragmatic adaptation can facilitate cooperation, it may also fragment the legal narrative of trafficking and obscure its structural nature as a human rights violation.

Moreover, the rapid digitalization of trafficking networks introduces new vulnerabilities. If domestic law lags behind technological evolution, conduct criminalized as trafficking in one jurisdiction may be treated merely as a cyber-related offence in another, undermining coherence in transnational enforcement.

**5.4. Normative Implications**

The normative assessment indicates that complete abolition of double criminality at the universal level would be unrealistic and potentially incompatible with the principle of legality (*nullum crimen sine lege*). Nevertheless, several calibrated reforms appear legally defensible:

- Clear endorsement of conduct-based interpretation in treaty practice;
- Enhanced legislative harmonization aligned with the Palermo definition;
- Inclusion of trafficking offences in regional mutual recognition frameworks that limit dual criminality verification;
- Development of interpretative guidelines through judicial dialogue and soft-law instruments.

The key finding is that double criminality should not be treated as an inflexible doctrinal barrier but as a procedural condition capable of context-sensitive interpretation.

**5.5. Judicial illustrations: Dual Criminality and Human-Rights Constraints on Cooperation**

The practical implications of the double criminality requirement are best understood through judicial case law, which illustrates how divergences in domestic legal frameworks may affect the outcome of extradition and mutual legal assistance proceedings in trafficking-related contexts.

*Case illustration 1*: Rantsev v. Cyprus and Russia (App. No. 25965/04, ECtHR, 7 January 2010) is not a dual criminality case as such. Rather, its significance lies in the Court's finding that trafficking in human beings falls within the scope of Article 4 ECHR and gives rise to positive obligations of prevention, investigation and international cooperation. The judgment illustrates a human-rights-based dimension of transnational cooperation rather than the operation of the double criminality requirement itself.

*Case illustration 2*: German extradition practice: A more direct illustration of functional divergence can be observed in national extradition practice within Europe. In several cases before German courts concerning requests from other EU Member States, extradition has been scrutinized where the legal characterization of the offence differed. German courts, applying §232 StGB, have required a demonstrable level of coercion or exploitation that may not always be explicitly formulated in the requesting state's legal framework. In such situations, although the underlying conduct involved exploitation, authorities have been compelled to assess whether the factual elements would meet the stricter domestic threshold. This illustrates how variations in evidentiary standards and offence construction may complicate the satisfaction of double criminality, even in systems broadly aligned with the Palermo definition. Under §232 of the German Criminal Code (StGB), trafficking offences require a demonstrable exploitation framework that may differ from broader vulnerability-based interpretations adopted in other jurisdictions.

In the context of the European Arrest Warrant, the case law of the Court of Justice of the European Union provides further insight into the limits of cooperation. Similarly, in Joined Cases C-404/15 and C-659/15 PPU, Aranyosi and Căldăraru, the Court of Justice of the European Union held that execution of a European Arrest Warrant may be postponed where there is a real risk of inhuman or degrading treatment contrary to Article 4 of the Charter of Fundamental Rights. The decision concerns fundamental-rights limitations on mutual recognition rather than dual criminality, which is largely waived for trafficking offences under the European Arrest Warrant Framework Decision.

*Case illustration 3:* UK conduct-based approach: Another instructive example emerges from UK extradition practice under the Modern Slavery Act 2015, where courts have adopted a conduct-based approach when assessing dual criminality. In cases involving exploitation that may not be identically defined in the requesting jurisdiction, UK courts have focused on whether the alleged acts—such as control, coercion or exploitation of vulnerability—would constitute an offence under domestic law, regardless of formal classification. This approach has allowed for greater flexibility in cooperation, illustrating the practical advantages of the in abstracto model. The UK Modern Slavery Act 2015 adopts a broader conduct-oriented approach, allowing courts greater interpretative flexibility in assessing exploitation-related conduct.

By contrast, issues of dual criminality arise where judicial authorities must determine whether the underlying conduct would constitute a criminal offence under domestic law, notwithstanding differences in statutory definitions. In such situations, courts increasingly favour a conduct-based (in abstracto) assessment, focusing on the factual substance of the alleged exploitation rather than on strict correspondence between legal classifications.

These case illustrations confirm that double criminality operates as a dynamic procedural filter, whose effects are shaped by judicial interpretation, evidentiary thresholds, and the broader legal context of cooperation. As such, its role in trafficking cases cannot be assessed in purely abstract terms, but must be understood through its interaction with concrete legal practice.

Practical implementation could be supported through the development of standardized prosecutorial checklists for assessing double criminality in trafficking cases, model clauses for mutual legal assistance requests, and judicial guidance instruments promoting conduct-based interpretation approaches.

## 6.Conclusion

This research set out to examine whether and to what extent the double criminality requirement hinders the effective prosecution of transnational human trafficking cases. The findings indicate that while double criminality remains a legitimate safeguard of legality and sovereignty, its rigid or formalistic application may generate enforcement gaps in a legal landscape characterized by partial harmonization and structural divergence.

