

**THE ROLE OF CONSENT IN THE TRAFFICKING OF WOMEN FOR SEXUAL
EXPLOITATION: ESTABLISHING WHO THE VICTIMS ARE, AND HOW THEY
SHOULD BE TREATED**

by

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Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organised Crime

South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution

The African [Banjul] Charter on Human and Peoples' Rights

Universal Declaration of Human Rights

Table of Abbreviations

Association of Chief of Police-----	ACPO
Asylum Support Programme Inter-Agency Partnership -----	ASP
Central and Eastern Europe -----	CEE
Council of Europe -----	CoE
Council of Europe Convention on Action against Trafficking in Human Beings (CoE Trafficking Convention)-----	CoE Trafficking Convention
Coalition Against Trafficking in Women -----	CATW
Convention for the Elimination of all Forms of Discrimination against Women -----	CEDAW
Convention Relating to the Status of Refugees-----	Refugee Convention
Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others-----	1949 Trafficking Convention
Convention to Suppress the Slave Trade and Slavery-----	1926 Slavery Convention
Convention against Transnational Organized Crime-----	Organized Crime Convention
Crown Prosecution Service -----	CPS
European Union -----	EU
European Convention on Human Rights and Fundamental Freedoms -----	ECHR
European Court of Human Rights -----	ECtHR
End Child Prostitution, Child Pornography and the Trafficking of Children -----	ECPAT
Group of experts on action against trafficking in human beings -----	GRETA
Human Rights Caucus -----	the Caucus

International Convention for the Suppression of the “White Slave Traffic” 1910-----	1910 Trafficking Convention
International Convention on the Suppression of the Traffic in Women of Full Age 1933-----	1933 Trafficking Convention
International Agreement for the Suppression of the ‘White Slave Traffic’ of 18 May 1904-----	1904 Agreement
International Covenant on Economic and Social Rights-----	ICESCR
International Covenant on Civil and Political Rights-----	ICCPR
International Organization for Migration -----	IOM
International Labour Organization -----	ILO
Joint Committee on Human Rights-----	JCHR
Member of Parliament -----	MP
National Health Service -----	NHS
National Referral Mechanism -----	NRM
Non-Governmental Organisation -----	NGO
Organization for Security and Co-operation in Europe-----	OSCE
Organised Crime Group -----	OCG
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime-----	UN Trafficking Protocol
Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime-----	Smuggling Protocol
Sexual Offences Act-----	SOA
Universal Declaration of Human Rights-----	UDHR

United Nations -----UN

United Nations General Assembly -----UNGA

United Nations Interim Administration Mission -----UNMIK

United Nations Development Fund for Women -----UNIFEM

United Kingdom Border Agency-----UKBA

Introduction

I. Context

Human trafficking has of late consistently featured on the global political agenda,¹ and recognition of the growing dimensions of this criminal activity has been the catalyst for a host of legal and policy responses aimed at the prevention of trafficking, the prosecution and punishment of traffickers, and more recently for making provisions for identifying, assisting, supporting and protecting the victims of this phenomenon.

The trade in human beings has flourished as a result of increased economic and social integration, and has been facilitated by the ease of movement of workers, capital and goods, all of which are aided by increasingly sophisticated global networks of communication and transport. One consequence has been the globalisation of certain criminal activities, which has generated its own reaction - 'We are compelled by the globalization of crime to globalize law and law enforcement.'² Under this umbrella of globalised law and law enforcement we find the anti-trafficking regime, in the forms of international criminal law and international human rights law, which form part of a global campaign against modern slavery-related practices.

The body of persons engaging in transnational movement includes economic migrants – regular and irregular - students, visitors, and asylum seekers. Those entitled to enter for non-economic purposes may abuse their status, or those with economic objectives may present themselves as being in one or another of the categories. Such

¹ Particularly, yet not exclusively, over the past decade or so. This is evident through discussion throughout the thesis of the central anti-trafficking instruments adopted at a United Nations, Council of Europe and European Union level, within that time period.

² U.S. Senator John Kerry, *cited in* P Andreas and E Nadelmann, *Policing the Globe: Criminalization and crime control in international relations*, (Oxford, New York 2006).

persons may be subject to deportation and/or criminal proceedings for breach of immigration law or engagement in unlawful activities in the destination State, and will have access to, for example, procedural rights as regards deportation or criminal trial.

This body of persons involved in transnational movement also includes adult female victims of human trafficking for the purpose of sexual exploitation, the latter being the chief concern of the thesis. As a system of bespoke rights for trafficked victims has been increasingly brought into the anti-trafficking regime,³ the role of consent - or lack thereof – in human trafficking has become increasingly important in traffick-related debate, and it has become apparent that this element has a significant and problematic role to play in terms of establishing who the victims are, and how they should be treated.

The economic attractions of destination States are a significant motivating factor behind the global movement of persons, and the individual choice to migrate (through regular or irregular channels). Consequently, the facilitation of illicit, clandestine entry into destination States presents a lucrative opportunity for those who can organise it, and the varying estimates⁴ as to the magnitude of this phenomenon and its victims indicate that it is a significant international problem which requires an international response.

³ See, Chapter 1, Part II, and Chapter 4, Parts IV - VII for discussion of State obligations as to the identification, assistance, support and protection of victims.

⁴ See, Chapter 1, Introduction, page 22, for estimates as to the magnitude of this clandestine activity.

II. Distinguishing Trafficking from Smuggling

From the outset, it is necessary to distinguish ‘trafficking’ from ‘smuggling’. Both as more typically understood concern the movement of goods rather than people. The terms are at times used without consistency but, for the most part, trafficking refers to the movement of goods across borders – goods which it is unlawful to possess in the destination State, such as guns or drugs. People ‘move’ or ‘migrate’ – legally or otherwise – across international borders. Sometimes, however, they are ‘transported’, in the same way that ‘goods’ are. This may be attributable to the fact that they are regarded (by those who move them) as just that – ‘goods’, ‘commodities’, as was clearly the case with the slave trade. If the action taken goes no further than simply ‘movement’ of said people, even the act of transportation may not necessarily be unlawful. More usually, transportation is to avoid restrictions upon movement, such as immigration barriers, which can affect refugee applicants, economic migrants, and those who have been subject to coercion as to cross-border transportation and exploitation.

Smuggling is typically characterised by transportation of goods while avoiding import charges. ‘Goods’ in this context refers to items which would otherwise be lawfully allowed to circulate in the destination State, such as cigarettes or alcoholic drinks. The cross-border movement of people cannot be categorised so simply. Where possession of these ‘goods’ is unlawful, it is more usual to term the activity ‘trafficking’, but the terms are not scientific or necessarily mechanically applied and there will always be exceptions in the way that they are used. Those who may require assistance to be smuggled – refugee applicants, economic migrants – face the obstacle

of immigration laws which may include criminal prosecution for breach or attempted breach of these laws. Such persons, then need the ‘help’ of smugglers and then may on arrival safely present themselves to the authorities if they are refugee applicants, or ‘disappear’ in the destination State if they are in the latter category of illicit economic migrants seeking work. These people have been willingly transported. Those who have been taken without consent or whose consent has been obtained through coercion, deception, fraud etc have been trafficked.

The conditions of the transportation of the two groups may not differ greatly, but the conditions in the destination State may. The interests of those involved in the transnational trade in humans may go no further than:

... the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.⁵

Those who engage in such activity engage, by definition, in the smuggling of humans. Those engaging in the illicit movement of persons may, however, have further economic interests than those arising from transport alone. They may have a stake in the exploitation of the economic activities of the persons whose entry they have facilitated – either as a means of recouping the (typically inflated) transportation fare, or as a means of additional, sustainable profit, from a human commodity which can be used, and sold, many times over.

⁵ Article 3, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime (adopted November 2000 by United Nations General Assembly Resolution A/RES/55/25, entered into force 28 January 2004) (hereafter ‘Smuggling Protocol’).

It is usual to talk about the ‘exploitation’ of trafficked persons, meaning something beyond mere regulatory irregularity (such as payment below the minimum wage) but also to degrading conditions and serious limitations on personal freedom, in extreme cases reaching slavery-like practices or servitude. Prominent among such conditions are those taken to work in the sex industry, where the evidence is that many (almost always woman, sometimes children) are held in subjugation and compelled to engage in humiliating and injurious practices at the instigation of those who have trafficked them or into whose custody they have been trafficked.⁶ The traffickers, like the smugglers, are driven by the search for profit but the traffickers are motivated by the prospect of high profits at relatively low risk. The risk is diminished by the transnational nature of the business which makes the investigation and prosecution of trafficking crimes especially difficult and requires international cooperation to provide the framework of an effective response.

The central aspect of the global trade in human beings is clearly economic gain. This lucrative business provides ample incentive for traffickers and smugglers to obtain persons to transport, exploit, and profit from the exploitation thereof. Humans are transported for a variety of purposes, and unlike the inanimate objects noted above, the ‘commodity’ here i.e. the transported humans, are entitled to certain rights and protections. Affected States may, as a result, principally have an interest in combating the trade on the basis that cheap labour may distort national labour markets, for instance, and also for the purpose of maintaining border integrity. Beyond this is the humanitarian objective of combating sexual exploitation of those trafficked or smuggled for that purpose. Those who are transported by coercion and exploited are

⁶ See, for example, *R v O* [2008] EWCA Crim 2835; *Rantsev v Cyprus and Russia* (app no. 25965/04) [2010].

correctly seen as victims, who ought to be entitled to specific treatment and protections that are not accorded to ordinary unlawful economic migrants. In order for anti-trafficking regimes to be legitimate and adequate, it is necessary for them to take into account the needs and interests of victims and not be content with simply establishing arrangements for more effective prosecution of traffickers.

Due to the transnational nature of smuggling and many instances of trafficking, an inherent feature is that both involve more than one, or even several, jurisdictions. Furthermore, organised criminal gangs control much of the activity, so that the use of criminal law to counteract these activities is highly desirable, while the obstacles to dealing with transnational organised crime are substantial. Nonetheless, cooperation and agreement between States as to the identification and seriousness of the wrongs and an acceptance of cooperative obligations to respond to the transnational criminal activity may mean that these obstacles and difficulties can be reduced. It is this approach which forms the core of the normative structures presented in the thesis.

III. Defining Human Trafficking

As with all transnational criminal projects, it is necessary to begin with the definition of the prohibited conduct which States are obliged to criminalise in their national legal systems.⁷ In order to launch a coherent and cohesive multi-pronged attack on human trafficking, particularly one invoking the criminal law, there is need to reach consensus as to what human trafficking actually is in a legal sense, so that there is clarity as

⁷ It may also be necessary to recognise that although the central instruments comprising the international legal anti-trafficking regime for the most part appear to provide for situations of purely 'internal' trafficking as well as those which involves the crossing of international borders, destination States may view the identification of conduct taking place wholly within their territory as a matter exclusively for them to regulate. This may mean that which sex trade activities and conditions are deemed to amount to 'exploitation' may vary between jurisdictions.

regards both the meaning of ‘trafficking in persons’, and the obligations placed on State parties to the various agreements and legislation which form the anti-trafficking regime. The most recent international legal definition of ‘trafficking in humans’ is provided within Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Trafficking Protocol),⁸ and is replicated verbatim in Article 4 of the Council of Europe Convention on Action Against Trafficking in Human Beings (the CoE Trafficking Convention).⁹ More recently, this definition has been for the most part replicated verbatim in Article 2 of the Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, 2011 (the 2011 Directive),¹⁰ with the additional aspect of specifically including begging as a form of ‘forced labour or services’. These instruments form the legal ‘anti-trafficking regime’ as discussed throughout the thesis, and their respective provisions define human trafficking in the following way:

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

⁸ Article 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted November 2000 by United Nations General Assembly Resolution A/RES/55/25, entered into force 25 December 2003) (hereafter ‘Trafficking Protocol’).

⁹ Article 4, Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, (adopted 3 May 2005, entered into force 1 February 2008) Warsaw, 16.V.2005, Council of Europe Treaty Series – No. 197 (hereafter CoE Trafficking Convention).

¹⁰ Article 2, 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, and replacing Council Framework Decision 2002/629/JHA [2001] OJ L 101/1 (hereafter EU 2011 Directive).

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services,¹¹ slavery or practices similar to slavery, servitude or the removal of organs.

This definition has taken significant and at times controversial steps in clarifying what human trafficking is in a legal sense. The definition is comprised of three elements – the ‘action’, the ‘means’, and the ‘purpose’ (of exploitation), all of which must be present in order for the activity in question to constitute human trafficking. The ‘action’ element is characterised by the ‘recruitment, transportation, transfer, harbouring or receipt of persons’. The ‘means’ is ‘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’, and the ‘purpose’ is ‘exploitation’, the meaning of which is expanded upon within the provision (above). These terms, of ‘action’, ‘means’ and ‘purpose’ will be used throughout the thesis to refer to each component element of the tripartite trafficking process. When referring to the definition of human trafficking throughout the thesis, this shall always be taken to refer to the abovementioned definition unless explicitly stated otherwise.

¹¹ Here, the EU 2011 Directive includes the words ‘including begging’.

IV. The Role of Consent

The current international legal definition of human trafficking adds the following specific caveat that:

The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.¹²

No such qualification was included in early traffick-specific instruments, which tended toward defining ‘trafficking in persons’ as transportation of women for the purpose of exploitation of prostitution, regardless of any consideration of consent.¹³ The inclusion of a ‘lack of consent’ element in current accepted international legal definition has been the subject of much debate,¹⁴ and has been the catalyst for this thesis, which comprises a theoretical academic enquiry from a legal perspective into the nature and role of consent in the transnational trade in women for sexually exploitative purposes.

As will be seen, lack of consent plays a pivotal role in the determination of who is and who is not a victim of human trafficking, and consequently what rights and protections they are or are not entitled to. Consent is a sophisticated and elastic concept, which can be perceived in a variety of ways. In stating that consent to exploitation is

¹² Article 3(b), UN Trafficking Protocol, Article 4(b) CoE Trafficking Convention, Article 2(4) 2011 EU Directive.

¹³ Early anti-trafficking legislation is considered at various points in Chapter 2, but see, in particular Part I.

¹⁴ See, for example, K Abramson, ‘Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol’, 44 *Harvard International Law Journal*, 473; B Balos ‘The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation’ (2004) 27 *Harvard Women’s Law Journal* 137; J Doezema, ‘Who gets to choose? Coercion, consent and the UN Trafficking Protocol’ (March 2002) *Gender and Development*, Volume 10 Number 1.

irrelevant where the ‘means’ have been employed, the wording of the definition clearly recognises the potential for consensual exploitation to take place. This raises various matters for discussion, such as the Autonomy v Paternalism debate in the context of sex work and exploitation, what constitutes ‘exploitation’, and whether or not sex work is inherently exploitative. These matters are dealt with in Chapter 3,¹⁵ but it is submitted at this point that this thesis recognises that an individual can consent to being exploited, and essentially argues that the ‘lack of consent’ requirement creates a false dichotomy between consent and coercion, and that this along with the effect of economic coercion¹⁶ creates a ‘grey area’ category of persons who fall somewhere on the spectrum between trafficked and smuggled.

When referring to a ‘spectrum’ of trafficking/smuggling or consent/coercion in the thesis, it should be noted at this point that this is a descriptive device to help elucidate the range of considerations which might go to determining whether or not any particular decision (of the victim) might be said to be autonomous but, that in making legal determinations – for example - is X a trafficker? Is Y a victim? It will always be necessary to come down on one side of the line or the other – has the prosecution shown that there was no consent? Can it be shown that the woman did not, in fact, consent? There can be no spectrum of convictions, only guilty or not guilty but the issue for the thesis is that there might be (and indeed it is argued that there is¹⁷) a range of victims, of whom the most favoured are victims of trafficking, the next, victims in the ‘grey area’ and, those who are perhaps not victims at all i.e. smuggled women sex workers.

¹⁵ See Chapter 2, Part IV, section D.

¹⁶ See Chapter 2, Part III, section B, subsection iv, for discussion of the role of ‘economic coercion of circumstances’ in the making – by a migrant – of the decision to migrate, and what this might mean for the migrant.

¹⁷ See Chapter 3, *passim*. The issue as regards how to legally address these different types of victims is more specifically developed in Chapter 3, Part VI, and Chapter 4, Part IX.

The current terminology used in defining human trafficking places great emphasis, then, on lack of consent and the presence of some form of coercion, or other ‘means’. The ‘lack of consent’ element is therefore a condition precedent to the existence of human trafficking, and has the potential to be problematic. If it is to be accepted that consent (or lack thereof) is relevant in the context of human trafficking – and therefore the trade in women for sold sex – then this renders it difficult to determine who are, and who are not, victims of human trafficking, and leaves those who may have ‘consented’ (or for whom there is no objective evidence of coercion) in a state of limbo – they have been ‘more than smuggled (at least in a moral, if not legal, sense), but less than trafficked’.

‘Lack of consent’ and ‘coercion’ are central to the anti-trafficking regimes but they are inherently elusive of definition and difficult in terms of application. Consideration of both (consent/coercion) will be a central concern of this thesis, including the particularly taxing matter of the effect of severe and pressing economic circumstances. A proportion of those whose movement is facilitated by people smugglers or ‘migration facilitators’ will travel in a fully informed and voluntary manner. They may have formed their own expectations about what to expect in the destination State. The facilitators may have presented an utterly false view of what the prospects will be in the destination State, the typical example being a promise of work in, say, the catering trade when in reality the person involved is destined for the sex trade. In even more extreme cases, the person will have been taken abroad against her will, invariably to severe conditions, typically some form of exploitation.

Apart from direct coercion of the individual by a trafficker, there may be ‘coercion by circumstances’, particularly economic disadvantage. It is necessary to consider whether or not this contextual coercion may amount to pressure of the kind which

makes any subsequent transportation trafficking, rather than mere smuggling into better economic conditions. In the latter case, the economic coercion will have been central to the transaction but, in the former, whether or not there is lack of consent (amounting to coercion) may be problematic. The distinction is vital. If there is no ostensible coercion (or lack of consent on the part of the person transported) then the person is simply an economic migrant without access to the bespoke rights which are available under international arrangements applicable to formally trafficked persons.

People smuggling is frequently viewed as being of a voluntary nature: consequently, smuggled individuals will be liable to removal from the destination State due to the voluntary commission of immigration offences, although they may not be liable simply for working there. However, a substantial proportion of those transported across national and international boundaries will have been transported so that (knowingly or not, willingly or not) they may engage in activities in the destination State which may be both exploitative and unlawful, such as working in illegal conditions (for example, for less than minimum wage, for excessive hours, or in severe or dangerous conditions) or to work in the sex trade.

Such people are often described as having been trafficked for the purpose of exploitation – an example of criminal activity which is defined by reference to lack of consent, or at least the presence of ‘coercion’ of some form. This is not without its difficulties, particularly with respect to some instances of engagement in the sex trade where, as is the case in the UK for example, mere participation in sex work is not unlawful, and may be seen by some of those engaged in it as comparable to the lawful activities of those who have been smuggled for economic ends (and will be so seen by authorities in the destination State). Yet, as will be explained in this thesis, it is in practice very difficult to maintain the distinction between prostitution as mere

economic activity and prostitution as exploitation (consensual or otherwise) of the women involved.

The difficulties inherent in maintaining this distinction has particular significance in the context of human trafficking, where identifying the existence of consent (of the women involved) - to being moved, for what purpose, and in what conditions – is difficult. Furthermore, such is the nature of exploitation of women in the sex trade (whether or not the women have been transported in order to engage in it) that the conditions in which ‘smuggled prostitutes’ may find themselves may be little different from those encountered by ‘trafficked prostitutes’. Formally the first category would, on the face of it, be seen as acting voluntarily – and would therefore be subject to such legal sanctions as any illicit economic migrant - whereas the latter would be seen to have been subject to some form of force or coercion and therefore not acting in a fully voluntary manner.

Treating such women differently may give the appearance of unfairness, save, perhaps, from the perspective of a State wanting to maintain border integrity by removing those encountered by the authorities. The appearance of unfairness derives from the recognition of women who can properly be described as ‘trafficked prostitutes’ or victims; persons with human rights and access to specific, bespoke protections under the anti-trafficking regime(s), which will in some cases – amongst other things - interfere with the right of the destination State to peremptory removal of the women unlawfully present in its territory.

Even the woman who is willingly smuggled into a country knowing that she will take part in the sex trade may not have anticipated how awful her conditions would be. It is here that the unfairness of treating such women differently from those who have been formally trafficked may be most apparent and most questionable. The question is

explored as to whether this category of persons – those who may be tentatively referred to as ‘consensually trafficked’ - is to be offered protection beyond the ambit of ordinary human rights law.

Since isolating real instances of consent or coercion will in some cases be very difficult, mistakes and misidentifications will be made. The ‘consensually trafficked’ or ‘smuggled’ woman will have such human rights protections as apply to her, such as the right to a fair trial,¹⁸ and protection from removal to a place where a real risk of ill treatment exists,¹⁹ but she will not have the specific protections conferred upon victims by the anti-trafficking regime, such as protection from peremptory removal, or a right to assistance and support etc. A State would be able to rely upon its rights to deny the extension of these benefits of trafficked women to smuggled ones and it would of course be in the State’s interests to classify as many trafficked women as ‘smuggled’ as it could.