The principal conclusions are as follows:

1. Normative divergence persists despite international harmonization efforts, particularly regarding the "means" and "purpose" elements of trafficking.
2. The conduct-based (*in abstracto*) model of equivalence offers a more balanced solution, aligning treaty objectives with legality safeguards.
3. Functional obstacles arise less from the existence of double criminality itself and more from interpretative rigidity and incomplete domestic implementation.
4. Targeted harmonization and interpretative guidance are preferable to wholesale abolition of the principle.

Ultimately, the suppression of transnational human trafficking depends not only on criminalization but on the depth of normative convergence and mutual trust between legal systems. Double criminality, properly interpreted, need not be an obstacle. However, without sustained efforts toward legislative coherence and judicial cooperation, it risks becoming a structural vulnerability within the global anti-trafficking regime.

In this sense, the evolution of double criminality in trafficking cases reflects a broader transformation of transnational criminal law: from a sovereignty-centered model of reciprocity toward a cooperation-oriented paradigm grounded in shared responsibility for combating exploitation.

## 7.Limitations and Future Directions

### 7.1. Limitations of the Study

Despite its comprehensive doctrinal and comparative framework, this research is subject to several limitations that must be acknowledged.

**(a) Doctrinal and Normative Focus**

The study is primarily grounded in doctrinal legal analysis and normative evaluation. It does not incorporate empirical data such as statistical rates of extradition refusal, quantitative analysis of mutual legal assistance outcomes, or structured interviews with prosecutors and judges. Consequently, while the research identifies structural and interpretative obstacles, it does not measure their frequency or empirical impact across jurisdictions.

**(b) Limited Jurisdictional Sample**

The comparative component relies on selected national legal systems representative of different legal traditions. However, it does not provide a comprehensive global survey of all jurisdictions implementing the Protocol to Prevent, Suppress and Punish Trafficking in Persons. Variations in implementation beyond the selected sample may reveal additional divergences not captured in this analysis.

**(c) Focus on Legal Architecture Rather Than Operational Practice**

The research examines the normative construction of double criminality under the United Nations Convention against Transnational Organized Crime and domestic legislation. However, it does not systematically analyse informal cooperation mechanisms, prosecutorial negotiation strategies, or police-level operational coordination, which may mitigate or bypass formal dual criminality barriers in practice.

**(d) Limited Exploration Of Human Rights Litigation**

Although the study acknowledges the human rights dimension of trafficking, it does not conduct an in-depth jurisprudential analysis of regional human rights courts. A more detailed examination of case law—particularly concerning positive obligations to investigate trafficking—could further illuminate the interaction between double criminality and state responsibility.

**(e) Rapid Technological Evolution**

The discussion of digitally facilitated trafficking is necessarily preliminary. Given the evolving nature of online exploitation and cross-border digital platforms, legislative and judicial responses are developing rapidly. The findings related to cyber-enabled trafficking may therefore require reassessment as domestic laws adapt.

**7.2 Future Research Directions**

Building on the identified limitations, several avenues for future research emerge.

**(a) Empirical Assessment of Double Criminality Refusals**

Future studies could conduct quantitative and qualitative empirical research examining:

- The frequency of extradition or MLA refusals explicitly based on double criminality in trafficking cases;
- Judicial reasoning patterns in dual criminality assessments;
- Variations between civil law and common law jurisdictions.

Such empirical mapping would strengthen the evidentiary basis for normative reform proposals.

**(b) Expanded Comparative Analysis**

A broader comparative project could examine implementation of the Palermo definition across a larger and more diverse set of jurisdictions, including:

- States with high outbound trafficking flows;
- Transit countries;
- Destination states with advanced anti-trafficking frameworks.
- This would enable identification of systemic regional patterns of incompatibility.

**(c) Interaction with Human Rights Obligations**

Further research should explore the interaction between double criminality and positive obligations arising under regional human rights systems. Specifically, future work could assess whether failure to cooperate due to strict dual criminality interpretations may, in certain circumstances, engage state responsibility for ineffective investigation of trafficking.

**(d) Digital Trafficking and Emerging Forms Of Exploitation**

As trafficking increasingly involves online recruitment, cryptocurrency payments, and platform-based exploitation, future research should analyse:

- Whether existing trafficking definitions adequately capture digital coercion and remote exploitation;
- How double criminality operates in cases where technological facilitation is criminalized unevenly across jurisdictions;
- The potential need for updated international interpretative guidance.

**(e) Normative Models Beyond Dual Criminality**

Comparative exploration of alternative cooperation models—such as expanded mutual recognition regimes, conditional waiver systems, or harmonized minimum standards—could provide structured reform pathways. Research could evaluate whether trafficking, as a crime implicating fundamental rights and human dignity, justifies differentiated treatment within extradition law.

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