There may be an analogy to be drawn here with the situation of refugee applicants. Those who satisfy the criteria of the Convention Relating to the Status of Refugees, 1951 (Refugee Convention)²⁰ have access to the protections which it confers, as well as to any human rights provisions which are relevant to them. Such is the difficulty in establishing formal refugee status, so pressing may be the circumstances of some of those who cannot do so, that States have been willing to allow a number of such people a variety of discretionary remedial concessions on humanitarian grounds, such as exceptional rights to remain in their territories. These concessions do not make their beneficiaries ‘refugees’ but are an acknowledgement that the mechanical, standardised

¹⁸ Article 6, Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) (hereafter ‘ECHR’).

¹⁹ Article 3, ECHR, and Article 33(1) Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

²⁰ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (hereafter ‘Refugee Convention’).

application of complex criteria combined with great evidential obstacles – such as establishing coercion/lack of consent - can result in genuine ‘hard cases’, which discretionary measures can to a degree mitigate without undermining the integrity of the refugee regime.

A similar humanitarian response to marginal cases of trafficked women, even of women who have not formally been trafficked might be appropriate, given the circumstances in which women are recruited in to the transportation of and trade in humans and the severity of the exploitative conditions in which they find themselves in the destination States. It is therefore suggested that Governments may be able to adopt a policy parallel to a humanitarian right to remain, as a response to this transnational criminal activity which must be seen in its proper context and addressed from a perspective which not only aims to criminalise the traffickers, but also to protect their victims.

Primarily, due to the problematic nature of correctly determining the presence of coercion and lack of consent, and secondly due to the fact that there may at times be little difference between the conditions experienced by women falling into either category, a proposal will be made in this thesis as to how the impact of the reluctance of States to concede to much as regards ‘merely’ smuggled prostitutes may be mitigated, without the attitude of States undermining significantly the purposes of the anti-trafficking regimes.

V. ‘The Thesis’: Structure and Chapter Outlines

This research set out to investigate the legal nature of the trafficking of women for sexual exploitation. However, it soon became apparent that consent (or lack thereof) had an important part to play in determining who the victims are and how they should be treated, and that there are ramifications of inclusion of this controversial element for putative victims of trafficking or smuggling for the purpose of exploitation. This is what the thesis aims to explore. A Chapter-by-Chapter breakdown of structure and content will now follow.

A. Chapter 1: The Contextual and Legal Background

Chapter 1 primarily provides analysis of the ‘push’ and ‘pull’ factors which lead individuals to make the decision to migrate, as it is accepted that many trafficking situations may at least begin on a voluntary and consensual footing. Prominent source, transit and destination countries are identified, as are frequented trafficking routes. Furthermore, Chapter 1 discusses the role of organised criminal groups in facilitating smuggling and trafficking.

The relevant obligations on States to address the trafficking phenomenon in terms of prevention, prosecution, punishment and the support and protection of victims are outlined, so that those most central to the thesis (i.e. those relating to the treatment of victims) may be dealt with in more depth at a later point, in Chapter 4.

The basic conditions for a valid consent are analysed, drawing upon and discussing various areas of the law where such a notion is employed and thereby paving

a pathway for analysis of the specific role of consent in the context of human trafficking, undertaken in Chapter 3.

Essentially, this Chapter aims to set out the legal and contextual background to trafficking activity and the legal nature of consent, in order to provide a basis for analysis of specific issues which are central to the thesis and explored in greater detail in subsequent Chapters.

B. Chapter 2: Human Trafficking: The Evolution of an International Legal Definition

The scope of the legal definition of human trafficking is analysed in Chapter 2 with reference to the main anti-trafficking instruments, which form ‘the anti-trafficking regime’. Unless stated otherwise, this will always refer to the UN Trafficking Protocol, the CoE Trafficking Convention, and the EU 2011 Directive. The analysis in this Chapter primarily includes discussion of the ‘action’ element of ‘recruitment, transportation....’ etc of the victim, and considers matters such as the requirement and legitimacy of border crossing.

This is followed by analysis of the more controversial and problematic ‘means’ element of trafficking – that of ‘coercion, force...’ etc. Examples and anecdotal excerpts are used to elucidate each element of the ‘means’, which are not clearly separable. This Part of the Chapter also tests the ambit and scope of the ‘means’ element, particularly the limits of ‘coercion’. Human trafficking is contextual, as the frequent flow of victims from poorer origin States to richer destination States indicates, and following consideration in Chapter 1 of the ‘push’ factors leading to global migration (and therefore a proportion of all instances of human trafficking), the effect

of ‘economic coercion of circumstances’ (on what might otherwise be deemed consent) is considered.

From an immigration perspective, this form of coercion does not negate the commission of an immigration offence for which the State has a legitimate interest in prosecuting the putative victim. It is recognised that States have a legitimate interest in immigration control and therefore may be reluctant to adopt an approach which is too broad and encompassing. Nonetheless, the argument is made that in the sole context of human trafficking, severe pressing economic need may render consent less valid or less freely given than otherwise and may, in fact, amount to coercion, particularly where traffickers knowingly take advantage of the pressing economic need of putative victims in order to recruit them.²¹ The tentative nature of such an ambitious argument is acknowledged and discussed.

As regards the ‘purpose’ elements of trafficking (i.e. the manifestations of ‘exploitation’ as provided for within the definition), human rights law is drawn upon to elucidate the meaning of some of the terms used within these instruments. Justification for this cross-treaty interpretation is discussed in terms of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the Vienna Convention),²² and the meaning of terms such as ‘slavery’, ‘forced labour’ and ‘sexual exploitation’ are discussed. The determination that human trafficking is a tripartite process defined by reference to lack of consent leads into the specific discussion in Chapter 3.

²¹ This latter point (as regards the trafficker taking advantage of severe economic circumstances affecting the victim in the origin State, in order to ‘recruit’ said victim) may constitute ‘abuse of a position of vulnerability’ (as included as a ‘means’ aspect of the tripartite trafficking definition) on the part of the trafficker. This is discussed in Chapter 2, Part III, section B, subsection v.

²² Vienna Convention on the Law of Treaties, (Done at Vienna on 23 May 1969, entered into force on 27 January 1980, in accordance with Article 84(1)) United Nations, *Treaty Series*, vol. 1155 (hereafter ‘Vienna Convention’). See, Chapter 2, Part IV, section B for discussion of this issue.

C. Chapter 3: The Role of Consent in Human Trafficking

As has been noted above, this thesis has particular focus on the meaning and effects of ‘consent’ within and without of a trafficking context, juxtaposed against the meaning of ‘coercion’ and other ‘means’ related aspects of the legal definition of human trafficking, although the approach taken here does not consider these two elements to be the only situations. As the detailed analysis undertaken in Chapter 3 will indicate, consent/coercion is treated here as a spectrum, as opposed to a dichotomous approach which would have the putative trafficked person being deemed to either have consented OR have been coerced, as the latter would represent too simplistic a view of this complex phenomenon.

The intricacies of a valid consent in a trafficking context are considered, as are the realities of consent in a trafficking context. Furthermore, this Chapter considers the Autonomy v Paternalism approaches taken to sex work, and includes specific discussion of sex work as a legitimate form of labour, what constitutes ‘exploitative’ labour and also whether sex work is inherently exploitative. The final Parts of the Chapter address the effects of the inclusion of a consent element in the trafficking definition, and closes with discussion of possible alternatives to the current situation which has created a ‘grey area’ between the trafficked and the smuggled sex worker. This leads into the final substantive Chapter, which addresses the treatment of victims and the effect that the ‘lack of consent’ requirement has here.

D. Chapter 4: The Treatment of Victims

The ramifications of positive or negative identification of an individual as a victim of human trafficking are considered in Chapter 4, which evaluates the legal and policy issues surrounding the current framework applicable to the identification and treatment of victims once discovered in the destination State. The UK is used as a central example, following implementation of the requirements of the relevant international legal instruments with respect to treatment of trafficked victims.²³ The victim-specific provisions of the legal anti-trafficking regime are analysed, as is the implementation and success or otherwise of these requirements within the UK legislative framework.

The thesis argues that there is no clear line which can be drawn between those who have been merely smuggled, those who have been trafficked, or those who have been ‘consensually trafficked’ into a situation of exploitation. As regards the latter, it may be possible to argue that although such an individual has not been technically trafficked and therefore she may not be protected from the impact of immigration sanctions, she may nonetheless be entitled to, for example, protection from peremptory removal, and the exercise of prosecutorial discretion as to whether imposing immigration sanction is, in individual cases, in the public interest. Chapter 4 closes with recommendations for dealing with both trafficked and ‘consensually trafficked’ persons.

²³ It should be noted at this point that the UK has announced an intention to opt in to the EU 2011 Trafficking Directive, but as of yet is not subject to its provisions.

Chapter 1

The Contextual and Legal Background

Introduction

Human trafficking is an example of transnational activity which is characterised by movement, exploitation, and lack of consent.²⁴ Trafficking is of a structural nature – it does not come and go in episodes – indeed, the enactment of international anti-trafficking legislation over the past Century or so indicates that it is an ongoing problem. In many instances, human trafficking illustrates the link between migration outflow from impoverished regions, and subsequent exploitation of the migrant by those involved in the trafficking process. The role of ‘push’ factors - such as economic hardship - in the global trade in human beings should not be underestimated, as they clearly have a part to play in the continuance of trafficking and exploitative migration-related activity.

Trafficking is contextual, and frequently takes place against a backdrop of poverty and lack of opportunity in the origin State. Trafficked women tend to originate from countries with unstable economies, or developing countries where the feminisation of poverty is evident, and are moved to richer, more stable predominantly Western destination countries. The trafficking patterns largely follow south to north and east to west flow, although patterns change according to supply and demand - as the demand for new, exotic women continues, so does the movement of trafficked victims. The

²⁴ The definition of human trafficking and the role of consent are discussed and developed throughout Chapters 2 and 3 respectively.

trafficking of women for sexual exploitation constitutes criminal activity which goes far beyond smuggling or facilitated migration, to a point where victims are deprived of their autonomy and basic rights such as liberty and freedom of movement.

This phenomenon is large scale and lucrative. The United Nations (UN) estimates that, globally, human trafficking annually nets about \$12 billion.²⁵ The International Organization for Migration (IOM) estimates the figure to be closer to \$31 billion.²⁶ Estimates as to the magnitude of the human trafficking phenomenon range from 700,000²⁷ women and children victims of trafficking for sexual exploitation, to several million²⁸ victims being trafficked worldwide annually, the latter figure including other forms of exploitation.

It has been estimated that 120,000 women and children are trafficked specifically into Western Europe each year.²⁹ Specific research conducted in 1998 led to an estimate that trafficked women both into and within the UK amounted to between 142 and 1420 per year.³⁰ In 2003, Government estimates envisaged around 4,000 sex trafficking victims being present in the UK at any one time.³¹ These victims will originate from different parts of the world, within and without the geographical

²⁵ V Malarek, *The Natashas: Inside the new global sex trade* (Arcade Publishing, New York 2004) 5.

²⁶ Some discrepancy between these figures can be explained by the fact that the IOM and the UN do not necessarily use the same definitions of 'trafficking in humans'. See Chapter 2 for discussion of the legal definition of trafficking in humans.

²⁷ European Commission, Justice and Home Affairs, 'Trafficking in Women – The misery behind the fantasy: from poverty to sex slavery – A comprehensive European Strategy' <http://ec.europa.eu/justice_home/news/8mars_en.htm> accessed 23 June 2007.

²⁸ International Organisation for Migration – however, IOM use a broad definition for human trafficking and so their statistics may not be the most reliable. See, <<http://www.iom.int/jahia/Jahia/pid/1>> accessed 1 March 2010

²⁹ See, International Organization for Migration 'Consequences of Trafficking and Policy Responses' <<http://www.iom.int/jahia/Jahia/about-migration/managing-migration/managing-migration-irregular-migration/consequences-of-trafficking-and-policy-responses>> accessed 01 July 2011, and Frank Laczko, International Organization for Migration, 'Human Trafficking: The Need for Better Data' (November 2002) <<http://www.migrationinformation.org/Feature/display.cfm?ID=66>> accessed 01 July 2011.

³⁰ L Kelly and L Regan, 'Stopping Traffic: Exploring the Extent of, and Responses to, Trafficking in women for sexual exploitation in the UK', (Imprint London, Home Office 2000) 22.

³¹ Joint Committee on Human Rights Twenty-Sixth Report, (Session 2005 – 6) [78/205] <<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/245/24507.htm#n109>> accessed 01 July 2011.

confines of Europe. Within the European Union (EU), every Member State is affected to some degree, be it an origin, transit, or destination State, or a combination thereof. One of the main obstacles to effectively combating human trafficking is the prevalence and involvement of organised crime groups, coupled with a real lack of cooperation, if not coordination, by the relevant enforcement authorities.³²

Industrialisation, technological advances and globalisation are an advantage to traffickers, as new mediums of transportation and communication exist which they can draw upon to maintain and expand trafficking networks. Cooperation and communication among the international community and affected States is imperative in order for a multi-pronged attack on trafficking to be successfully made. Information and intelligence needs to be subject to a system of central collection in order for it to be analysed and for an effective action plan to be implemented. Harmonised criminal law and human rights responses must take account of the need to prevent trafficking, prosecute and punish the trafficker, and to protect and provide for the victim. In order for trafficking to be tackled effectively, both supply and demand factors need to be addressed, as it is these push and pull factors which underpin and facilitate the trade in humans. Criminalisation, monitoring mechanisms, and law and policy which addresses prevention, prosecution and punishment (of traffickers) as well as that providing for support and assistance to victims is all imperative to a successful anti-trafficking regime.

As noted in the Introduction to the thesis, it is essential from the outset to make the distinction between individuals who play no voluntary part in becoming part of the global trafficking network, and individuals who elect to enter trafficking networks as a method of facilitated migration. There exists a spectrum, along which lie those who did

³² At an EU level, the recent 2011 Directive may go some way toward remedying lack of cooperation and coordination between the relevant authorities. See Part II of this Chapter, section A, subsection ii.

not consent to any part of the trafficking process; those whose consent was vitiated by deception or some other relevant factor; and those who fully consent to facilitated migration for the purpose of working in the sex industry, albeit in exploitative conditions.³³ For completeness, there will also be those who fully consent to the facilitated migration process for the purpose of working in the sex industry in conditions which cannot be deemed to be 'exploitative'.³⁴

Push and pull factors serve to encourage the migrant to leave their country of origin. The 'push' comes from various sources which will be considered in due course, and the 'pull' from the lure of richer countries and the promise of a better future. It must be borne in mind that the services of trafficking networks are actually in demand by potential migrants and putative trafficking victims; not every trafficked person 'falls' into the hands of traffickers.

Aronowitz observes that 'Often both smuggled and trafficked individuals leave a country of origin willingly.'³⁵ Potential migrants may see traffickers as 'migration brokers',³⁶ or facilitators - agents who aid them in their quest to migrate. Europol state that:

The deceit or misrepresentation practiced by the recruiter or trafficker does not always have to be the pivotal aspect of the recruitment phase. The mere

³³ It is accepted here that consent to sex work – even where it is to be undertaken in exploitative conditions – can in some circumstances be valid. This is further discussed throughout Chapter 3.

³⁴ There is disagreement as to whether or not sex work is inherently exploitative. The position of this author is that sex work is not always exploitative, but that conditions surrounding it may render it so. These issues are discussed further throughout Chapter 3, Part IV, section D.

³⁵ A Aronowitz, 'Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that drive it and the Organisations that promote it.' (2001) 9 *European Journal of Criminal Policy and Research* 163, 164.

³⁶ A Phizacklea, 'Migration Theories and Migratory Realities: a Gendered Perspective' in Danielle Joly, *International Migration in the New Millennium: Global and Regional Perspectives* (Ashgate 2004) 152.

offer of a means to leave the country can be enough to secure the individuals cooperation.³⁷

Where the ‘voluntary’ trafficked migrant is concerned (i.e. those who proceed on an initially consensual basis), whatever the purpose they are ultimately intended for, there is a shared characteristic – all have elected to leave their place or country of origin for some reason. The rise in irregular migration services has come about as a result of a lack of legal channels for migration.³⁸ Despite the ‘self-generated character of much of the migration’³⁹ of today, this does not negate the fact that traffickers are taking advantage of those potential migrants. As Ravenstein asserts, ‘none...can compare in volume with that which arises from the desire inherent in most men to ‘better’ themselves in material respects’.⁴⁰ The deceptive nature of facilitated migration has the potential to paint somewhat of a ‘rosy’ picture for the potential victim – an opportunity to increase ones material worth. It is not impossible to envisage consent being given by an individual to be transported into a situation of exploitative labour where the conditions experienced and pay offered fall below accepted labour standards in the destination State, yet still present an improvement on the prospects facing the migrant in the origin State.

The aim of this Chapter is to provide an overview of the legal and contextual background to migration and trafficking-related activity, and the problematic notion of consent in the law which is central to the enquiry made by the thesis. Part I will address

³⁷ Europol, ‘Trafficking of Women and Children for Sexual Exploitation in the EU: The Involvement of Western Balkans Organised Crime’, Public Version, Crimes Against the Person Unit, 18. <http://www.europol.europa.eu/publications/Serious_Crime_Overviews/Western_Balkans_THB_Threat_Assessment.PDF> accessed 1 August 2007, link no longer live.

³⁸ A Aronowitz, n 35, 171.

³⁹ A Wright, *Organised Crime* (Willan Publishing, 2006) 94.

⁴⁰ E G Ravenstein, ‘The laws of migration: second paper’ (1889) *Journal of the Royal Statistical Society* 52:2, 286.

the underlying economic and social ‘push’ factors acting on the would-be trafficked victim and ensuring the continuance of human trafficking with a view to emphasising the role of certain factors such as economic hardship (on the part of the migrant) in illicit migration and human trafficking. This Part will also look at intra-European migration and trafficking patterns, including consideration of frequented trafficking routes and prominent source, transit and destination States. Finally, this Part also considers the role of organised criminal gangs in illicit migration and human trafficking. This Part is necessarily descriptive and illustrative – at least as to context – and largely from a European perspective. Even if one were attainable, this Part of the Chapter does not set out to provide a full comprehensive account of the trafficking phenomenon, the clandestine nature of which precludes such a thing.

Part II will specifically address the central State obligations imposed by the international legal anti-trafficking regime, which addresses the prosecution and punishment of traffickers, prevention of trafficking, and (briefly) the treatment of victims⁴¹ will be outlined. This sketch represents only a part of trafficking activity; sufficient to explain the legal regime, yet the whole picture might indicate that aspects of anti-trafficking law may be inadequate as Chapter 4 will discuss as regards specifically the treatment of victims. Other aspects of the international legal regime are not at all considered irrelevant here, yet they go beyond the ambit of the focus of this thesis and so will not be considered further. The corresponding UK legislative framework will also be considered.

Part II will establish and analyse the basic principles of an integral part of the enquiry made within this thesis: that of consent. This discussion will draw upon various areas of the law where such a notion is employed, in order to provide an illustration of

⁴¹ The treatment of victims is considered in more depth in Chapter 4.

problematic nature of determining a valid consent, so that the specific matter of the role of consent in human trafficking can be analysed in depth in Chapter 3.

I. Contextual Factors underlying the Continuance of Human Trafficking

This Part will analyse and establish the contextual factors underlying the trafficking of women and girls for sexual exploitation. The focus is restricted to Europe, although the same factors will be applicable to trafficking patterns beyond these geographical confines. The restriction of focus to this geographical region is in the interests of continuity and so that limited and specific example may be given to illustrate the points made. The underlying causes of this activity are manifold, and tend to work together to ensure its continuance. These factors can be analysed within a framework of economic and social influences, which shape the market forces of supply and demand which arguably lead to some or all instances of global human trafficking today.

A. 'Push' Factors in Origin States

Potentially, migration can be seen as 'an individual, spontaneous, and voluntary act, which rests on the comparison between the present situation of the actor and the expected net gain of moving, and results from a cost-benefit calculus.'⁴² According to this statement, a potential migrant makes a rational, individual decision to migrate for material purposes, with the material rewards being higher than the cost of the migration activity itself.

⁴² J Arango, 'Theories of International Migration' in Danielle Joly, *International Migration in the New Millennium: Global and Regional Perspectives* (Ashgate 2004) 18.

Outshoorn states that ‘The dynamics of trafficking are best explained by migration theory’.⁴³ Various theories exist which offer explanations for migration⁴⁴ which are amongst other matters largely based upon factors such as wage disparities,⁴⁵ yet these theories were conceived with respect to migration in general as opposed to specifically the trafficking of humans; nonetheless, the same ‘push’ factors can be identified. Migration is complex and diverse and it varies in forms, motivations and contexts. It is a dynamic process, and cannot easily be explained by any one static theoretical framework. Human trafficking is just one aspect of this multifaceted global issue. Trafficking as a form of migration needs to be seen in its proper individual social, historical, cultural and political context. Empirical research can likely tell us much more about migration than theory can.⁴⁶

Economic migrants may seek to enter a State lawfully or unlawfully, to undertake otherwise lawful or unlawful activities, such as industrial agriculture or prostitution, the legality of the latter being dependent upon which State one enters. Some will reach their goal alone; others with the aid of migration facilitators, a proportion of whom will be trafficked. Either way, as a result of ‘push’ factors in origin States and because the economic attractions of certain destination States are high, organised clandestine entry is profitable to those who organise it, and there is clearly a demand for their services.

⁴³ J Outshoorn, ‘The Political Debates on Prostitution and Trafficking of Women’, (2005) *Social Politics: International Studies in Gender, State and Society* Volume 12, number 1, 141-155, 143.

⁴⁴ See, J Arango, n 42, and A Phizacklea, n 36, where various migration theories are discussed.

⁴⁵ Such as ‘neoclassical theory’, the basic premise of which is that it is in wage disparity between state of origin and state of destination where the motivation for migration will be found – see, J Arango, n 42.

⁴⁶ Discussed in this section, below. See for example J Mertus, ‘Human Rights of Women in Central and Eastern Europe’, (Spring 1998) 6 *American University Journal of Gender Social Policy & Law*, 369; GfK Ukraine, ‘Human Trafficking Survey: Belarus, Bulgaria, Moldova, Romania, and Ukraine’, Kyiv, Ukraine, December 2006, prepared by GfK Ukraine for the International Organization for Migration. <<http://www.childcentre.info/projects/trafficking/dbaFile13968.pdf>> accessed 1 February 2007; UNICEF, UNOHCHR, OSCE, ODIHR ‘Trafficking in Human Beings in South Eastern Europe’, (2004) 25 <http://www.iom.md/materials/1_traff_human_beings_se.pdf> accessed 3 May 2007.

The same factors influencing the decision to migrate – and therefore having an effect on trafficking patterns - are frequently cited by various sources,⁴⁷ indicating that several main themes can be identified. These largely centre on socio-economic problems, such as economic difficulty in the origin State, arising as a result of, for example, regional conflict, political unrest or economic transition. Gender discrimination and gender-based violence often go hand-in-hand with this.⁴⁸ These underlying factors work together to render women in some origin countries particularly vulnerable to human trafficking, and the demand for sexual services for sale creates the potential for them to be sexually exploited in the destination State.

Similarly, a recent IOM survey cited several reasons for the prevalence of human trafficking in Belarus. Among these were listed low wages and unemployment, gender and ethnic discrimination, and corruption, as well as lack of information concerning employment abroad.⁴⁹ The context in which human trafficking takes place has not gone unnoticed in law and policy responses to the phenomenon; for example, the Report of the UN Special Rapporteur on Violence Against Women, its Causes and Consequences in 1994 proposed a definition of human trafficking which recognised that ‘[Trafficking is the] illicit and clandestine movement of persons ...largely from developing countries with economies in transition...’⁵⁰ thereby specifically recognising the impact of economic factors on trafficking patterns.

The matters discussed above undoubtedly have an impact on the decision by certain women to migrate, which can lead to them falling into the hands of traffickers.

⁴⁷ Ibid.

⁴⁸ See, J Mertus, n 46; GfK Ukraine, n 46; T Obokata, ‘Trafficking of Human Beings as A Crime against Humanity: Some Implications for the International Legal System’, *International and Comparative Law Quarterly* (2005), 54, 445 – 458.

⁴⁹ GfK Ukraine, n 46, 50.

⁵⁰ Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, ‘Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms.’ (1997) UN Doc E/CN.4/1997/47/Add.4.

The root causes of trafficking have been considered by many sources and frequently flag up the same factors such as poverty and unemployment.⁵¹ Although in the most basic sense it can be contended that migration ‘results from the uneven geographical distribution of labour and capital’,⁵² there are further influencing factors in countries of origin which are specific to women and therefore have the effect of rendering them particularly vulnerable to trafficking and exploitative facilitated migration.

i. Economic Marginalisation: The Feminisation of Poverty

Women in CEE face a higher likelihood of being trafficked for forced into prostitution than their Western European or US counterparts. The IOM identifies that trafficking arises as a result of the factors outlined above, and – notably – the marginalisation of women in origin States.⁵³ Therefore, the root causes of trafficking of any individual for any ‘purpose’ are universal up to a certain point, yet beyond this point they become gendered as the marginalisation of women exacerbates the other factors. While poverty and lack of employment opportunities are issues applicable to male and female trafficking victims, it is evident that specific issues tied to structural inequalities within origin States also serve to make women victims of this phenomenon. Accordingly, the European Commission suggests that women are particularly vulnerable to human trafficking as a result of the feminisation of poverty, gender discrimination, and lack of education and professional opportunities in the origin state.⁵⁴

Mertus identifies that the transition to a market economy impacted upon women’s rights particularly in terms of increased unemployment and non-employment; declining

⁵¹ See, European Commission, Justice and Home Affairs, n 27.

⁵² J Arango, n 42, 18 .

⁵³ GfK Ukraine, n 46.

⁵⁴ European Commission, Justice and Home Affairs, n 27.

levels of income and increased poverty; overt job discrimination and continued occupational segregation; and a surge of traditional attitudes toward gender roles.⁵⁵ Indeed, 'A continuous ideological thread of feminist theory through time and across continents is the common understanding that male power is linked to the subjugation and servitude of women in the home.'⁵⁶

Following the collapse of the socialist regimes after 1989 in Eastern Europe, women's hopes for improved and equal rights may indeed have come into fruition in some areas of life, but not all. Discrimination was and is still a huge factor in some/many parts of CEE. There has been a decline in employment - Mertus states that 'in the Russian Federation and in other Commonwealth of Independent States countries, an estimated 70% - 80% of women are unemployed.'⁵⁷ Lower income and increased poverty hit women the hardest as they were already the lowest paid anyway.

Mahoney observes that discrimination and inequality is often embedded in the national laws; it is perpetrated by society and made acceptable by law.⁵⁸ Consequently, 'The movement of women within countries and across frontiers is usually a result of their unequal bargaining power and vulnerability to exploitation.'⁵⁹ The feminisation of poverty corresponds with the feminisation of migration from some States. Women's work, if they can get it, is unlikely to have the same status as men's work and therefore comes with less pay, and less rights.

Gender discrimination and job segregation are exemplified in various ways – advertisements can request men for higher positions and women for secretarial

⁵⁵ J Mertus, n 46, 371.

⁵⁶ K Mahoney, 'Theoretical Perspectives on Women's Rights and Strategies for their Implementation', *Brooklyn Journal of International Law* 21(3): 799-856, 800.

⁵⁷ J Mertus, n 46, 379.

⁵⁸ K Mahoney, n 56, 799.

⁵⁹ Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, (1994) U.N. ESCOR E/CN.4/1997/47/Add.4 Commission on Human Rights, 53rd Session, Provisional Agenda Item 9(a), at 19 <<http://www.awf.or.jp/pdf/h0010.pdf>> accessed 11 Jan 2007.

positions. Words may feature in advertisements for female occupations which imply that the applicant must be sexually available.⁶⁰ This demonstrates unequal social sexual policy. CEE women may be well educated, but receive less return on their education as a result of discrimination. In Moldova, for example, although women on the whole receive the same level of training as men, it is reported that they comprise 68% of the unemployed,⁶¹ and those employed tend to receive unequal pay when compared to their male counterparts, when doing the same job. This obvious discrimination has a devastating effect upon the female population, and serves to act as a significant ‘push’ factor influencing the supply of migrants and trafficking victims.

A United Nations Development Fund for Women (UNIFEM)⁶² report demonstrates that women’s employment levels in Eastern Europe seriously fell during the transition to a market economy; a 40% decline was noted in some countries. The biggest unemployment problem is with young women in CEE – it is less difficult for older women to find employment due to the skills which they possess. Statistics confirm the problem of unemployment amongst young women.⁶³ These disadvantages create a renewable source of disillusioned young females which is ideal for the sex trafficking market.

⁶⁰ J Mertus, n 46, 383.

⁶¹ This was reported by 28% of Bulgarian women assisted by IOM Sofia from March 2000 – August 2001, see UNICEF, UNOHCHR, OSCE, ODIHR, ‘Trafficking in Human Beings in South Eastern Europe’, n 46, 25.

⁶² United Nations Development Fund for Women, Biannual Report 2000: ‘Le Progrés des femmes à traverse le monde’.

⁶³ In Romania, for example, the likelihood of unemployment for women aged 15 – 24 is twice that of men – see International Labour Office Yearbook of Labour Statistics 1993; ILO World Labour Report 1994, *cited in* J Mertus, n 46, 383.

ii. Violence against Women

Empirical research conducted in CEE flags up the main problem areas identified by women in that region,⁶⁴ which include poor economic conditions and discrimination in employment, and, violence against women. Such factors demonstrate the disadvantaged position of women in some CEE States, compared to that of their male counterparts. Structural inequalities can be well ingrained.

In 1998 – 2001, research was undertaken among migrant domestic workers in London who were questioned as to their motivations for migrating.⁶⁵ The prime motivators for migration included the improvement of family welfare or children's education. In some cases, the behaviour of the husband was a motivating factor i.e. if he drank excessively, or indulged in womanising, as well as the economic motivation resulting from lack of earnings on the part of the husband.⁶⁶ Domestic violence can also be a motivating factor.⁶⁷

Europol recognise many of the same factors influencing migration choices as those considered above: 'Unemployment or lack of employment opportunities, poverty, gender, racial or ethnic discrimination, escaping persecution, *domestic violence or abuse* and the perception of increased opportunities elsewhere.' (Emphasis added)⁶⁸ In Moldova, for example, violence against women, sexual or otherwise, has increased

⁶⁴ J Mertus, n 46, 371.

⁶⁵ A Phizacklea, n 36, 131.

⁶⁶ Morokvasic includes the desire to escape marital problems among suggested female migration motivations, alongside economic incentives, family unity, and opportunities for more social independence. See M Morokvasic, 'Birds of Passage are also Women...' (1984) *International Migration Review*, 18(4), 886 – 907, 896.

⁶⁷ H Konrad, 'Trafficking in Human Beings – the Ugly Face of Europe', (2002) 13 *Helsinki Monitor* 260, 260.

⁶⁸ Europol, n 37, 4.

alongside the economic decline, along with alcoholism and prostitution.⁶⁹ Violence against women - within and without of a domestic setting – which is perpetuated by or tolerated within a society, is clearly a significant influential factor on migration choices.

Konrad provides the following analysis as regards the prevalence of trafficking for sexual exploitation:

... the unequal economic development of different countries; mass unemployment in many countries of origin, but also inequality, discrimination and *gender-based violence* in our societies, the prevailing market mechanisms; the patriarchal structures in the source and destination countries; the demand side including the promotion of sex tourism in many countries of the world, the mindsets of men, etc. – the primary root-cause is poverty, most particularly among women.⁷⁰ (Emphasis added)

The abovementioned issues confirm that the motivations of female migrants, who potentially become victims of human trafficking, are based upon more than simply material hardship, although this is undeniably a central factor. The combined factors considered make them vulnerable to ‘migration brokers’ and traffickers. Social and economic marginalisation, often in a society which permits discrimination or even violence against women, cultivates a climate which encourages and facilitates human trafficking. These oppressive conditions also contribute to making it harder to isolate exactly what part consent (or lack of it) has played in the decision to migrate.

⁶⁹ UNICEF, UNOHCHR, OSCE, ODIHR, ‘Trafficking in Human Beings in South Eastern Europe’, n 46, 25.

⁷⁰ H Konrad, n 67, 263.

B. Intra-European Migration and Trafficking Patterns

i. Permeability of Borders

Since the late 1980's, CEE has seen a significant rise in migration flows, particularly if we include those who are not moving for the purpose of permanent residence.⁷¹ Migration increased following the collapse of communist rule, and an east to west migratory flow became prevalent within Europe.⁷² Newly liberalised migration policies within CEE have facilitated border crossing, which may have transformed CEE into an ideal geographical location for trafficking networks to use, as countries of origin, transit, and destination.

Okolski⁷³ attributes the problem of migrant trafficking in Europe to two main political trends. Primarily, the opening up of the former socialist countries to population movements, as the aftermath of the collapse of communism in Europe. This highlights the issue of 'intra-EU' trafficking, whereby victims who legally enjoy free movement rights may still be trafficked within the EU. Secondly, Okolski identifies the closing of Western European borders to migrants coming from the South as an underlying cause of human trafficking. He asserts that in order to reach an effective solution to the problem of migrant trafficking, both segments of the continent must counteract it, and ultimately a common European migration policy is needed which includes uniform external borders.⁷⁴

⁷¹ M Okolski, 'New Migration Movements in Central and Eastern Europe', in Danielle Joly, *International Migration in the New Millennium: Global and Regional Perspectives* (Ashgate 2004) 36.

⁷² Ibid 36.

⁷³ Ibid 51.

⁷⁴ Ibid.

Common border policy may indeed serve to counteract human trafficking, but alone it is insufficient. It would make transit more difficult for trafficking networks perhaps to a large extent, but it fails to take into account various factors. Primarily, in some origin, transit or destination States, authorities can be complicit in the trafficking market,⁷⁵ either turning a blind eye, or taking bribes of money or sexual favours from the victims themselves. Further, no amount of common border policy can negate the economic and social factors underlying human trafficking from the origin side, and the demand for the services that sex trafficking provides on arrival in the host state.

The advent of both the EU and the Schengen Agreement⁷⁶ has somewhat altered the face of intra-EU migration, consequently having an effect on those trafficked within these territories. The Schengen Agreement takes free movement of persons to a new level, with member States promising to gradually abolish common border checks. Smartt suggests that this freedom facilitates human trafficking once inside the Schengen zone,⁷⁷ as stringent border checks are often cited as an effective anti-trafficking measure.⁷⁸ Alternatively, it can be argued that border regulation serves to push the transportation of victims to a more clandestine level,⁷⁹ so we are presented with somewhat of a catch-22 situation.

The UK has opted out of Schengen for the time being, and therefore chooses to retain control over intra-EU movements of people affecting its borders. If territorial borders the world over were eradicated then victims would not need to search for the clandestine help of traffickers or ‘migration brokers’, yet, the practicalities of

⁷⁵ See, Part I, section C, subsection iii, below.

⁷⁶ The Schengen Agreement was signed on 14 June 1985.

⁷⁷ U Smartt, ‘Human Trafficking: Simply a European Problem?’ *European Journal of Crime, Criminal Law and Justice*, (2003) Vol. 11/2, 164–177, 164.

⁷⁸ The intention of the Schengen Agreement was to eradicate all internal borders, which renders movement of human beings much easier once within Schengen territory. Those circulating within Schengen countries will not be subject to stringent passport checks.

⁷⁹ See, for example, A Kalaitzidis, ‘Human Smuggling and Trafficking in the Balkans: Is it Fortress Europe?’ *5 Journal of the Institute of Justice and International Studies* 1 (2005), 7.

eradicating borders renders such measures implausible. Attempts at creating ‘Fortress Europe’ have failed to result in sufficient scrutiny at borders, as it is estimated that one third of non-EU nationals resident within the EU are illegally present.⁸⁰ There is evidence that Schengen visas have been found in the possessions of organised criminal groups,⁸¹ and it may be that these visas were intended for use in trafficking and smuggling operations.

It is estimated that there is upward of 4 million undocumented migrants circulating in the EU today.⁸² Estimates as regards human trafficking affecting the EU range up to 400,000 human beings trafficked yearly into Member States.⁸³ These are telling figures, yet problematic for several reasons: primarily, it is extremely difficult to get a realistic statistical picture of such clandestine activity; secondly, the reliability of the estimate made depends on the definition of ‘human trafficking’ that is applied.⁸⁴ This, coupled with lack of tools to collate information about international human trafficking, renders the collection of reliable statistics even more of a difficult issue.

On the one hand, hardened immigration policies for third country migrants have created a rise in routes for irregular migration and asylum applications. Kalaitzidis states that ‘The EU actions have ... forced the hands of the potential immigrants and drove [sic] them deeper in the hands of smugglers and traffickers.’⁸⁵ On the other hand, once inside the EU, there can be increased ease of movement. It has been stated that ‘the EU has a dismal record of preventing human trafficking within its borders which

⁸⁰ See B Ghosh, *Huddled Masses and Uncertain Shores*, IOM, (Martinus Nijhoff Publishers, The Hague, London and Boston 1998) for further discussion of this matter.

⁸¹ A Aronowitz, n 35, 176.

⁸² U Smartt, n 77, 164.

⁸³ Ibid 165.

⁸⁴ For discussion of the definition of human trafficking, see, Chapter 2.

⁸⁵ A Kalaitzidis, n 79, 7.

has greatly increased since the collapse of the Soviet Union and has taken a particularly virulent form since the collapse of Yugoslavia.’⁸⁶

Immigration law and policy may differ between the countries involved, thus affecting the status of the trafficked victim.⁸⁷ Traffickers’ knowledge about local factors such as weaknesses in border or immigration control is used to their advantage.⁸⁸ The increased ease of movement once inside the EU coupled with this knowledge means that the patterns and routes continually shift. Aronowitz considers the effect of the ease of intra-EU movement on trafficking and states that ‘[w]ith the frequent rotation between countries of young women smuggled into the European Union, it is becoming more and more difficult to determine which are the transit and which are the destination countries.’⁸⁹

The EU has specific run programmes such as STOP and STOP II, through which funding was provided for the purposes of combating trafficking.⁹⁰ STOP II covered activities such as ‘Training, exchanges and work experience placements, studies and research, meetings and seminars, dissemination of the results obtained under the programme.’ Clearly, a multi-national approach is needed which takes into account the role to be played in source, transit and destination countries which are affected by trafficking patterns. EU free movement policies create trafficking opportunities, yet on

⁸⁶ Ibid 9.

⁸⁷ However, the EU 2011 Directive may go some way toward reconciling this issue among Member States.

⁸⁸ International Organization for Migration, ‘Migrant Trafficking and Human Smuggling in Europe: A Review of the Evidence with Case Studies from Hungary, Poland and Ukraine.’ (Geneva, Switzerland: IOM, 2000).

⁸⁹ A Aronowitz, n 35, 166.

⁹⁰ The aim of these programmes was to ‘... develop, implement and evaluate a European policy in this area; encourage and strengthen networking and practical cooperation such as the exchange and dissemination of information, experience and good practice, and the improvement and adaptation of training and scientific and technical research; give particular attention to participation in the projects developed by this programme of the public or private organisations, institutions or associations concerned in the applicant countries; step up of cooperation with third countries and the competent regional and international organisations.’ See European Commission, Justice and Home Affairs ‘STOP II - to help prevent and combat trade in human beings and all forms of sexual exploitation’ <http://ec.europa.eu/home-affairs/funding/expired/stop/funding_stop_en.htm> accessed 01 July 2011.

the other hand its integrated structure may provide a more effective means of responding to organised crime.

ii. Prominent Source, Transit and Destination Countries

There has been a shift in source countries of victims trafficked into the EU and Western European countries. Throughout the 70's, and 80's, the women were largely of South American and Thai origin. Throughout the 90's, trafficked women came increasingly from Eastern Europe.⁹¹ Women from in and around Europe are logistically a more desirable commodity to traffick in and around the region than those from further afield, simply because they are located more conveniently in a geographical sense and therefore will be cheaper and easier to procure and move. The recent UK Project Acumen Report⁹² found that of the 2,600 women identified by the investigation as 'trafficked', 1,300 were from China and the remainder were predominantly from Eastern Europe and Thailand. Although trafficking victims clearly originate from a wide range of places, a Europol report estimates that 90% of the traffick victims in the EU originate from CEE.⁹³ A Council of Europe source indicates that in Europe, 78% of female victims of trafficking are sexually exploited, in various forms of prostitution.⁹⁴ One might assume that the remainder are subject to other forms of exploitation such as domestic servitude.

⁹¹ See First report of the Dutch National Rapporteur: 'Trafficking in Human Beings' Table 4.1. *Registration data relating to reports of (possible) victims of THB over the period 1992 -2000* (2000) 49.

⁹² Project Acumen: ACPO Migration and Associated Matters, 'Setting the Record: The trafficking of migrant women in the England and Wales off-street prostitution sector' (August 2010) <<http://www.acpo.police.uk/documents/crime/2010/201008CRITMW01.pdf>> accessed 20 Dec 2010.

⁹³ Europol, n 37.

⁹⁴ Council of Europe, Parliamentary Assembly, 'Campaign against trafficking in women', Doc. 9190, 7 September 2001, Committee on Equal Opportunities for Women and Men, Rapporteur: Mrs Lydie Err, Luxembourg, Socialist Group, <<http://assembly.coe.int/Documents/WorkingDocs/doc01/EDOC9190.htm>> accessed 12 July 2007.

Okolski notes that a strong migration ‘outflow’ is visible as regards Albania, Belarus, Moldova, Bulgaria, and Ukraine, as well as outflow to a lesser extent being observed in Hungary, the Czech Republic, Croatia, Russia, Poland, Romania, Lithuania and Slovakia.⁹⁵ To some extent trafficking affects every CEE state, but IOM have identified known countries of origin,⁹⁶ as have Interpol and Europol,⁹⁷ and the same source countries are frequently cited and for the most part match those where a significant migration outflow has been noted.⁹⁸ Notable external origin areas and countries have also been identified,⁹⁹ indicating the scale of the trafficking phenomenon and the wide geographical variety of origin countries.

As regards the UK as a destination state, Europol reports that ‘[m]ost trafficked prostitutes come from the Balkans and former Soviet Union, or from the Far East, especially China or Thailand.’¹⁰⁰ This matches the findings of the recent Project Acumen Report.¹⁰¹ It is clear from the information provided above that different sources identify the same origin countries. The countries which are mentioned time and time again have similar stories to tell, and exhibit the socio-economic ‘push’ factors identified earlier in this Chapter.

States are ‘transit States’ because they are strategically placed along trafficking routes. Romania, Bulgaria, and Moldova frequently feature as transit States.¹⁰² The Balkan region has become a pivotal hub for trafficking activity within Europe. Further

⁹⁵ See M Okolski, n 71, 42.

⁹⁶ These include Czech Republic, Hungary, Latvia, Poland, Slovakia, the Ukraine, Albania, Romania, Bulgaria and Russia - see International Organization for Migration <<http://www.iom.int/jahia/jsp/index.jsp>> accessed 10 Jan 2009.

⁹⁷ These are Romania, Bulgaria, Belarus, Russian Federation, Moldova, Ukraine, Albania, Armenia, Serbia and Montenegro, and Croatia. At the time of publishing of the Europol Report, Serbia and Montenegro had not yet become separate republics. The separation occurred in June 2006. See Europol, n 37, 15.

⁹⁸ See M Okolski, n 71, *passim*.

⁹⁹ These include Africa, Asia, Latin America and the Caribbean, and the Middle East – in a broad sense, then, many of the countries of the world have been identified as sources countries. See First report of the Dutch National Rapporteur, n 91, 49.

¹⁰⁰ Europol, n 37, 15.

¹⁰¹ Project Acumen, n 92, 5.

¹⁰² Europol, n 37, 33.

to this, there is some indication that victims of trafficking originating from Asia, the Middle East and Africa are being transported via this region.¹⁰³ Poland also constitutes an important transit country, particularly as regards women trafficked from Romania, Bulgaria, and former Soviet States. The Lithuania – Belarus shared border is a favourite ‘back door to the west’,¹⁰⁴ as it forms a convenient point for illegal border crossing. Other notable transit States include Hungary, Romania, Austria, Germany, Serbia and Montenegro.¹⁰⁵ All of these countries serve as gateways to Western Europe.

The Western parts of Europe are predominantly - although not exclusively - countries of destination. The organisation ‘End Child Prostitution, Child Pornography and the Trafficking of Children’ (ECPAT) estimates that up to 120,000 female victims are smuggled into Western Europe each year and forced to work as prostitutes.¹⁰⁶ The main destination countries for trafficked victims in Europe are Austria, Belgium, France, Germany, Greece, Italy, Netherlands, Spain, and the UK.¹⁰⁷ This highlights the trend of largely east to west and south to north, or south to south flow of victims.

Most typically, one might assume that women are trafficked from poorer States to richer western States. To a large extent this is true, yet it is not always the case. Where there is demand for a sex trade, there will be trafficked victims.¹⁰⁸ Specific research conducted in 1998 led to an estimate that trafficked women both into and within the UK amounted to between 142 and 1420 per year.¹⁰⁹ On the face of it, this estimate might appear to be low, but sources are contradictory and the recent perceived ‘failure’ of

¹⁰³ Ibid 26.

¹⁰⁴ U Smartt, n 77, 170.

¹⁰⁵ Europol, n 37, 16.

¹⁰⁶ U Smartt, n 77, 168.

¹⁰⁷ Europol, n 37, 5.

¹⁰⁸ See L Brussa, ‘Survey of Prostitution, Migration and Traffic in Women: History and Current Situation’, (European Union, EG/PROST (91) 2) 43.

¹⁰⁹ L Kelly and L Regan, n 30, 22.

Pentameter 2¹¹⁰ to uncover traffickers in the UK¹¹¹ could imply that the figure of trafficked victims is lower than anticipated (or simply that the operation was something other than a success). This wide range confirms the problematic nature of obtaining reliable evidence about the extent of human trafficking; further, this estimate may have even at the time fallen short of the real figure. In 2003, Government estimates envisaged around 4,000 sex trafficking victims being present in the UK at any one time,¹¹² which conflicts with the figures mentioned above and compounds the issue of unreliability of data relating to this clandestine activity.

Countries where there is a demand for an active sex trade, and where the sale of sex is most lucrative for traffickers, are most likely to be destination countries. Brussa¹¹³ identifies consumer demand as a central underlying factor affecting the continuance of the sex trade, and also the knock-on effect that this demand has upon the traffickers, who see and exploit the opportunity for economic gain. They need products or commodities to satisfy the consumer demand, and where better to delve than into a renewable pool of resources: that of economically and socially marginalised women who have sought the aid of a ‘migration broker’ (or trafficker) to facilitate their economic migration. Trafficking and prostitution are highly gendered; there is demand by men for a supply of women.

¹¹⁰ The Pentameter 2 website states that ‘Pentameter 2 (UKP2) aims to rescue and protect victims of trafficking for sexual exploitation and to identify, disrupt, arrest and bring to justice those involved in criminal activity.’ <<http://www.pentameter.police.uk/>> accessed 3 January 2010.

¹¹¹ Conflicting opinions exist as to the success or otherwise of Pentameter 2. See, for example, UK Human Trafficking Centre, ‘United Kingdom Pentameter 2, Statistics of Victims recovered and Suspects arrested during the operational phase’, which cites 15 convictions for trafficking offences secured as a result of the operation, full document available at <http://www.soca.gov.uk/about-soca/library/doc_download/122-uk-pentameter-2-statistics.pdf> accessed 01 July 2011, and see also, Nick Davies, ‘Inquiry fails to find single trafficker who forced anybody into prostitution’, *Guardian*, (20 October 2009) <<http://www.guardian.co.uk/uk/2009/oct/20/government-trafficking-enquiry-fails>> accessed 20 October 2009.

¹¹² Joint Committee on Human Rights Twenty-Sixth Report, n 31, para. 81.

¹¹³ See, L Brussa, n 108, 43.

This demand can be created by the residents of the host country, seasonal visitors, or international presence. Traffickers are led by market forces, which may include 'seasonal' markets, driven largely by tourism, or major events such as the 2012 Olympics in London.¹¹⁴ Human trafficking has also occurred in the backdrop of conflict, such as in the war-torn region of the former Yugoslavia. In this context, human trafficking has been labelled a crime against humanity.¹¹⁵

During the Yugoslav war, Non-Governmental Organisations (NGOs) reported that 50% of the clientele in Bosnia and Herzegovina were internationals; mainly soldiers.¹¹⁶ In Macedonia, international presence is linked to prostitution and trafficking increases in the area, yet local police claim that the sex trade in the area is mainly funded by domestic sources.¹¹⁷ Similarly, international presence in Kosovo is, according to NGOs, a real factor influencing the presence of trafficked women. Kosovo force soldiers and United Nations Interim Administration Mission (UNMIK) international police officers have been suspected as being involved.¹¹⁸

Local NGOs state that prior to this international presence, prostitution and trafficking were not considered to be commonplace. In Bosnia and Herzegovina, it is estimated that 70% of all profits from prostitution come from internationals.¹¹⁹ Thus, one can see the effect of international presence – be it of soldiers or holidaymakers – upon the sex trade and therefore trafficking. This can be contrasted with the situation in southern Asia, where the clientele have been reported to be largely of domestic

¹¹⁴ See, for example, Stewart Tendler, 'Sex Trafficking and Illegal Workers Threaten Olympics' *The Times* (24 March 2007).

¹¹⁵ See, T Obokata, n 48.

¹¹⁶ UNICEF, UNOHCHR, OSCE, ODIR, 'Trafficking in Human Beings in South Eastern Europe', n 46, 65.

¹¹⁷ *Ibid.*

¹¹⁸ Organization for Security and Co-operation in Europe, 'Minutes from October 18 Trafficking Round Table Meeting', (OSCE, Priština, 22 October 2001).

¹¹⁹ UNICEF, UNOHCHR, OSCE, ODIR, 'Trafficking in Human Beings in South Eastern Europe', n 46, 65.

¹¹⁹ Organization for Security and Co-operation in Europe, n 118.

origin.¹²⁰ Accordingly, it can be seen that traffickers draw from the resources in the origin States and use these resources to supply the demand, wherever it happens to be at the time.¹²¹ With trafficking for sexual exploitation featuring consistently on the political agenda of late, the employment of demand sanctions as a method of combating prostitution and sex trafficking is not an unexpected move.¹²²

iii. Popular Trafficking Routes

Different sources identify similar routes frequented by traffickers. It seems fairly safe to say at this point that no European country is left untouched by the human trafficking phenomenon. The expansion of the EU has also allowed for multiple new points of entry and departure into various countries to appear, thus facilitating the opening up of new routes.

Notable identified trafficking routes include; the Balkans Route,¹²³ the Eastern Route,¹²⁴ the Central European Route,¹²⁵ the Eastern Mediterranean Route,¹²⁶ and the North African or Southern Route.¹²⁷ The documentation of these routes indicates that specific regions are highly active as regards human trafficking. The Balkans Route, for example, is one of the most well known, and is used for a variety of organised crime activities. The IOM estimates that the numbers trafficked into and through the Balkan

¹²⁰ See, L Brown *Sex Slaves: The Trafficking of Women In Asia* (Virago Press, 2001).

¹²¹ Furthermore, residents of developed States may travel to developing States for the purpose of purchasing sexual services.

¹²² See Part 2, section A, subsection iii, below, for discussion of the use of demand sanctions as a preventative measure.

¹²³ This route runs from the Balkans into Slovenia, Hungary, and Greece.

¹²⁴ This route from Russia and Belarus into Poland.

¹²⁵ This route from the Far and Middle East, and former Soviet states, and moved on via Slovakia and the Czech Republic and Hungary, on to Western Europe.

¹²⁶ This route runs through Turkey into Bulgaria and Romania.

¹²⁷ According to this route, victims are taken from Africa into Spain, Italy, and Malta.

region annually may exceed 170,000 people,¹²⁸ although use of varying definitions of ‘human trafficking’ render the validity of such statistics questionable.¹²⁹

While it may be generally appropriate to refer to the routes using these terms, it cannot be taken as given that these are the only routes used, or that these routes are fixed. They provide guidance as to the more popular channels used by traffickers, yet it must be borne in mind that traffickers are resourceful so that where one route or part thereof may be blocked, other routes and methods of transport will quickly be found. This will of course depend upon the level of sophistication of the traffickers and trafficking networks involved. Ultimately, it can be said that:

... it would be simpler and far more accurate to identify that traffickers will seek to use whatever routes offer the best chances of a risk-free passage and this will obviously change according to many circumstances, not least of which is the law enforcement with regards counter trafficking tactics & action.¹³⁰

Traffickers employ all available transport methods in order to move their victims from place to place along trafficking routes. They will use highly clandestine modes of transport if necessary, and in turn, the policing of borders and passes are sometimes very difficult to maintain adequately. As well as air travel, traffickers will operate via land or water; for example, the border between Serbia and Bosnia-Herzegovina is partly

¹²⁸ IOM, ‘Applied Research and Data Collection on Trafficking in Human Beings to, through and from the Balkan Region’, (IOM 2001).

¹²⁹ As mentioned previously, the use of different definitions of ‘traffick in persons’ tends to yield different results – the IOM definition has a wider scope than the definition which is provided within the UN Trafficking Protocol, the CoE Trafficking Convention, and the 2011 EU Directive. Therefore these figures may include other types of migrant which do not necessarily fit the definition provided within the latter instruments.

¹³⁰ Europol, n 37, 17.

made up by a river. Depending upon the time of year, the Drina River can be crossed either on foot or by way of a short boat journey. Policing the entire length of this area is difficult, and so traffickers and their victims can all too easily slip through the net. Some popular routes into the EU taken by sea include those from Albania, Morocco, or Tunisia.¹³¹ These routes enter Southern Europe; Italy has at times served as an active gateway for traffick victims in transit, often destined for neighbouring Albania. However, the Adriatic Sea has been subject to law enforcement activity, and as a result of good co-operation between the two countries, the main transport method between the two – by speedboat – has been largely affected. The presence of Guardia di Finanza naval service officers is responsible for bringing this activity down to a minimum. A considerable number of law enforcement officers were deployed for this purpose.¹³²

Since this intervention has restricted the use of this method, it is reported that ‘the more usual method is through the misuse of Schengen visas issued by EU States in country or occasionally across the land border between Greece and Albania.’¹³³ Policing of this border is difficult because it is long and mountainous. Movement across land is a method commonly employed by traffickers into and through Europe. Transport by air is more difficult because of the requirement of travel documents, as is the use of official border crossings by land. The ability to obtain such documents will depend upon the level of sophistication of the traffickers, and the level of involvement of corrupt officials. Trafficking and illicit migration is frequently facilitated by organised criminal gangs, the influence of which will now be discussed.

¹³¹ U Smartt, n 77, 173.

¹³² Interforza, Guardia di Finanza.

¹³³ Europol, n 37, 32.

C. The Influence of Organised Crime

Brussa identifies various reasons for the continual rise in trafficking, including principally '[t]he enormous profitability of exploiting women as prostitutes motivating individuals and organized crime networks to engage in the trade in women.'¹³⁴ The involvement of organised crime groups is increasingly identified as a factor influencing trafficking activity. As Scarpa observes:

... there are some differences between slavery of the past centuries and the new slavery-like practices of our time, insofar as the latter ones are characterised by very low purchase costs, very high profits for the exploiter, surplus of potential slaves and irrelevance of ethnic differences.¹³⁵

Accordingly, it seems clear that the modern forms of exploitation such as human trafficking are driven by economic motives on the part of the trafficker(s). In turn, organised crime groups (OCGs) prey on the economic and/or social vulnerability of the putative trafficked victim. In the Explanatory Memorandum to the Proposal for the recent EU Trafficking Directive (which is now in force¹³⁶), it is recognised that:

Social vulnerability ... is used by international organised crime networks to facilitate migration and subsequently severely exploit people by use of force, threat, coercion, or various forms of abuse such as debt bondage. In

¹³⁴ L Brussa, n 108, 42.

¹³⁵ S Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford 2008) 5.

¹³⁶ EU 2011 Directive, n 10.

fact the high level of profits generated is a major underlying driver. The demand for sexual services and cheap labour is a concurrent driver.¹³⁷

The role of OCGs in human trafficking - in Europe and globally - is facilitated by globalisation. Improved methods of communication and travel enhance the opportunities for involvement and financial gain. Lack of deterrent renders trafficking activity low-risk, and substantial profits render it high return. Trafficking has not in the past been perceived as tantamount in severity to other organised crime activities, yet this perception is changing as it has become increasingly evident that OCGs are a significant factor in the continuance of the trafficking phenomenon on a global scale. Their *modus operandi* is to establish links with collaborators in origin countries in order to recruit new sex workers. Migration patterns can serve to mask trafficking activity.

We are left in no doubt about the lucrative nature of this activity, which is described as ‘one of the most lucrative organised crime activities generating a global multibillion dollar a year income.’¹³⁸ Malarek suggests that a trafficked woman can bring in an amount up to \$250,000 per year.¹³⁹ The same organised crime groups indulge in various activities including drug and arms trafficking, and money laundering, so the revenue generated from all of the above will be used interchangeably to fund other illegal and clandestine activities. If financial gain is accepted as the primary motivation for organised crime activities, then trafficking is an ideal medium; not least because of the low risks, but because the trafficked victim can be sold again and again. Drugs and guns are much more rapidly expendable. Trafficking victims, however, can be sold to customers multiple times and finally on to other traffickers; once consumers

¹³⁷ Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, (COM (2010) 95 Final) at 1.2.

¹³⁸ Europol, n 37, 4.

¹³⁹ V Malarek, n 25, 13.

demand new products, the supplier must find a way to meet this demand – one victim is sold on and new victims are bought, creating a sustainable business and profit.

Europol state that among the most prevalent OCGs are groups originating from Albania, Bulgaria, Lithuania, Nigeria, Romania, and the Former Yugoslavia.¹⁴⁰ Italian prosecutors state that Albanian, Nigerian, and Chinese criminal gangs essentially dominate trafficking and the slave trade in Italy.¹⁴¹ Chinese criminal groups apparently play a large part in trafficking eastern European women and girls into Britain. Small Polish gangs are evident, with Polish and Czech gangs being prevalent in Spain. Turkish gangs operate prostitution cartels in Germany.¹⁴² Some gangs recruit directly from refugee centres.

Warnath observes that ‘Trafficking of women and children is not a new problem ... what is new is the growing involvement of organised crime and the increasing sophistication of its methods.’¹⁴³ Europol¹⁴⁴ identifies some of the factors indicating a high degree of organisation among traffickers, such as the simultaneous movement of different nationalities on the same transport - moving large numbers of people over long distances is likely to be logistically difficult and therefore requires a high degree of organisation. Patterns of trafficking, using numerous methods and stop off points, have been identified,¹⁴⁵ which compound the difficulty of combating this clandestine phenomenon. Lack of a coordinated strategy between European States may be a factor, although the recent EU 2011 Directive may go some way toward addressing this issue.

¹⁴⁰ Europol, n 37, 4.

¹⁴¹ US/Italy bilateral working group on ‘Trafficking Women’, (Report of July 1999).

¹⁴² U Smartt, n 77, 172.

¹⁴³ Warnath, S., ‘Trafficking of women and children: The future direction of United States Policy: Report of the US-EU Trafficking in Women Seminar’, (L’viv, 9 – 10 July, 1998, 63 – 66. L’viv, Ukraine, 1998) 63.

¹⁴⁴ Europol, ‘General Situation Report 1996 – 1997: Illegal Immigration.’ (The Hague, The Netherlands: Europol, File No. 2562-52, 1999).

¹⁴⁵ See M Okolski, n 71, *passim*.

Kalaitzidis asserts that transnational OCGs are wholly responsible for the huge growth in irregular migration.¹⁴⁶ This may hold some truth in that OCGs largely play the part of facilitators of irregular migration; they allow the decision to migrate to become a reality for those who could otherwise have not achieved it. Such organisations have been subject to considerable international scrutiny since before the turn of the century, as the United Nations Convention against Transnational Organized Crime (Organized Crime Convention)¹⁴⁷ indicates. The Organized Crime Convention is a reaction to an already existing and rapidly growing and evolving problem; OCGs are responsible for much more than simply irregular migration - drug smuggling and money laundering are activities also on the agenda, to name a few. Indeed, OCGs have been described as potentially being ‘more organised than the law enforcement agencies themselves.’¹⁴⁸

i. What Constitutes an OCG?

The UN Trafficking Protocol is annexed to the Organized Crime Convention, making clear the links between organised criminal activity and human trafficking. An OCG may in a general sense be taken to mean any number of criminals working in association. This is ultimately too broad for legal purposes. Definitions of organised crime have been offered by various sources.¹⁴⁹ Article 3 of the Organized Crime Convention offers the following definition:¹⁵⁰

¹⁴⁶ A Kalaitzidis, n 79, 1.

¹⁴⁷ United Nations Convention against Transnational Organized Crime, (adopted November 2000 by United Nations General Assembly Resolution A/RES/55/25, entered into force on 29 September 2003) (hereafter ‘Organized Crime Convention’).

¹⁴⁸ Europol, n 37, 25.

¹⁴⁹ The Council of the European Union in a Joint Action 1998 adopted the following definition: ‘Within the meaning of this joint action, a criminal organisation shall mean a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or

For the purposes of this Convention:

(a) “Organized crime group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit...

The terms ‘Serious Crime’¹⁵¹ and ‘Structured Group’¹⁵² are elaborated upon within the Article. The Council of Europe in 2001 adopted essentially the same definition in a Recommendation.¹⁵³ Further guidance has been offered by a mechanism intended to assist EU Member States in describing organised crime.¹⁵⁴

a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.’ Article 1 of Joint Action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (1) (98/733/JHA) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:351:0001:0001:EN:PDF>> accessed 11 June 2007.

¹⁵⁰ Article 3, Organized Crime Convention, n 147.

¹⁵¹ Article 3(b) provides that “‘Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’.

¹⁵² Article 3(c) provides that “‘Structured group” shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure’.

¹⁵³ Council Of Europe, ‘Recommendation Rec. (2001) 11 of the Committee of Ministers to Member States concerning guiding principles on the fight against organised crime’, (adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers’ Deputies).

¹⁵⁴ Council of the European Union, 6204/2/97 ENFOPOL 35 REV 2, (Brussels, 21 April 1997).

ii. The Structure of Organised Crime Groups and ‘Trafficking Networks’

Traffickers, however organised, would be unlikely to identify themselves as OCGs – it is the law enforcement agencies that give them this label. The actual traffickers are likely to be supported by subsidiaries, who may be involved in various parts of the process such as supply of documentation to validate the status of the victim in that host country, or even the identification and recruitment of potential victims. These subsidiaries, together with the traffickers, form ‘trafficking networks’.¹⁵⁵ The criminal groups involved range from high level, international networks, to amateur small group networks, or even individuals. Trafficking networks may involve hierarchical organisations, or others who are in some way affiliated e.g. family members. Europol identifies the following levels or styles of trafficker:¹⁵⁶ amateur or low level traffickers;¹⁵⁷ small group or medium level traffickers;¹⁵⁸ and international or high level networks,¹⁵⁹ indicating that there is a hierarchy of ‘types’ of trafficker.

A typology of a/the trafficker was developed by Shelley,¹⁶⁰ which sub-divides ‘traffickers’ into categories: Natural Resource; Violent Entrepreneur; and Traditional Slavery with Modern Technology. Shelly expands upon each category somewhat. The

¹⁵⁵ Europol, n 37, 12 – 13.

¹⁵⁶ Ibid 12.

¹⁵⁷ Amateur or low level traffickers are likely to be individuals who provide an occasional service. They will be based in the origin state – their home state – and will aid with the recruitment and trafficking of their own nationals. They may work for larger networks, and will have the potential to ‘graduate’ through the ranks. They are likely to receive a one-off payment as opposed to directly partaking in trafficking related profits. Europol, n 37.

¹⁵⁸ Small group or medium level traffickers will have established links with other similar groups or persons, and are likely to be cross border in operation and have some level of permanence. They will be involved in every stage of the trafficking process and will receive direct profits. These profits will come from the sale or exploitation of victims. Europol, n 37.

¹⁵⁹ International or high level networks have the ability to conduct the entire operation. They will have contacts in origin, transit, and destination states and can handle large numbers of victims at once. The profits are likely to be reinvested in arms sales, drugs and legitimate business ventures. Europol, n 37.

¹⁶⁰ Louise Shelley, ‘Statement to the House Committee on International Relations Subcommittee on International Terrorism, Nonproliferation and Human Rights’, (June 25, 2003)

<http://wwwc.house.gov/international_relations/108/shel0625.htm> accessed 1 January 2006

Natural Resource groups are primarily Russian Mafia, who are essentially involved for the purpose of short term gain, with no particular regard for the sustainability of the business as such. They will take advantage of opportunities in order to make ‘here and now’ profits. Characteristically, they will be largely unconnected with the victim and the geographical area of origin. The second category - that of Violent Entrepreneur - operates heavily in the Balkans, particularly Albania and Former Yugoslav States. These are invested parties,¹⁶¹ in that they are more heavily involved and looking for long term gain, and are fully prepared to use violent means to achieve their end. The final category - Traditional Slavery with Modern Technology - is mainly associated with Africa, particularly Nigeria. The individuals trafficked by these groups are often found for sale in the red light districts of northern Europe.

It is evident that the vast majority of traffickers form part of a network as opposed to working alone.¹⁶² In order for the process to run smoothly, many parties may be involved along the way to conduct different parts of the operation. Reported patterns of involvement vary from source to source,¹⁶³ but it seems clear that traffickers are capable of establishing a strong degree of integration, as they will effectively work alongside traffickers of other nationalities in order to secure their profits. Evidently, this is a business which does not discriminate as regards business partners. Further to this, corrupt State officials have been known to be complicit in the trafficking and illicit migration process, as will be discussed below.

¹⁶¹ Ibid.

¹⁶² Europol, n 37, 13.

¹⁶³ See UNICEF, UNOHCHR, OSCE, ODIHR, ‘Trafficking in Human Beings in South Eastern Europe’, n 46, 37, and Europol, n 37.

iii. The Corruption of State Officials

The corruption of State officials and law enforcers is a factor which serves to undermine efforts to combat trafficking. Corruption will play a significant part in preventing prosecution of traffickers, and ensures the continuance of OCG activities. Indeed, 'As law enforcement personnel and government officials become more corrupt and members of the crime groups gain more influence, the line between the state and the criminal networks starts to blur.'¹⁶⁴ Matters such as turning a blind eye at border controls further the low risk environment and facilitate the transnational nature of trafficking and the cross border criminality of the trafficking networks. La Strada Ukraine¹⁶⁵ states, as regards the problematic nature of tackling the trafficking phenomenon, that '[c]omplacency on the part of government and law enforcement officials is as much to blame as financial difficulties.'¹⁶⁶

Many Eastern European OCGs are almost impenetrable as a result of corruption, coupled with a high level of sophistication, or close ethnic and cultural ties. It is reported that corruption and complicity by law enforcers in Bosnia and Herzegovina, for example, is commonplace, where the police directly and indirectly facilitate human trafficking.¹⁶⁷ Their involvement can go as far as part-ownership of clubs and brothels, or as guards, informants, and clients, as well as involvement in the provision of false documents for trafficked victims.

¹⁶⁴ D M Hughes, 'The 'Natasha' Trade: The Transnational Shadow Market of Trafficking in Women', Special issue of Journal of International Affairs; In the Shadows: Promoting Prosperity or Undermining Stability? (Spring 2000) Vol. 53, No. 2, 625 – 651, 633.

¹⁶⁵ La Strada Ukraine describes itself as 'a non-governmental organization in Ukraine with a bi-directional goal: working to prevent trafficking in women and helping the victims of trafficking', see, <<http://www.brama.com/lastrada/about.html>> accessed 12 December 2008.

¹⁶⁶ Lily Hyde, *Women's groups battle sex slavery*, Kyiv Post, 23 January 1998.

¹⁶⁷ Europol, n 37, 28.

Brussa identifies ‘Lack of an effective international regime for collecting data, providing information and penalizing organized international trafficking networks, ensuring that the problem remains hidden’,¹⁶⁸ as one of the central reasons for the continual rise in trafficking. Ultimately, OCGs are able to continue their activities due to a number of significant factors. There is a lack of effective law enforcement, made worse by corruption. Prosecution rates for trafficking offences in the UK are not overly impressive.¹⁶⁹ Further to this, there may be a lack of effective procedures for support and protection of trafficked persons.¹⁷⁰

There is a well-established sex industry in Europe, which is not going to disappear. This sex industry needs workers in order for OCGs to continue to make money, and the well-established links and networks between OCGs in Europe and the EU have ensured, at least for the time being, that the needs of consumers are fully met. However, OCGs are, of course, operating unlawfully and are now subject to greater vigilance than ever before as a result of the raised profile of their activities and the recognition that more efficient responses are needed to combat these transnational criminal organisations.

Human trafficking is clearly a multi-faceted and highly problematic phenomenon. The complex underlying ‘push’ and ‘pull factors’, which mirror the market forces of supply and demand require a coordinated response which aims to prevent, prosecute and punish those responsible for trafficking activity, as well as to provide support and protection to individuals who have been trafficked.

¹⁶⁸ L Brussa, n 108, 42.

¹⁶⁹ In the period 2009 - 2010, 106 prosecutions were secured for human trafficking offences. See Mr Hanson, Written Answers to Questions, Hansard HC, Column 935W (30 March 2010). Also see, for example, UK Human Trafficking Centre, ‘United Kingdom Pentameter 2’ n 111, and See also Nick Davies, n 111.

¹⁷⁰ This issue will be discussed further throughout Chapter 4.

This Chapter has so far evaluated the underlying factors relevant to the continuance of human trafficking. This evaluation has included consideration of (largely economic) ‘push’ factors which may account for a potentially significant proportion of trafficking situations, which, at least at its beginning is on a voluntary (and therefore consensual) basis, so far as the person being transported is concerned. Further, other relevant issues such as the role played by organised criminals has been considered. These (and other) agents play a central role in the trafficking of women for sexual exploitation, whether it starts as an apparently voluntary agreement or as outright kidnapping for the purpose of forced sex work – the latter situation perhaps better reflecting how trafficking is typically perceived. This Chapter now turns to consideration of the relationship between transnational law criminal law and human rights, and will go on to outline and provide an overview of the obligations placed upon States by the international legal anti-trafficking regime.

II. Transnational Criminal Law and Human Rights

As is the case with respect to many transnational criminal activities, States have found that recourse to criminal sanctions, however desirable, is extremely difficult without modifications to the substantive criminal law, including the creation of extraterritorial offences, and elaborate cooperation between national investigatory and prosecution authorities of States. Establishing each of these transnational regimes has to take into account its particular characteristics but they have factors in common. One of those features, which of course applies to all criminal law and procedure, not just transnational law, is the relevance of human rights law – both as imposing certain specific duties on States, even with respect to private action (like the activities of

organised crime) and for the protection of victims, on the one hand, and for providing the framework for criminal investigation and fair trials for those suspected of offences under the transnational regime.

The aim of anti-trafficking legislation is to combat trafficking through imposing criminal responsibility on the traffickers and obligations on the state both to prevent and punish traffickers, and to provide for protection and support of victims with respect for their human rights. One element in the response of States to trafficking is to criminalise the activities of those who engage in trafficking, partly as a mark of the seriousness of the impact of trafficking on the women caught up in it,¹⁷¹ and partly due to the transnational nature of trafficking activity. With respect to the latter, the prospects of a wholly national, effective, criminal response may be remote due to jurisdictional restrictions and the need for criminal cooperation between affected States.¹⁷² Where there is conduct wholly within one State (i.e. where ‘internal’ trafficking occurs) and defendants are found it may be possible to proceed against them under the ‘ordinary’ criminal law,¹⁷³ without needing to go into the complications of trafficking prosecutions.

Provided that an adequate anti-trafficking regime is in place, the State in question has fulfilled its human rights obligations up until the point where the putative victim is discovered in the destination State. Consequently, another element of the response to trafficking has been explicit recognition of the ‘special position’ of the victims of human trafficking. What this means is that due to the non-consensual nature of human

¹⁷¹ It should be noted at this point that trafficking is not restricted to the exploitation of women for paid for sex. However, the latter situation provides the framework of enquiry for this thesis.

¹⁷² Although the EU 2011 Directive could go some way toward resolving some of these issues – see section A, subsection i, below. Matters relating to jurisdiction are specifically discussed, within that subsection, on page 65.

¹⁷³ In the United Kingdom, for example, provisions exist which target activity which can take place either as part of or independently from human trafficking – one such example being the criminalisation of ‘controlling prostitution for gain’, contrary to Sexual Offences Act 2003, s 53.

trafficking, these women should not be treated as mere illegal immigrants, subject to peremptory removal processes and/or criminal proceedings for immigration¹⁷⁴ (or some other¹⁷⁵) offences committed as a result of having been trafficked.

This may have a purely humanitarian basis but can be reinforced by the ordinary human rights obligations of the destinations States – the trafficked women may have suffered inhuman treatment or have been subjected to slavery-like practices or forced labour,¹⁷⁶ which might include protection against return to a jurisdiction where there is a real risk that the same thing could happen to them again. The obligations of States under the anti-trafficking regime include positive actions, such as effective criminal prosecution of the individuals involved, the engagement of the victims in the criminal process etc. Where criminal proceedings may properly be taken against the victims, their vulnerability must be taken into account in determining what constitutes a fair trial.¹⁷⁷

The interrelation between international criminal law and human rights law is central to the anti-trafficking regime.¹⁷⁸ The following sections will set out the international legal regime outlining the obligations placed upon States. The relevant legal provisions of the relevant UN, Council of Europe, and EU instruments will be considered. Aspects of the legal regime which are central to the enquiry made in this thesis – namely the definition of human trafficking,¹⁷⁹ the role of consent,¹⁸⁰ and the treatment of ‘victims’¹⁸¹ - are considered in greater detail in subsequent Chapters.

¹⁷⁴ See Chapter 4, Part VI, section A, for discussion of *R v O* [2008] EWCA Crim 2835

¹⁷⁵ See *R v LM* [2010] EWCA Crim 2327; [2011] 1 Cr. App. R. 12; [2011] Crim. L.R. 425, discussed in Chapter 4, Part VII.

¹⁷⁶ See Chapter 2, *passim*, for detailed discussion of the meaning of these terms as aspects of ‘exploitation’ as a ‘purpose’ element of human trafficking.

¹⁷⁷ See, Chapter 4, Part VII, for discussion of prosecutorial discretion as regards offences committed by individuals who might be trafficked victims.

¹⁷⁸ See, Chapter 2, Part IV, section B, for discussion of this issue.

¹⁷⁹ See, Chapter 2 for full discussion of the international legal definition of human trafficking

¹⁸⁰ See, Chapter 3 for full discussion of the role of consent in human trafficking. The basic principles of consent are outlined at a later point in this Chapter (Part III, below), in order to introduce and define the

A. The International Criminal Regime – State Obligations

This section serves to outline the principal features of the main international instruments which deal with trafficking as a transnational criminal matter. The object is not to produce a comprehensive account of these provisions, but to indicate and outline the structure of the regimes, the main obligations placed upon States by these regimes, and to identify those issues which will be treated in some detail later in the thesis.¹⁸²

i. Criminalisation, Prosecution and Punishment of Traffickers

The legal and policy responses to human trafficking are paramount to making destination States into hostile environments for traffickers and organised criminal networks to operate. The transnational nature of human trafficking demands an international response. This has come notably from the United Nations, the Council of Europe, and the European Union, all of which have recently¹⁸³ produced instruments aimed at strengthening measures to prevent and combat human trafficking.

In 2000, the UN Trafficking Protocol was adopted.¹⁸⁴ The UN Trafficking and Smuggling Protocols are annexed to the UN Organized Crime Convention, which requires Parties to criminalise the following: participation in an OCG;¹⁸⁵ the laundering

concept of consent, and to provide a basis for further analysis of this concept specifically within the context of human trafficking in Chapter 3.

¹⁸¹ See, Chapter 4 for full discussion of provisions and practice relating to assistance to and support of victims.

¹⁸² Notably, the thesis will treat in detail the provisions relating to the treatment of victims and the effect that the consent/coercion spectrum has upon determining who is and who is not a 'victim', and how they should be treated.

¹⁸³ I.e. over the past decade or so.

¹⁸⁴ UN Trafficking Protocol, n 5.

¹⁸⁵ Article 5.

of proceeds of crime;¹⁸⁶ corruption (of public officials);¹⁸⁷ and the obstruction of justice.¹⁸⁸ In the UK, organised crime is defined as ‘those involved, normally working with others, in continuing serious criminal activities for substantial profit, whether based in the UK or elsewhere’.¹⁸⁹ The Serious Organised Crime and Police Act 2005 established a Serious Organised Crime Agency (SOCA), whose functions include preventing and detecting serious organised crime.¹⁹⁰ A National Crime Agency has recently been proposed to replace SOCA¹⁹¹ which ‘will include a dedicated Border Police Force with the aim of combating organised crime — including human trafficking — more effectively at the border.’¹⁹²

The Trafficking Protocol was the first international instrument concerned with combating human trafficking, and has paved the way for subsequent instruments with comparable aims to be drafted. To date, the Protocol has 117 parties.¹⁹³ The central aims of the Protocol are to prevent and combat human trafficking, to protect and assist victims with full respect for their human rights, and to promote State cooperation in achieving these objectives.¹⁹⁴

Article 3 provides the definition of human trafficking, which is reproduced in the Introduction to this thesis.¹⁹⁵ The Article goes on to say that consent (to the intended

¹⁸⁶ Article 6.

¹⁸⁷ Article 8.

¹⁸⁸ Article 2.

¹⁸⁹ Serious Organised Crime Agency, ‘Organised Crime Groups’, <<http://www.soca.gov.uk/threats/organised-crime-groups>> accessed 01 Jan 2011.

¹⁹⁰ Serious Organised Crime and Police Act 2005, s 2.

¹⁹¹ See Home Office, ‘Policing in the 21st century: reconnecting police and the people’ July 2010 <<http://www.homeoffice.gov.uk/publications/consultations/policing-21st-century/policing-21st-full-pdf?view=Binary>> accessed 01 July 2011, and BBC News ‘SOCA: Highs and Lows of Serious Organised Crime Agency’ (8 June 2011) <<http://www.bbc.co.uk/news/mobile/uk-13681317>> accessed 01 July 2011.

¹⁹² Home Office, ‘Home Office Defends Position on Human Trafficking’ 31 August 2010 <<http://www.homeoffice.gov.uk/media-centre/news/trafficking-directive>> accessed 01 July 2011.

¹⁹³ United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en> accessed 03 March 2011.

¹⁹⁴ Article 2.

¹⁹⁵ See, Introduction, Part III.

exploitation) is irrelevant where any of the ‘means’ to implement the transportation and exploitation of people set out in the above paragraph are employed, but that it is not necessary to prove that any of those means were employed where a child is concerned, a child being any person under eighteen years of age. The elements of the abovementioned definition (and therefore the offence of trafficking) are analysed in depth in Chapter 2.

In order to effectively combat trafficking, criminalisation of trafficking activity is needed. State parties are called upon by the Trafficking Protocol to criminalise human trafficking where: perpetrators acted with intent; acted as accomplice; or played an organisational or directorial role in the commission of the trafficking offence.¹⁹⁶

More recently, the Council of Europe drafted the Convention on Action against Trafficking in Human Beings.¹⁹⁷ To date, the Convention has 43 parties.¹⁹⁸ Concerned with prevention and prosecution as well as victim protection, the CoE Trafficking Convention replicates verbatim the definition of human trafficking and many of the obligations contained within the UN Trafficking Protocol - but it goes further in some respects.¹⁹⁹

The CoE Trafficking Convention has broader scope of application than the UN Trafficking Protocol as the former only applies (unless stated otherwise) ‘where those offences are transnational in nature and involve an organized criminal group’.²⁰⁰ The CoE Trafficking Convention, however, applies ‘to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised

¹⁹⁶ Article 5.

¹⁹⁷ CoE Trafficking Convention, n 9.

¹⁹⁸ Chart of signatures and ratifications available at

<<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG>>
accessed 22 Feb 2011.

¹⁹⁹ Most notably in terms of the provisions concerning the treatment of victims – see Chapter 4, Part IV, for fuller discussion of this issue.

²⁰⁰ Article 4.

crime.’²⁰¹ Article 31 establishes matters relating to jurisdiction, in requiring States to adopt legislative or other measures to establish jurisdiction over trafficking offences committed within and without the territory of the State.²⁰²

Article 18 provides a solid obligation as regards measures to establish trafficking activity as criminal conduct at a domestic level. Unlike the Trafficking Protocol, which remains silent on the issue of criminal sanctions beyond actual criminalisation of human trafficking, the CoE Trafficking Convention makes specific mention of sanction in Article 23(1) in stating that:

Each Party shall adopt such legislative and other measures as may be necessary to ensure that (trafficking offences) are punishable by effective, proportionate and dissuasive sanctions. These sanctions shall include, for criminal offences established in accordance with Article 18 when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.

The European Convention on Extradition²⁰³ and the European Arrest Warrant²⁰⁴ use potential sentencing as part of the definition of extradition offences and it is, then, necessary that trafficking and associated offences be at least so punishable in order to use the criminal cooperation mechanisms of the European systems.²⁰⁵ Article 23 of the

²⁰¹ Article 2.

²⁰² Article 31 requires that jurisdiction be established where the offence is committed ‘in its territory; or on board a ship flying the flag of that Party; or on board an aircraft registered under the laws of that Party; or by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State; against one of its nationals.’

²⁰³ European Convention on Extradition (signed 13 Dec 1957, entered into force 18 April 1960).

²⁰⁴ See Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

²⁰⁵ Article 2 of the European Convention on Extradition envisages sentencing of at least 12 months, and the European Arrest Warrant applies ‘where a final sentence of imprisonment or a detention order has

CoE Trafficking Convention also addresses the applicability of sanctions to legal persons,²⁰⁶ confiscation of proceeds of crime in this context, and ‘the temporary or permanent closure of any establishment which was used to carry out trafficking in human beings’.²⁰⁷

Aggravating circumstances are addressed in Article 24 which identifies these as where:

... the offence deliberately or by gross negligence endangered the life of the victim; the offence was committed against a child; the offence was committed by a public official in the performance of her/his duties; the offence was committed within the framework of a criminal organisation.²⁰⁸

The Article does not specify the sanction or consequences of aggravated offences, beyond stating that the abovementioned offences shall be ‘regarded as aggravating circumstances in the determination of the penalty’,²⁰⁹ thereby calling for more severe penalties where such offences are committed.

Combating human trafficking has also consistently featured high on the EU agenda in recent years, with law and policy adopted over the past decade indicating a

been imposed for a period of at least four months’ and ‘for offences punishable by imprisonment or a detention order for a maximum period of at least one year’. See Summary to Council Framework Decision 2002/584/JHA, *ibid*. The summary goes on to state that ‘If they are punishable in the issuing Member State by a custodial sentence of at least three years, the following offences, among others, may give rise to surrender without verification of the double criminality of the act: terrorism, trafficking in human beings...’

²⁰⁶ Article 23(2).

²⁰⁷ Article 23(3).

²⁰⁸ Article 24 (a) – (d).

²⁰⁹ Article 24.

clear intention to do just that.²¹⁰ Article 5(3) of the EU Charter of Fundamental Rights²¹¹ even provides for explicit prohibition of trafficking in human beings.²¹²

In July 2002, a Council Framework Decision (the 2002 Framework Decision) on combating trafficking in human beings was adopted,²¹³ addressing human trafficking for sexual and labour exploitation. The 2002 Framework Decision included provisions which defined human trafficking (and the aiding and abetting thereof²¹⁴) as an act to be prohibited and punishable by Member States²¹⁵ through use of ‘proportionate and dissuasive criminal penalties’.²¹⁶

The most recent EU legislation comes in the form of the 2011 Directive,²¹⁷ which replaces the abovementioned Framework Decision. The initial UK response demonstrated a reluctance to opt in to this Directive, claiming that there would be ‘No benefits for the UK’.²¹⁸ Unsurprisingly, this decision was criticised.²¹⁹ Subsequent to the text of the Directive being finalised, the UK Government has, however, indicated an intention to opt in.²²⁰

²¹⁰ See European Commission website: ‘Fight against Trafficking in Human Beings’

<<http://ec.europa.eu/anti-trafficking/index.action>> accessed 1 Sept 2010.

²¹¹ See Charter of Fundamental Rights of the European Union [2000] OJ C364/01, reprinted [2010] OJ C83/389 <http://www.europarl.europa.eu/charter/pdf/text_en.pdf> accessed 12 June 2011, Implemented by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (2007/C 306/01).

²¹² Article 5.

²¹³ Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [2002] OJ L 203/1

²¹⁴ Article 2.

²¹⁵ Article 1

²¹⁶ Article 3. This Article goes on to provide examples of aggravating circumstances which would call for a custodial sentence of no less than 8 years, such as the use of serious violence or involvement with organised crime

²¹⁷ EU 2011 Directive, n 10.

²¹⁸ Home Office, n 192.

²¹⁹ See, for example, CARE, ‘EU Directive ON Human Trafficking: Why the Government Should Opt In’

<<http://www.care.org.uk/wp-content/uploads/2011/02/EU-Directive-on-Human-Trafficking-Why-the-UK-should-opt-in-7-Feb-2011.pdf>> accessed 25 March 2011.

²²⁰ See Parliamentary Business, ‘MPs debate EU Directive on Human Trafficking’ UK Parliament website 10 May 2011 <<http://www.parliament.uk/business/news/2011/may/trafficking-in-human-beings/>> accessed 11 May 2011, where it was stated that the European Scrutiny Committee recommended in a report that the UK Government should opt in, and Damien Green stated that ‘...the [European Scrutiny] Committee acknowledged that the objective of preventing and combating trafficking

The 2011 Directive reconciles discrepancies between Member State law in terms of prevention and prosecution (of trafficking and traffickers) as well as protection and treatment of victims of trafficking²²¹ - the latter is outlined below and specifically discussed in Chapter 4.²²² Substantive criminal law provisions build upon the matters covered by the 2002 Framework Decision, and include prohibiting and making punishable the acts provided within the definition of human trafficking, provided in Article 2 (which is phrased in almost exactly the same terms as the UN Trafficking Protocol and CoE Trafficking Convention²²³) by a maximum of at least 5 years custodial sentence.²²⁴ The 2011 Directive also provides for aggravating circumstances on the part of the trafficker which are punishable by a maximum of at least 10 years custodial sentence.²²⁵ Inchoate offences are also punishable.²²⁶

A welcome move under the Directive is the establishment of jurisdiction over Member State nationals or residents who commit trafficking offences outside of their

cannot be sufficiently achieved by member states alone and can, by reason of both its scale and effects, be better achieved by action at EU level. Our intention to opt in is consistent with that view.’ – See, Home Office, (Minister of State of Immigration, Damian Green) ‘EU Directive on Human Trafficking – Written Ministerial Statement’ (22 March 2011) <<http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/eu-direct-human-trafficking-wms/>> accessed 22 March 2011, and European Scrutiny Committee report ‘Trafficking in Human Beings’, 9 March 2011, <<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-xxii/42805.htm>> accessed 24 March 2011.

²²¹ See European Commission website: ‘Fight against Trafficking in Human Beings’ <<http://ec.europa.eu/anti-trafficking/index.action>> accessed 1 Sept 2010.

²²² Specific legislation includes Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261/19, which is discussed in Chapter 4, Part I, section A.

²²³ The definition provided within the EU 2011 Directive replicates almost verbatim the UN Trafficking Protocol definition, yet goes further with regard to the ‘purpose’ element in that it includes ‘begging’ as an example of forced labour or services.

²²⁴ As required by Article 4, EU 2011 Directive.

²²⁵ Article 4 covers aggravating factors, which are where: the offence was committed against a victim who was particularly vulnerable, which, in the context of this Directive, shall include at least child victims; the offence was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] L 300/42; the offence deliberately or by gross negligence endangered the life of the victim; the offence was committed by use of serious violence or has caused particularly serious harm to the victim.

²²⁶ Article 3 requires ‘Inciting, aiding, abetting and attempting’ to be made punishable by States.

country of nationality or residence.²²⁷ A separate EU Directive provides for prosecution and punishment of employers of illicit third-country national where the employer is aware of the victim's status as trafficked.²²⁸

The UK response has been to criminalise human trafficking and related activity with a veritable plethora of offences, so that the elements of the internationally accepted definition of human trafficking are fragmented across different provisions. Various provisions were enacted and repealed²²⁹ so that at present many of the central provisions relating to sex trafficking are found in the Sexual Offences Act 2003 (SOA 2003).

Trafficking into, within and out of the UK are criminalised by sections 57 – 59 SOA 2003. According to these provisions, A commits an offence if he facilitates the entry, travel within, or departure from the UK of B, and A intends to or believes that another is likely to do something which would constitute a 'relevant offence', the latter being primarily (although not exclusively)²³⁰ an offence under Part 1 of the SOA 2003.²³¹ Part 1 has broad reach, including offence ranging from rape²³² to controlling prostitution for gain,²³³ and due to the sheer magnitude of 'relevant offences' contained within that Part, it seems that simplified, consolidatory legislative measures would not be unwelcome. A further trafficking offence is provided within s.4 of the Asylum and

²²⁷ Article 10.

²²⁸ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24.

²²⁹ Such as the offence of 'Trafficking in Prostitution', found in s.145 of the Nationality, Immigration and Asylum Act 2002 and repealed by Sexual Offences Act 2003 (hereafter 'SOA') (Schedule 7) as of as of 1 May 2004 [SI 874 (2004)].

²³⁰ SOA 2003, s 60 also includes as 'relevant offences': 'an offence under section 1(1)(a) of the Protection of Children Act 1978 (c. 37); an offence listed in Schedule 1 to the Criminal Justice (Children) (Northern Ireland) Order 1998 (S.I. 1998/1504 (N.I. 9)); an offence under Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 (S.I. 1978/1047 (N.I. 17)), or anything done outside England and Wales and Northern Ireland which is not an offence within any of paragraphs (a) to (d) but would be if done in England and Wales or Northern Ireland.'

²³¹ SOA 2003, s 60.

²³² SOA 2003, s 1.

²³³ SOA 2003, s 53.

Immigration (Treatment of Claimants) Act 2004, which addresses facilitation of entry or arrival into the UK of an individual, coupled with non-consensual exploitation of said individual. All of the aforementioned offences include a lack of consent element, save in the case of minors. The penalty for a trafficking offence under national law ranges from a fine not exceeding the statutory maximum, to a custodial sentence not exceeding 14 years.²³⁴

People smuggling offences are dealt with elsewhere in the UK legislative framework,²³⁵ and are characterised by illicit facilitation of movement of an individual. The maximum penalty for smuggling offences is a 14 year custodial sentence. Consequently, there is on the face of it potentially no difference as to the sanction to be applied to traffickers and smugglers prosecuted in the UK, although severity sentencing may vary to reflect the severity of the offence in individual cases. Further to this, the ultimate sanction in a trafficking case will vary according to whether (and which of) any of the ‘relevant offences’ is also committed.

Bespoke operations have been undertaken in the UK, such as Pentameter and Pentameter 2, aimed at locating and arresting traffickers operating here and rescuing their victims. Operation Pentameter 2 reportedly led to 15 convictions for trafficking (with or without other related offences), although the report from the UK Human Trafficking Centre²³⁶ which provides these statistics does not specify whether those convictions were for trafficking for sexual or labour exploitation. The report treats sex

²³⁴ SOA 2003, ss 57(2), 58(2) and 59(2).

²³⁵ Immigration Act 1971, s 25 (substituted by the Nationality, Immigration and Asylum Act 2002, s143) creates an offence of assisting unlawful immigration (known as facilitation) and also covers acts previously dealt with under the old offence of ‘harbouring’. Immigration Act 1971, s 25A (also substituted by the Nationality, Immigration and Asylum Act 2002, s143) creates an offence of knowingly facilitating the arrival or entry of another into the UK for gain, coupled with knowledge or reasonable cause to believe that the individual is an asylum seeker. Immigration Act 1971, s 25B(1) of that Act (also substituted by the Nationality, Immigration and Asylum Act 2002, s143) addresses assisting entry into the UK in breach of deportation or exclusion order. Immigration Act 1971, s 25B(3) of that Act provides for assisting entry/remaining of an excluded person.

²³⁶ See, UK Human Trafficking Centre, n 111.

trafficking and labour trafficking separately in terms of the amount of reported victims of either form of exploitation,²³⁷ yet convictions for trafficking offences are listed under a generic heading. Conflicting opinions exist as to the actual success (or otherwise) of this operation.²³⁸ Nonetheless, the criminal law anti-trafficking provisions in the UK clearly have had some reach in terms of prosecution and punishment for trafficking offences, as decided cases indicate.²³⁹

Prohibition and prosecution are, of course, only part of the picture. Preventative measures and effective monitoring mechanisms are undoubtedly a valuable aspect of the anti-trafficking regime. The following section will consider such measures as are envisaged by the main anti-trafficking instruments.

ii. Prevention and Monitoring

The UN Trafficking Protocol requires that States take measures to prevent human trafficking and re-victimisation, such as ‘research, information and mass media campaigns and social and economic initiatives’.²⁴⁰ Cooperation with NGOs and other relevant bodies is called for in implementing such measures.

The Trafficking Protocol also calls for action by origin States to ‘alleviate the factors that make persons, especially women and children, vulnerable to trafficking,

²³⁷ 164 victims were identified for sexual trafficking and 5 for labour trafficking, potentially indicating the prevalence of sex trafficking in the UK, although not conclusively probative. See UK Human Trafficking Centre, ‘United Kingdom Pentameter 2, Statistics of Victims recovered and Suspects arrested during the operational phase’, n 111, which cites 15 convictions for trafficking offences secured as a result of the Operation.

²³⁸ See, for example, UK Human Trafficking Centre, n 111, and also Nick Davies, n 111.

²³⁹ See, for example, *Attorney General's Reference (Nos.37, 38 and 65 of 2010)*, *Re* [2010] EWCA Crim 2880; [2011] Crim. L.R. 336; (2010) 108(2) L.S.G. 18; Times, February 24, 2011; *R. v Maka (Shaban)* [2005] EWCA Crim 3365; [2006] 2 Cr. App. R. (S.) 14; *Attorney General's Reference (No.6 of 2004)*, *Re Also known as: R. v Plakici (Luan)* [2004] EWCA Crim 1275; [2005] 1 Cr. App. R. (S.) 19; (2004) 148 S.J.L.B. 541.

²⁴⁰ Article 9 (2).

such as poverty, underdevelopment and lack of equal opportunity'.²⁴¹ Noll²⁴² asserts that the relevant factors such as poverty and lack of education which exacerbate the risk of human trafficking are in fact themselves human rights violations. However, Piotrowicz recognises that:

... it nevertheless remains the case that the State has not done the trafficking. The fear of having one's social and economic rights violated might also suffice to make someone vulnerable to other threats but it is a big leap from there to the point where the State is responsible for the criminal acts of another. To make a tort analogy, is not the damage too remote?²⁴³

Further to these requirements, the Trafficking Protocol addresses the issue of cooperation and training of law enforcement and immigration officials, as well as other relevant authorities, in terms of the exchange of information to help determine whether individuals attempting to cross international borders are either traffickers or victims of trafficking. The Protocol states that '[t]he training should also take into account the need to consider human rights and child-and gender-sensitive issues'.²⁴⁴ Information exchange regarding the types of travel documents used by traffickers and trafficked persons, and the methods and means used by OCGs to recruit and transport victims such as the routes used etc, is also envisaged.²⁴⁵

²⁴¹ Article 9 (4).

²⁴² G Noll, 'The Insecurity of Trafficking in International Law', in *Globalization, Migration and Human Rights: International Law Under Review*, 343, 353 (Vincent Chetail ed., Bruylant, Bruxelles 2007).

²⁴³ R Piotrowicz, 'The Legal Nature of Trafficking in Human Beings', *Intercultural Human Rights Law Review*, Vol. 4, 2009, 179, 184 – 5.

²⁴⁴ Article 10(2).

²⁴⁵ Article 10(1).

Similarly, the CoE Trafficking Convention goes beyond prosecution and punishment of traffickers, and also has a provision relating to origin State action regarding the reduction of vulnerability of the putative victim.²⁴⁶ According to this provision, States are called upon to take measures to prevent and combat human trafficking through coordination between the relevant bodies responsible for combating human trafficking, as well as strengthening polices and prevention programmes, through ‘...research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings.’²⁴⁷

A monitoring mechanism is provided for within Article 36, whereby a Group of Experts against trafficking in human being (GRETA)²⁴⁸ and the Committee of the Parties²⁴⁹ will help to ensure effective implementation through the provision of periodic reports relating to the implementation measures adopted by each party and the adoption of recommendations with respect to the implementation measures taken or yet to be taken. These recommendations are not binding upon the State party in national or international law.

²⁴⁶ Article 5(2) states that ‘Each Party shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings.’

²⁴⁷ Article 5(2).

²⁴⁸ Described in the Explanatory Report to the CoE Trafficking Convention as ‘a technical body, composed of independent and highly qualified experts in the area of Human Rights, assistance and protection to victims and the fight against trafficking in human beings, with the task of adopting a report and conclusions on each Party’s implementation of the Convention.’ See Explanatory Report to the CoE Trafficking Convention, para 354, <<http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm>> accessed 01 July 2011.

²⁴⁹ Described as ‘a more political body, the Committee of the Parties, composed of the representatives in the Committee of Ministers of the Parties to the Convention and of representatives of Parties non-members of the Council of Europe, which may adopt recommendations, on the basis of the report and conclusions of GRETA, addressed to a Party concerning the measures to be taken to follow up GRETA’s conclusions.’ See Explanatory Report to the CoE Trafficking Convention, para 354, *ibid*.

The EU 2011 Directive includes similar prevention-based provisions,²⁵⁰ and calls for action such as:

... information and awareness raising campaigns, research and education programmes, where appropriate in cooperation with civil society organisations, aimed at raising awareness and reducing the risk of people, especially children, becoming victims of trafficking in human beings.²⁵¹

Training for those likely to come into contact with putative victims is called for, so that said individuals can adequately identify and deal with trafficked persons.²⁵²

Establishment of national monitoring mechanisms such as National Rapporteurs²⁵³ (or ‘equivalent mechanisms’) by Member States is required by Article 19 of the Directive. The ‘equivalent mechanism’ in the UK is the Inter-Departmental Ministerial Group on Trafficking, whose duties have included monitoring progress on the UK Action Plan on Tackling Human Trafficking,²⁵⁴ and the implementation of the CoE Trafficking Convention.

Measures intended to have further preventative effect are currently under consideration in the guise of the UK Human Trafficking (Border Control) Bill 2010 – 2011, which aims to ‘require border control officers to stop and interview potential

²⁵⁰ Article 18.

²⁵¹ Article 18(2).

²⁵² Article 18(3).

²⁵³ Article 19 provides that the role of the Rapporteur would include carrying out assessments of trends in trafficking in human beings, gathering statistics, and measuring the results of anti-trafficking actions, and produce regular reports.

²⁵⁴ See Home Office and Scottish Executive, ‘UK Action Plan on Tackling Human Trafficking’ (March 2007) <<http://www.homeoffice.gov.uk/documents/human-traffick-action-plan?view=Binary>> accessed 4 January 2008.

victims of trafficking notwithstanding entitlements under European Union law to free movement of persons; and for connected purposes.²⁵⁵

Measures to discourage the demand for the product of exploitation of trafficked persons are encouraged by the Trafficking Protocol,²⁵⁶ the CoE Trafficking Convention,²⁵⁷ and the EU 2011 Directive.²⁵⁸ Legislation aimed at reducing the demand for sold sexual services has been enacted in several countries over the last decade or so, including the UK, and will be discussed in the following section.

iii. Prevention through Demand Reduction Measures

As the demand for the purchase of commercial sex continues and increases so will the supply of local sex workers, trafficked sex workers, and migrant workers who choose to migrate for the economic purpose of sex work. Preventative measures envisaged by the relevant legal instruments frequently touch upon the issue of addressing the demand for sexual services.

Article 6 of the CoE Trafficking Convention suggests that demand sanctions may be considered by States, by requesting that:

²⁵⁵ See Parliamentary Business, Bills and Legislation, ‘Human Trafficking (Border Control) Bill 2010 – 2011’ <<http://services.parliament.uk/bills/2010-11/humantraffickingbordercontrol.html>> accessed 01 June 2011.

²⁵⁶ Article 9(5).

²⁵⁷ Article 6.

²⁵⁸ Article 18(1) and (4).

To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures...²⁵⁹

The UN Trafficking Protocol has a similar provision.²⁶⁰ The CoE Convention also specifically calls for consideration by Parties of the criminalisation of use of the services provided by the object of exploitation (i.e. the trafficked person) where there is knowledge of the individual's status as trafficked.²⁶¹ Similarly, the EU 2011 Directive states that 'Member States shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings',²⁶² and also specifically calls for consideration by Member States of the criminalisation of use of the services of the trafficked person where there is knowledge of her status as trafficked.²⁶³

The Explanatory Memorandum to the Proposal for the EU 2011 Directive highlights the potentially controversial nature of such measures in stating that:

The issue of introducing a specific obligation to criminalise clients who knowingly use sexual services from a trafficked person was controversial

²⁵⁹ Article 6.

²⁶⁰ Article 9(5) targets the demand aspect, and requires that 'States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.'

²⁶¹ Article 19.

²⁶² Article 18(1).

²⁶³ Article 18(4).

among stakeholders. Several MS (Member States) pointed out that in any case such a provision should not be binding.²⁶⁴

Accordingly, the provision is not binding. This continues the theme of addressing sex work in a trafficking context without prejudice as to how individual countries or Member States choose to address it.²⁶⁵

Current legislative examples in various States have taken the form of criminalising the purchase of sexual services. The UK response was to enact the Policing and Crime Act 2009, section 14 of which contains a strict liability offence which criminalises the purchase of sexual services from an individual who is forced, coerced, or deceived into providing them.²⁶⁶ The proposed use of demand sanctions such as these, although part of a larger overarching UK action plan to combat human trafficking,²⁶⁷ was at least initially based upon a Swedish model, where the purchase of sold sex has been criminalised since 1999.²⁶⁸ The Swedish model does not require the existence of force, coercion etc – it constitutes an outright prohibition in any circumstances.

Finland has also adopted a nuanced model. In 2006, an amendment was made to the Finnish Penal Code which criminalised the purchase of sexual services from victims of pimping or trafficking. The original proposals behind the Finnish legislative

²⁶⁴ See Explanatory Memorandum to the Proposal for the 2010 Directive, at 2.1.2 <http://ec.europa.eu/anti-trafficking/download.action?nodeId=24dad5a5-7144-4331-9f4c-64c6509764e2&fileName=EC+Proposal+for+a+Directive+on+combating+trafficking+COM+2010_95_en.pdf&fileType=pdf> accessed 30 Dec 2010. The Directive is now in force – see, n 10, above.

²⁶⁵ The terms ‘sexual exploitation’ and ‘exploitation of prostitution’ are not defined within the trafficking definition, as discussed in Chapter 2, Part IV, section C.

²⁶⁶ Policing and Crime Act 2009, s 14.

²⁶⁷ Home Office and Scottish Executive, ‘UK Action Plan on Tackling Human Trafficking’, n 254.

²⁶⁸ The Swedish Law Prohibiting the Purchase of Sexual Services, 1998: Law (1998:408) Prohibition of the Purchase of Sexual Services; *Lag ou förbund mot köp av sexuella tjänster* (1998): Dem som mot ersättning skaffar sig en tillfällig sexuell förbindelse, doms – om inte gärningen är belagd med straff enligt Brottsbalken – för köp av sexuella tjänster till böter eller fängelse i högst sex månader. För försök döms till ansvar enligt 23 kap. Brottsbalken, now enshrined in the Swedish Penal Code.

amendments were to adopt a Swedish-style blanket criminalisation, but these proposals were rejected.

In light of these recent legislative responses to the demand for sold sex, a question to be determined is as to whether certain ways of managing prostitution do have an effect on demand of such significance that it distorts trafficking patterns, and whether such measures are proportionate in terms of the negative side effects that they may bring. The reasons for introducing such measures as demand sanctions might not always be trafficking related but their effectiveness might be relevant to anti-trafficking strategies.

The Swedish model was not conceived as an anti-trafficking measure. Some sources report that the Swedish law has had a positive effect as regards combating sex trafficking into Sweden,²⁶⁹ and that it is no longer an attractive destination for traffickers:²⁷⁰ ‘In conversations recorded during crime investigations, pimps/procurers and traffickers have expressed frustration about setting up shop in Sweden and attracting customers who are willing to buy their women in prostitution.’²⁷¹ However, some commentators say that there is no conclusive evidence for this,²⁷² and sceptics might suggest that the effect of the Swedish Law may only have been to divert the problem elsewhere. The UK model – in force since April 2009 – has yet to result in any

²⁶⁹ In the 2003 and 2004 reports, The Swedish National Rapporteur for Trafficking in Women at the National Criminal Investigation Department noted that the Swedish Law has had positive effects as regards combating trafficking, see Justis- og Politidepartementet (Ministry of Justice and the Police) ‘Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences, An abbreviated English version, A Report by a Working Group on the legal regulation of the purchase of sexual services’ (Issued on 8 October 2004)

<http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing_sexual_services_in_sweden_and_the_netherlands.pdf> accessed 01 July 2011.

²⁷⁰ G Ekberg, ‘The Swedish Law the Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings’, *Violence against Women* (October 2004) Vol. 10 No. 10, 1187 – 1218, 1199.

²⁷¹ *Ibid.*, 1200.

²⁷² *Ibid.*

convictions.²⁷³ Supply prohibition in the absence of effective demand limitation may in fact only encourage smuggling/trafficking by introducing a ‘smugglers’ premium’ in the increased price of the illicit good or service.

There are clearly principled reasons for targeting the demand for sexual services, including the protection of women from sexual exploitation²⁷⁴ within and without of a trafficking context, on the basis that there is no real consent of the woman or that the position of the trafficked prostitute is a form of slavery. On the face of it, these reasons point to eradication, particularly with respect to the trafficked prostitute. Nonetheless, there may be undesirable side-effects of the UK demand sanction legislation,²⁷⁵ such as the potential for such legislation to adversely affect those who are most vulnerable – the sex workers themselves, and the potential lack of deterrent effect of such legislation. Full discussion of this matter goes beyond the ambit of this thesis.

The pertinent issue as regards consent of trafficked persons in respect of demand sanction laws such as those imposed in the UK is that they do not avoid similar issues – it is still necessary to determine that the sex worker is, in fact, coerced or forced and not operating consensually, therefore necessitating the distinction between ‘sex worker’ and ‘victim’, and the distinction between the purchaser as just that, or as a criminal. The connection with ‘consent’ arises in two further ways – if the sex trade is legalised and regulated, the position of the prostitute may be improved, so ‘consent’ is rendered easier to imagine and accept - in the Netherlands, ‘voluntary prostitution is regulated to make conditions more transparent.’²⁷⁶ If, on the other hand, prostitution is severely condemned and policed, it will be driven underground and the position of the prostitute

²⁷³ Statement by Timothy Hand, Crown Prosecution Service Representative, (Personal Communication, February 2011).

²⁷⁴ J Outshoorn, n 43, 141.

²⁷⁵ See J Elliott, ‘Criminalising the Purchase of Sexual Services: The Use of Strict Liability as a Form of Risk Management?’ in K Doolin, J Child, A Beech and J Raine (eds) *Whose Criminal Justice: State or Community?* (Waterside 2011).

²⁷⁶ Justis- og Politidepartementet, (Ministry of Justice and the Police) n 269, 27.

will become more vulnerable, which is arguably the effect that demand sanctions have.²⁷⁷

The following section will outline both the human rights and bespoke anti-trafficking legislative framework applicable to victims of trafficking.

B. The International Human Rights Regime and the Treatment of Victims – State Obligations

The practice considered in this thesis is predominantly European and the term ‘human rights’ in the main refers to the law and practice under the European Convention on Human Rights (ECHR)²⁷⁸ (which is binding on all the States concerned). In some cases, it is necessary to take into account other human rights agreements, such as the International Covenant on Civil and Political Rights (ICCPR);²⁷⁹ therefore, other such instruments will be referred to at times.

i. Human Rights Obligations

Although human trafficking is sometimes referred to as a breach of the human rights of the trafficked person, it is worth noting from the outset that trafficking does not necessarily involve such a breach.²⁸⁰ A conviction for trafficking would not depend upon demonstrating any such breach.

Human rights obligations are addressed to States, whereas trafficking *per se* involves criminal acts carried out by private actors. The State has obligations under

²⁷⁷ See J Elliott, n 275.

²⁷⁸ ECHR, n 18.

²⁷⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereafter ‘ICCPR’).

²⁸⁰ See R Piotrowicz, n 243, 184 – 5.

human rights law to have in place adequate measures – legislative or otherwise – to ensure that individuals are protected from human rights abuses which may occur as a result of being or having been trafficked, such as being subjected to inhuman or degrading treatment²⁸¹ or slavery and its related practices or forced labour.²⁸² Consequently, violations where the immediate cause of the damage is the act of a private person (and therefore a non-state actor) arise from the failure of the State to act – to prevent the violation, to provide an effective remedy for the violation, or in some cases, to provide for the criminalisation of the private conduct of traffickers and effective investigations into suspected trafficking offences. Further to this, human rights obligations may arise with respect to how victims must be treated once they are discovered in the host State and have escaped the control of their traffickers.²⁸³

The human rights framework relating to victims of human trafficking is simply that which is applicable to any human being in need of certain types of protection, and includes, for example, protection of those who - if returned to the origin State - face a real risk of ill-treatment amounting to human rights violations. These human rights obligations overlap with the requirements of the trafficking instruments (discussed below and in Chapter 4) but are further protected by the possibility of national and international legal action to challenge State action or inaction. Trafficked persons may therefore have recourse to protections under Article 3 of the ECHR or Article 33(1) of the Refugee Convention.²⁸⁴ As discussed in Chapter 4,²⁸⁵ the applicable standard here

²⁸¹ Provided within Article 3 ECHR, and discussed in depth in Chapter 4, Part VIII, section B.

²⁸² See, for example, *Siliadin v France* (app no. 73316/01) [2005] ECHR 545, *R v Tang* [2008] HCA 39 (28 August 2008) 142, *Rantsev v Cyprus and Russia* (App no. 25965/04) [2010], *Hadijatou Mani Koraou v The Republic of Niger* [2008] ECW/CCJ/JUD/06/08, *OOO et al v Commissioner of Metropolitan Police* [2011] EWHC 1246 QB. The applicable human rights provisions with respect to slavery, forced labour, and practices related to slavery are discussed in depth in Chapter 2, Part IV, section D.

²⁸³ See Chapter 4, Part VIII, for discussion of this issue.

²⁸⁴ Refugee Convention, n 20.

²⁸⁵ See, Chapter 4, Part VIII, section B.

is that laid down in *Soering*,²⁸⁶ namely ‘where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.’²⁸⁷ It has been established that application of this principle now extends beyond extradition.²⁸⁸

Such obligations arise in the context of victims of human trafficking because of the context of some cases which arise in practice. These include the possibility of threats and reprisals (from traffickers) on return (of the victim) to the origin State, the potential for re-trafficking, or even serious ill-treatment due to social ostracism from the individual’s community as a result of the woman having worked in prostitution.²⁸⁹

Aside from the rights and protections conferred by ordinary human rights law, there are specific aspects of the anti-trafficking regime which offer nuanced and bespoke rights and protection to victims of human trafficking. These will be outlined in the following section, and discussed in greater depth in Chapter 4.

ii. The Treatment of Victims

The applicable framework regarding the provision of support, assistance and protection to victims of human trafficking includes adoption of measures to identify, protect and rehabilitate victims once discovered in the destination State, and provide for victims to remain in the territory of that State where necessary and appropriate, as well as relevant provisions relating to repatriation.

²⁸⁶ See, *Soering v UK* (1989) 11 E.H.R.R. 439.

²⁸⁷ *Soering*, para 91.

²⁸⁸ See, for example, *Cruz-Varas v Sweden* (1992) 14 E.H.R.R. 1.

²⁸⁹ See, Chapter 4, Part VIII, *passim*.

The Trafficking Protocol offered very little by way of obligations to provide any specific rights or protections to victims of human trafficking, in stating that Parties may ‘*consider* implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons’²⁹⁰ (Emphasis added). Such measures could, according to the Protocol, include access to accommodation and counselling. States are asked to consider issuing temporary residence permits²⁹¹ while giving consideration to humanitarian and compassionate factors.²⁹² Consequently, the Protocol imposes no solid obligation on Parties to adopt any measures which are favourable in terms of victim protection.

The CoE Trafficking Convention, however, requires more, primarily calling for the provision of a recovery and reflection period of at least 30 days in situations where there are ‘reasonable grounds’ to believe that an individual is a victim of trafficking.²⁹³ The UK currently provides a period of 45 days, which could be extended in certain circumstances.²⁹⁴ When this period has passed and an individual has been positively identified as a victim of human trafficking, a residence permit should be granted either where a victim is cooperating in criminal proceedings or an investigation, and/or, where provision of the permit is deemed necessary owing to the ‘personal situation’ of the trafficked victim.²⁹⁵

A lack of clear implementing legislation as regards this matter in the UK is apparently attributable to the fact that domestic policies such as that of Discretionary

²⁹⁰ Article 6(3).

²⁹¹ Article 7(1).

²⁹² Article 7(2).

²⁹³ Article 13.

²⁹⁴ Home Office ‘Impact Assessment of Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings’ (6 October 2008) 5

<<http://www.ialibrary.berr.gov.uk/ImpactAssessment/?IAID=da0f3cecd6214381bef9e9514cb46afd>>

accessed 10 May 2010.

²⁹⁵ Article 14.

Leave are already considered sufficient to meet this requirement.²⁹⁶ The matter is arguably not so clear cut, as the discussion in Chapter 4 will indicate.²⁹⁷ Where a residence permit is granted in the UK, it will be for a minimum of one year.²⁹⁸

States are required to protect the identity and private life of victims,²⁹⁹ and to provide assistance in terms of providing accommodation and medical treatment, and access to counselling and interpreters etc.³⁰⁰ Further obligations include providing access to legal assistance and free legal aid, as well as to compensation from the perpetrators.³⁰¹ The ‘possibility’ of States ‘not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so’ is addressed in Article 26, but it is not framed in terms of a solid obligation for any State to do so.³⁰²

Paramount to securing access to the abovementioned benefits is correct and timely identification of victims. Article 10 of the CoE Trafficking Convention provides for the development of identification procedures and the training of relevant officials to execute these procedures. Previous UK victim support efforts were minimal, and include the Poppy Project.³⁰³ Following ratification of the CoE Trafficking Convention, the UK has in place a ‘National Referral Mechanism’ (NRM). Under this mechanism, indicators are used by front-line professionals to help identify putative victims, before referring their details on to a designated Competent Authority³⁰⁴ who are charged with making a decision as to whether there are ‘reasonable grounds’ to believe that the

²⁹⁶ Home Office, n 294, 6.

²⁹⁷ See Chapter 4, *passim*.

²⁹⁸ Home Office, n 294, 6.

²⁹⁹ Article 11.

³⁰⁰ Article 12.

³⁰¹ Article 15.

³⁰² See Chapter 4, Part VII, for further discussion of this issue.

³⁰³ The Poppy Project is funded by the Office for Criminal Justice Reform (reporting to the Ministry of Justice) and offers accommodation and support to female victims of trafficking. This project has played a valuable role in identifying and supporting victims of human trafficking. See The Poppy Project, <http://www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php> accessed 21 March 2010.

³⁰⁴ In the case of the UK, these are the UK Borders Agency and the UK Human Trafficking Centre.

individual has indeed been trafficked.³⁰⁵ The Anti Trafficking Monitoring Group has concluded that the UK NRM has thus far been somewhat problematic.³⁰⁶ This merits further discussion, which will take place in Chapter 4.

The EU 2011 Directive makes some provision for the support, assistance and protection of victims, and states that more rigorous protection of victims' rights is one of its major objectives.³⁰⁷ Assistance must be given before, during and for an appropriate time after criminal proceedings have concluded (which can continue in any case without involvement of the victim³⁰⁸) so that victims may have access to the rights laid down in the 2011 Directive and Framework Decision 2001/220/JHA, the latter of which relates to the standing of victims in criminal proceedings.³⁰⁹

Access to assistance under the 2011 Directive depends upon a 'reasonable-grounds indication'³¹⁰ that the individual in question is a victim of trafficking. As with the CoE Convention, a mechanism for victim identification must be established,³¹¹ and 'assistance and support' is to include comparable measures to those required under the CoE Convention – accommodation, counselling etc.³¹² Victims are to have access to legal counselling and representation,³¹³ and are to be subject to a risk assessment to determine the level of protection needed and whether, say, a witness protection programme or similar is necessary.³¹⁴

³⁰⁵ Home Office, n 294, 5.

³⁰⁶ See The Anti Trafficking Monitoring Group, 'Wrong Kind of Victim? One year on: An analysis of UK measures to protect trafficked persons' (June 2010) <http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmg_report_for_web.pdf> accessed 01 July 2011.

³⁰⁷ EU 2011 Directive, Preamble, para 7.

³⁰⁸ Article 9

³⁰⁹ Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [2001] OJ L 82/1.

³¹⁰ Article 11.

³¹¹ Article 11(4).

³¹² Article 11(5).

³¹³ Article 12(2).

³¹⁴ Article 12(3).

Rather than including specific provisions regarding residence permits – temporary or otherwise – the 2011 Directive instead points to Council Directive 2004/81/EC April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities,³¹⁵ and Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.³¹⁶ Consequently, the issuance of residence permits becomes a possibility either where the victim is cooperating in criminal proceedings where the State is trying to obtain a prosecution against the traffickers, or where there is need for such a permit on the basis of refuge or subsidiary protection.

Article 8 of the 2011 Directive also provides for non-application of penalties to victims who have committed criminal acts as a result of having been trafficked, although this is not a clear obligation as tentative language is used in that the Article states that Member States are asked to take ‘... necessary measures to ensure that competent national authorities are *entitled* not to prosecute ...’.³¹⁷ (Emphasis added). The UK currently has in place two Crown Prosecution Service (CPS) Protocols which provide for prosecutorial discretion as regards offences committed by victims as a result of having been trafficked.³¹⁸

³¹⁵ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261/19.

³¹⁶ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

³¹⁷ See Chapter 4, Part VII, for further discussion of this matter.

³¹⁸ Crown Prosecution Service, ‘Prosecution of Defendants Charged With Offences Who Might Be Trafficked Victims’ and ‘Prosecution of Young Defendants Charged With Offences Who Might Be Trafficked Victims’ <http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/> accessed 01 July 2011.

The provisions of the various instruments comprising the legal anti-trafficking regime clearly aim for a multi-faceted attack on trafficking and illicit facilitated migration. Those most central to the inquiry made by the thesis are the definition of 'human trafficking', which raises the issue of 'coercion' or 'lack of consent' of the person transported and, secondly, the consequent provisions relating to the assistance and support to be offered to victims, the correct identification of whom depends upon their having being coerced, forced, and therefore 'lack of consent' etc. The question arises about the relationship between coercion and the lack of consent of any potential victim. It has been/will be submitted that 'coercion' ought not be understood solely as the forcible overriding of any wish of the woman (amounting to kidnapping into exploitation in another country). However, identifying the circumstances when the treatment of the woman and the context in which she makes any decision such that we may say that she has been 'coerced' is problematic.

It is useful here to reiterate the dual aspect of the definition of human trafficking – it may be used as a basis of criminal liability but it may also be used for collateral purposes, such as indicating when the various cooperation obligations apply or for identifying who is a victim. One's first reaction would likely be in favour of identical interpretations (of the definition of trafficking) whenever a question of interpretation arose, especially where all or any of them had been given domestic effect in those terms, but that would be to concede, for instance, that the stricter requirements of the criminal law would prevail over the broader humanitarian objectives of identifying victims.

To elaborate upon this point - in practice, we know that it is very unlikely that any question of interpretation will arise other than in a domestic forum (or by a domestic body). These days, national courts often (though not always) use the Articles of the

Vienna Convention on interpretation,³¹⁹ which they regard as being customary international law, whenever they are faced with the interpretation of a treaty. They are also, of course, bound by domestic law, not just principles of interpretation but other principles and rules, one of which, is the principle of legality – that a criminal defendant is entitled to have the law setting out the offence with which he is charged interpreted strictly in his favour.

One can easily imagine that a defendant to a criminal charge of trafficking will allege that the women consented to being transferred and exploited and so there was no trafficking offence. He would argue that ‘consent’ covered all circumstances other than direct coercion (of which, he would say, there had been none). A transported woman would want to argue that she had been trafficked in the widest range of circumstances and that she was a trafficked victim. She would want to say (and she would not have any presumptions in her favour as a criminal defendant would) that she had not consented – that she had been deceived, driven by press of economic circumstances, could not have consented to the appalling conditions amounting to a slavery like practice etc.

There is a conflict between the standards of the criminal law and the humanitarian objective of identifying victims who are to be protected. One solution would be to adopt the same understanding in both sets of cases, which would have to be the criminal standard, at the expense of some possible ‘victims’. Another would be to say that, even for criminal purposes, the definition of trafficking clearly envisages an absence of consent in a wider range of circumstances than direct coercion and, even for establishing criminality, it is for a court to examine whether or not there was consent by the women in this case, and where there was not there would be the criminal offence of

³¹⁹ Articles 31 and 32.

trafficking and the transported women would be victims. The latter may be the preferable solution. The third possibility is that we use a different test to determine who is a trafficker and who is a victim. This might serve both criminal and humanitarian purposes but could easily lead to confusion and might not be too popular with destination States, which would have both to prosecute more traffickers and protect more victims.

Where women are smuggled but not trafficked because of difficulties - legal and evidential - about establishing that there was not consent, then – as will be argued in Chapter 4 - States should, even if they are not obliged to, consider treating women who have endured oppressive, exploitative conditions short of slavery-like practices as ‘victims’, in the same way that discretionary powers are sometimes used with respect to failed refugee applicants. Clearly, the variety of interests covered by the trafficking definitions do not lead to simple interpretative solutions.

Consideration of the consent/coercion spectrum in this thesis approaches the question through consideration of the ‘lack of consent’ of the woman, making it clear that no automatic conclusions are to be drawn that lack of consent equates with coercion. The following section will introduce the notion of consent, providing a platform for further analysis in Chapter 3 of the difficulties of this already flexible concept when considered specifically within the context of human trafficking.

III. Consent in the Law

As stated by George Fletcher, ‘No idea testifies more powerfully to individuals as a source of value than the principle of consent.’³²⁰ Valid consent serves to act as a ‘procedural justification’ for the doing of ‘something’, to someone or someone’s property.³²¹ On the face of it, then, the doing of ‘something’ is defensible provided the conditions for a valid consent (as to the doing of ‘something’) are present.³²² Yet, as will be argued throughout this thesis, not only is correct determination of a valid consent inherently problematic in an exploitative facilitated migration and trafficking context, but also that there are limits to the justificatory scope of consent.

In basic terms, consent can be defined as ‘subsisting, free and genuine agreement to the act in question’.³²³ Determining lack of consent is difficult³²⁴ and specifying and determining the scope of the conditions for a valid consent is no mean feat. Nonetheless, the following section intends to do just that, and will set out and analyse the basic conditions for a valid consent, and what can vitiate or invalidate consent. Further analysis of the role of consent specifically in a human trafficking/exploitative facilitated migration context will be undertaken in Chapter 3.

³²⁰ G P Fletcher, *Basic Concepts of Legal Thought*, (Oxford, Oxford University Press 1996) 109.

³²¹ D Beyleveld, and R Brownsword, *Consent in the Law*, (Hart Publishing, 2007) 125

³²² Ibid.

³²³ The Law Commission, *Consent in Sex Offences: A Report to the Home Office Sex Offences Review*, (1998), para 2.12.

³²⁴ As indicated by the UK experience as regards low conviction rates for rape. The amount of reported rapes which end in conviction currently stands at approximately 6% - see ‘The Stern Review’, Government Equalities Office 2010

<http://www.equalities.gov.uk/pdf/Stern_Review_of_Rape_Reporting_1FINAL.pdf> accessed 01 August 2010.

A. The Requirements of a 'Valid' Consent

If a valid consent must indeed be 'subsisting, free and genuine agreement to the act in question',³²⁵ then the issues to be analysed here can be categorised as follows: the consent must be freely given; it must be informed; the consenting agent must have the capacity and understanding as regards that to which she is consenting; and the consent must subsist at the time of the act consented to. These issues will now be addressed.

i. Consent must be 'Freely' Given

An ostensible consent is not necessarily an authentic consent unless it is freely given and is therefore the product of unforced choice.³²⁶ Drawing the line between forced and unforced choice is not always necessarily simple.³²⁷ A defining characteristic of 'forced' choice is the application of external force which bears negatively on the generic interests of the consenting party.³²⁸ As typically understood, this external force would be exerted by the party to whom the consent is to be given. Whether external force can come from other sources will be discussed at a later point in this thesis.³²⁹

In the ordinary sense of the word, 'free' consent can be defined as 'voluntary agreement to or acquiescence in what another proposes or desires; compliance, concurrence, permission.'³³⁰ In a Report on Consent in Sex Offences, the Law

³²⁵ The Law Commission, n 323, para 2.12.

³²⁶ D Beyleveld, and R Brownsword, n 321, 126.

³²⁷ Research conducted into sexual relationships and rape in prison indicates in particular how problematic correct determinations of consent/lack thereof can be within a coercive environment. See, for example, Human Rights Watch, 'No Escape: Male Rape in U.S. Prisons', <<http://www.hrw.org/legacy/reports/2001/prison/index.htm>> accessed 22 May 2011.

³²⁸ D Beyleveld, and R Brownsword, n 321, 126.

³²⁹ See Chapter 2, Part III, section B, subsection iv.

³³⁰ Oxford English Dictionary Online, Additions Series <<http://www.oed.com/>> accessed 01 Feb 2006.

Commission stated that ‘The essence of consent ... is *agreement* to what is done.’³³¹ The Report goes on to state that agreement must be ‘free and genuine’ in order for it to qualify as consent,³³² and that ‘consent should be defined as a subsisting, free and genuine agreement to the act in question’.³³³ ‘Coercion’, ‘pressure’, and ‘influence’³³⁴ may all demonstrate a different level of interference with free consent, yet all have the potential to vitiate it.

Under the UK Sexual Offences Act 2003, one has consented ‘if he agrees by choice, and has the freedom and capacity to make that choice.’³³⁵ In a recent Report concerning consent in the context of rape, the Scottish Law Commission proposes that consent should be defined as ‘free agreement’. This definition accepts that agreement can be given in situations where it is not ‘real’, ‘full’, or ‘valid’;³³⁶ and it follows that such an agreement would not qualify as valid consent. Consent must be ‘free from the influence or opinion of others’.³³⁷ Indeed, ‘every consent involves a submission, but it by no means follows that a mere submission involves consent.’³³⁸

Beyleveld and Brownsword recognise that:

... determination of whether ‘consent’ has been given ‘freely’ is doubly complex: first, we need a stable and defensible conception of ‘free’ action; and secondly, employing this conception, we need to be able to interpret actions with some confidence as ‘free’ or otherwise.³³⁹

³³¹ The Law Commission, n 323, para 2.9

³³² *Ibid*, para 2.10

³³³ *Ibid*, para 2.12

³³⁴ D Beyleveld, and R Brownsword, n 321, 131.

³³⁵ SOA 2003, s 74, also see, The Crown Prosecution Service, ‘Sexual Offences Act 2003’ <http://www.cps.gov.uk/legal/s_to_u/sexual_offences_act/> accessed 01 Jan 2010.

³³⁶ See, Scottish Law Commission, *Report on Rape and Other Sexual Offences: Report on a reference under section 3(1)(e) of the Law Commissions Act 1965*, (Scot Law Comm No 209, 2007) para 2.38.

³³⁷ D Beyleveld, and R Brownsword, n 321, 12.

³³⁸ *R v Olugboja* [1981] All ER 443, at p. 448, quoting Coleridge J in *Day* [1841] 9 C&P 722

³³⁹ D Beyleveld, and R Brownsword, n 321, 12.

In the most basic sense, where a choice is made against one's will, the 'choice', so-called, does not constitute freely given consent. This may be too simplistic a formula as because where either a choice is made as a product of outright coercion, or where a choice must be made between undesirable alternatives, each constitutes an influenced choice but the consequence, vitiating consent, is not necessarily the same in each case. Further, in neither situation could it be said that the will of the consenting agent was overborne; more that the choice was influenced – by external factors - albeit to potentially different degrees.

The former situation – that of outright coercion, such as threat of physical force - is more clearly capable of invalidating or vitiating consent, whereas the latter less clearly does so. As Philips observes, '...it is difficult to imagine what a society would be like in which a person would invalidate a consent simply by showing that she was placed in a position having to choose between unattractive alternatives.'³⁴⁰ Every day, choices are made which result in an undesirable outcome but in the absence of a more agreeable alternative. It is difficult to view such choices as 'free', but it is impractical to view such choices as being made wholly without consent. It follows from this that even consent which is legally considered to be valid comes in varying degrees and shades of grey. It is not difficult to argue that direct coercion vitiates consent sufficient to render it invalid. The effect of more indirect forms of coercion on consent is more difficult to categorise – that which is 'persuasive' may not uniformly be considered coercive – in fact it may in some situations simply be deemed to be a material consideration to be taken into account (by the consenting individual) when making a decision.

³⁴⁰ M Philips, 'Are Coerced Agreements Involuntary?' (1984) *Law and Philosophy* 3, 133-45, 140.

Clearly, overt forms of coercion such as force or violence may invalidate consent where there is no legal justification for the force, as any agreement cannot be considered to be ‘freely’ given. Further, psychological forms of coercion may invalidate consent – even where there is no overt threat.³⁴¹ The specific ‘means’ (such as coercion) through which consent may be invalidated in the context of human trafficking for sexual exploitation will be considered in depth at a later point in this thesis.³⁴²

ii. Consent must be ‘Informed’

As stated in the District of Columbia Court of Appeal case *Canterbury v Spence*, ‘[t]rue consent to what happens to one’s self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.’³⁴³ This statement was made in the context of medical treatment, yet the basic premise has further reach than purely a medical context. Is it possible to achieve a fixed point on a spectrum of what qualifies as ‘informed’? This may be conceptually and evidentially difficult. There is no settled legal meaning of the term ‘informed consent’,³⁴⁴ and accordingly the standard may vary according to context. Nonetheless, one cannot escape the fact that a valid consent must be an informed consent. It is, therefore, necessary to consider what qualifies as informed, which will involve consideration of various different areas of the law where informed consent may be treated differently.

³⁴¹ See, for example, *Olugboja* [1981] All ER 443, where the rape victim submitted to sexual intercourse through fear, without the defendant using force or making any threats or violence.

³⁴² See Chapter 2.

³⁴³ 464 F 2d 772 (DC Cir 1972).

³⁴⁴ M Jones, ‘Informed Consent And Other Fairy Stories’, (1999) *Medical Law Review* 1999.7(103) 1.

In order for consent to operate as a procedural justification for doing ‘something’,³⁴⁵ the consenting individual must know what she is consenting to. Early domestic case law in the UK seemed to indicate that consent could operate as a defence even where the consenting party was unaware of, for example, the fact that she would be exposed to an incidental risk of injury.³⁴⁶ Subsequent case law³⁴⁷ took a different approach – in order for a person to give a valid consent, they must know the ‘nature and quality’ of that to which they are consenting. This indicates that consent to a particular something does not equate to consent to incidental ‘extras’, the risk of which the consenting agent was unaware and therefore uninformed – nonetheless, the consent to the original ‘action’ remains valid – the principle here is simply that the consent does not extend beyond the exact particulars of the ‘action’.³⁴⁸

Deception as to the act consented to unquestionably invalidates consent.³⁴⁹ Where information is withheld which would be considered material and important to the decision making process (of the consenting agent), any consent given to the specified act cannot be considered to be informed. This in turn would mean that there was no valid consent – it was vitiated; damaged; no longer subsisting. The seriousness of the outcome is therefore linked to the importance placed upon valid consent. Implied consent may be sufficient for minor risks, but not risks of a serious magnitude.³⁵⁰

³⁴⁵ D Beyleveld, and R Brownsword, n 321, 5.

³⁴⁶ Notably in *R v Clarence* [1888] 22 QBD 23, the court determined that the wife’s consent to sex also extended to any incidental risk of injury which arose from having consensual sex; namely, catching gonorrhoea.

³⁴⁷ Such as *R v Dica* EWCA Crim 1103, [2004] QB 1257. This case involved consent to sexual intercourse, but not to the transmission of HIV, the presence of which in the defendant the victims were unaware.

³⁴⁸ See, for example, *R v B* [2006] EWCA Crim 2945, where the court held that the complainant’s consent to sexual intercourse was not invalidated by her ignorance of the Defendant’s status as HIV positive, so there could be no rape on that basis.

³⁴⁹ See, for example, *R v Williams* [1923] 1 KB 340, where a choirmaster was found guilty of rape where he had sexual intercourse with a girl to whom he was giving singing lessons, under the pretence that her breathing was not quite right and that he had to perform an operation to enable her to produce her voice properly.

³⁵⁰ Implied consent is not likely to often be a factor in trafficking cases, and therefore will not be further discussed here.

It is clearly complex to determine what qualifies as informed when the information relates directly to the agreement. It is useful here to look to other areas of the law which employ a notion of informed consent. The notion of ‘free and informed’ consent is specifically mentioned and elaborated upon in the Council of Europe’s Convention on Human Rights and Biomedicine,³⁵¹ and requires that the individual concerned be given ‘appropriate information as to the *purpose and nature* (of the intervention) as well as its consequences and risks.’(Emphasis added)³⁵²

The Explanatory Report to that Convention emphasises the autonomy of the patient and makes clear reference to restraining ‘the paternalistic approaches which might ignore the wish of the patient.’³⁵³ The Report builds on this by emphasising the importance of presenting the information clearly to the patient, using terminology that she can understand, which she can use to weigh up the necessity and usefulness against the potential risks. In a medical context, it has been stated that ‘...once the patient is informed in broad terms of the nature of the procedure which is intended, and gives her consent, that consent is real.’³⁵⁴

Jones states that ‘[t]he underlying ethical principle of informed consent is that one should respect the patient’s autonomy: the capacity to think, decide and act on one’s own thoughts and decisions freely and independently.’³⁵⁵ The ability to make such decisions depends on information about the chosen course of conduct, and the ability to assess this information, ‘i.e. the capacity to act autonomously.’³⁵⁶ The EU Charter on fundamental rights includes in Article 3 the right to integrity of the person, and

³⁵¹ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (adopted 4 April 1997, entered into force 1 Dec 1999, Oviedo, 4. IV.1997, Council of Europe Treaty Series – No. 164).

³⁵² Article 5.

³⁵³ Explanatory Report to the Council of Europe’s Convention on Human Rights and Biomedicine, para 34.

³⁵⁴ *Chatterton v Gerson* [1981] Q.B. 432.

³⁵⁵ M Jones, n 344, 8.

³⁵⁶ *Ibid.*

paragraph 2 specifically states that ‘In the fields of medicine and biology, the following must be respected in particular: the free and informed consent of the person concerned.’ Clearly, where physical and mental integrity is concerned, a high standard of free and informed consent may be required.

That there is social utility in medical intervention in the majority of cases is undisputed here. There is long-standing debate between legal and medical professionals as to the correct approach to informed consent in a medical context³⁵⁷ - understandably so where self determination and bodily integrity are concerned. Whether or not one agrees with a paternal stance of ‘Doctor knows best’, it is possible to sympathise with the origins of such an argument. The autonomy of the consenting agent where exploitation is the act consented to is a difficult matter which merits further discussion – this will be revisited in Chapter 3 with specific focus on trafficking for sexual exploitation.

The notion of informed consent features to varying extents in aspects of family law, and contract law – the examples used here are not mutually exclusive. For example, before an adoption order can be made, all persons with parental responsibility or guardianship must ‘freely, and with full understanding of what is involved, agree(s) unconditionally.’³⁵⁸ Clearly, pressure from, for example, an adoption agency invalidates ‘freely’ given consent. Consent could not be considered to be ‘informed’ if adoption was agreed to on the basis of a fundamental mistake, such as in *Re M (A Minor) (Adoption)*³⁵⁹ where a father agreed to an adoption of his child by his ex wife and her husband, yet unbeknown to him his wife was in fact terminally ill, and died shortly after conclusion of the adoption. The missing information would have been material to the decision making of the father, therefore his consent could not be

³⁵⁷ See, for example M Jones, *ibid*, and D Beyleveld, and R Brownsword, n 321.

³⁵⁸ J Herring, *Family Law*, (Longman, Pearson Education Limited 2001) 542.

³⁵⁹ [1991] 1FLR 458.

considered to be informed. Furthermore, informed consent in this context concerns close personal relationships and persons in need of care and protection (i.e. children) and, therefore, it is desirable to ask for a high standard of informed consent in terms of all facts which may be material to the decision making of the consenting agent.

Similarly, consent to marry can be rendered voidable by ‘duress, mistake, unsoundness of mind or otherwise’.³⁶⁰ Mistake in particular goes toward the notion of informed consent – yet the categories of mistake capable of invalidating consent to marriage (and therefore rendering a marriage voidable, but not yet void) are limited. Primarily, there may be mistake as to the identity of the partner to be married,³⁶¹ and secondly there may be mistake as to the nature of the ceremony.³⁶² In neither situation can the consent given be considered to be informed. Fraud or misrepresentation which lead to a mistake can also invalidate consent and render a marriage voidable.

Furthermore, where marital separation is concerned, consent orders may be made. If parties have reached agreement prior to the making of a consent order, then the court will hold a contested hearing and then take the agreement into account.³⁶³ Although there is a strong presumption in each case that the court will implement the agreement,³⁶⁴ it is recognised that ‘there could be some circumstances when a party should not be bound by their agreement: namely where there was duress, undue influence, unforeseen circumstances, or injustice.’³⁶⁵ In particular, the category of ‘unforeseen circumstances’ goes toward the validity of consent in that it cannot be considered to be ‘informed’ in that instance. As with the abovementioned example,

³⁶⁰ Article 16(2) of the Universal Declaration of Human Rights 1948 (adopted 10 December 1948 UNGA Res 217 A(III) (hereafter ‘UDHR’) states that ‘Marriage shall be entered into only with the free will and full consent of the intending spouses.’

³⁶¹ See for example *Militante v Ogunwomoju* [1993] 2FCR 355.

³⁶² J Herring, n 358, 51, and see for example *Valier v Valier* [1925] 133 LT 830.

³⁶³ See *Edgar v Edgar* [1980] 2 FLR 19 CA.

³⁶⁴ Although the court should still consider all the circumstances of the case: *Smith v Smith* [2000] 3 FCR 374.

³⁶⁵ J Herring, n 358, 207.

these areas of the law concern personal relationships and therefore inherently sensitive issues. Consequently, a high standard of informed consent may be called for. Because the situations above involve intense relationships and significant interventions of a personal kind, the reality of consent seems particularly important. It may not be quite so crucial in economic matters, such as are regulated by the law of contract.

A choice to enter a contract must be an informed choice, in that '[t]he background informational obligations must be discharged, and so on.'³⁶⁶ The rules for informed consent in contract law 'function ... to ground procedural justification in relation to the agreement reached.'³⁶⁷ Consent in a contractual sense may be invalidated (in that the contract may be invalidated) by, for example, mental incapacity, duress,³⁶⁸ or undue influence. Bix notes that:

There is too much at stake – to those seeking to enter agreements as well as to third parties – to set the bar too high too often on contractual consent. Among other problems, making too many commercial transactions subject to serious challenge on consent/voluntariness grounds would undermine the predictability of enforcement that is needed for vibrant economic activity.³⁶⁹

Transactions which are purely commercial contracts for 'goods' are more at 'arm's length' when compared to the abovementioned different aspects and areas of law where

³⁶⁶ D Beyleveld, and R Brownsword, n 321, 178.

³⁶⁷ Ibid, 179.

³⁶⁸ Duress occurs where 'where the doctrinal rule allows a party to void a contract if it can show an appropriate combination of wrongful threat on the part of the other contracting party, and a lack of reasonable alternatives to entering the contract on its own part.' See B Bix, *The Ethics of Consent: Theory and Practice*, A Wertheimer, Franklin G, Miller (eds) Forthcoming, Minnesota Legal Studies Research Paper No. 08-36, 2, 7, See also H Beale (Ed), *Chitty on Contracts 30th edition: Volume 1 - General Principles* (Sweet & Maxwell Ltd 2008) 7.

³⁶⁹ B Bix, *ibid*, 5.

some form of informed consent doctrine is invoked, such as marriage or adoption, and is less likely to concern personal relationships or bodily integrity in the way that medical intervention, certain family law matters, and exploitative sex work can do. Where the relationship between the transported woman and the trafficker is of an economic nature, we might want not to impose too strict a standard of consent,³⁷⁰ were it not for the sometimes awful consequences which may befall those caught up in the trafficking environment.

On the one hand, ‘consent, in terms of voluntary choice, is – or, at least, appears to be or purports to be - at the essence of contract law.’³⁷¹ Yet, In a contractual sense, a judge may find that even in the absence of (full) consent, a transaction should be enforced, and vice versa:³⁷² ‘the level or kind of consent that might be sufficient to ground enforcement in one type of situation may not be sufficient in another.’³⁷³

Undue influence may be particularly pertinent to the discussion of informed consent here. As stated succinctly by Beale, ‘[t]he equitable doctrine of undue influence is a comprehensive phrase covering cases in which a transaction between two parties who are in a relationship of trust and confidence may be set aside if the transaction is the result of an abuse of the relationship.’³⁷⁴ The doctrine is necessarily broad - Lord Chelmsford LC stated in *Tate* that ‘[t]he courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise’.³⁷⁵ In 1887, Lindley LJ asked ‘Is it that it is right and expedient to save persons from the consequences of their own folly? or (sic) is it that it is right and expedient to save them from being

³⁷⁰ See, Chapter 3, Part I, for discussion of the identified requirements of a valid consent specifically applied in the context of human trafficking.

³⁷¹ B Bix, n 368, 1.

³⁷² Ibid, 2.

³⁷³ Ibid, 5.

³⁷⁴ H Beale (Ed), *Chitty on Contracts 30th edition: Volume 1 - General Principles* (Sweet & Maxwell Ltd 2008) 56.

³⁷⁵ *Tate v Williamson* (1866) L.R. 2 Ch.App. 55, para 61. See. also *Winder* (1940) 3 M.L.R. 97; *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 para 6.

victimised by other people?’³⁷⁶ Clearly, there is an issue as regards how informed one has to be within the context of undue influence.

Where there is an allegation of undue influence, it is necessary to show that the influenced party acted with ‘free’ and ‘informed’ consent. In *Etridge*, (a combined appeal of eight cases) which is a central case here, a wife sought to challenge a transaction into which she had entered on the basis of her husband's undue influence, but, ‘their relationship did not fall within a special category of case where an irrebuttable presumption of trust and confidence arose.’³⁷⁷ Lord Nicholls – with the support of the other lordships – referred in that case to ‘the taking of unfair advantage’,³⁷⁸ ‘misuse’ of influence,³⁷⁹ and ‘abuse of trust and confidence’.³⁸⁰ Undue influence may occur not only where the defendant pressured the claimant or subjected her to excessive persuasion, ‘but also it seems if the defendant abused the claimant's trust by making a decision for her rather than allowing her to make her own decision.’³⁸¹

The reasoning of the court in *Etridge* can be summarised thus:

Where a wife proposed to charge her interest in the matrimonial home in favour of a bank as security for her husband's indebtedness or the indebtedness of his company, her solicitor would have to explain the nature and consequences of the transaction and the seriousness of the risk

³⁷⁶ *Allcard v Skinner* (1885) 36 Ch D 145, at p. 182.

³⁷⁷ *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44; [2002] 2 A.C. 773.

³⁷⁸ *Ibid*, para 8.

³⁷⁹ *Ibid*, para 9.

³⁸⁰ *Ibid*, para 10.

³⁸¹ H Beale (Ed), n 374, 56.

involved, but he would not have to be satisfied that the wife was free of undue influence.³⁸²

And, apparently:

The most that a bank could be expected to do, was to take reasonable steps to satisfy itself that the practical consequences of the proposed transaction had been clearly explained; the decision whether to proceed with the transaction or not had to rest with the wife and it was not a solicitor's role to intervene and attempt to prevent the transaction even if it was thought not to be in her best interests.³⁸³

Therefore, if the wife is not fully informed as to the particulars, and accordingly she cannot be said to have consented in an 'informed' manner, she may still be held to the contract. It was stated in that case that:

In holding the balance fairly between the vulnerability of the wife who relies implicitly on her husband and the problems for financial institutions asked to accept a secured or unsecured surety obligation from her for her husband's debts, it has not been assumed that in the ordinary case the wife would necessarily be separately advised at all, or that even in probable undue influence cases the lender should make the taking of separate advice a condition, irrespective of its quality: see the O'Brien case [1994] 1 AC 180. That balance preserves the economic value of residential property as

³⁸² *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44; [2002] 2 A.C. 773, Case analysis, Westlaw UK.

³⁸³ *Ibid.*

security for lending purposes for small businesses and protects wives in appropriate cases.³⁸⁴

This ‘balance’ referred to is morally if not legally questionable, and the lack of a requirement for separate and full advice for the wife is open to criticism – her consent cannot be considered to be fully informed if she does not have all the facts, particularly where there may be a substantial risk of financial loss. However, such economic loss due to lack of informed consent is still – although morally questionable – at more of an ‘arm’s length’ nature than in some other areas of the law where an informed consent doctrine is applied. Clearly, different types of consent agreements create different types of relationships, in which cases the standard or notion of informed consent may be treated differently.

Knowledge – as to the act consented to - is the key element here as regards informed consent. The cases considered in this section show an important aspect of the consent inquiry – it goes to the nature of the decision-making, not to its quality. The question is not, ‘Was that a good or bad decision?’ but, ‘Was that decision reached freely and on an informed basis?’ We should try to avoid too easily saying a woman did not consent because things (perhaps foreseeably) turned out badly. If a consenting agent has sufficient information to understand what she is consenting to and to weigh up the merits or otherwise of the act, she has the tools to make a decision which can be considered to be consensual and informed. Yet, ‘[t]he significance of consent to an individual, and to the society that must decide whether to give effect to it, depends on the circumstances in which it is elicited.’³⁸⁵ The importance of this statement will

³⁸⁴ *Etridge (No.2)* (n 377) 790.

³⁸⁵ P H Schuck ‘Rethinking Informed Consent’ (1994) Yale Faculty Scholarship Series, Paper 2765, 906.

become clearer throughout the discussion of informed consent in the context of human trafficking which will take place in Chapter 3.

iii. Capacity and Understanding

The consenting agent must have the capacity to give consent, and to understand that to which she is consenting. Essentially, a person – in any context - ‘will not have had the capacity to agree by choice where their understanding and knowledge were so limited that they were not in a position to decide whether or not to agree.’³⁸⁶ Beyleveld and Brownsword provide some insight here:

If the conditions for an authentic consent are that it is given freely and on an informed basis (however these conditions are interpreted), then the logic is that the specification of a ‘subject of consent’ – that is, one having the relevant capacity (or competence) to consent – will reflect these conditions. This means, first, that a person with a capacity to consent will be capable of forming their own judgements and making their own decisions free from the influence or opinion of others; and, secondly, that such a person will be able to understand and apply the information that is material to their decision.³⁸⁷

This clearly relates to mental capacity to understand and process information, and to use the information when making an informed decision. Where mental capacity to do

³⁸⁶ P Rook Q.C and R Ward, *Rook and Ward on Sexual Offences: Law and Practice* (3. rd. Ed, Sweet & Maxwell, 2003), at para 1.94.

³⁸⁷ D Beyleveld, and R Brownsword, n 321, 12.

so is lacking, consent cannot be considered to be valid. Adults may be assumed to have the capacity to consent, but this can be rebutted.³⁸⁸

As regards minors (those under 18 years of age, according to UK law),³⁸⁹ the basic position is that the capacity of those aged under 16 to consent to, say, sexual intercourse, is not legally recognised.³⁹⁰ There is however a somewhat nuanced position in medical law terms, as the principle of ‘Gillick Competence’³⁹¹ indicates. It is undisputed here that there is a sound basis for legal restrictions as regards the recognition of capacity of minors to consent – such measures are protective.

iv. The Timing of Consent

The timing of consent is a relevant factor when determining a valid consent. In a 1998 Report the Law Commission stated as regards this matter that:

... an agreement to an act should not be regarded as a consent to that act unless it is *subsisting* at the relevant time. If what is relied on is past agreement, this will mean *both* (a) that, when previously given, the agreement must have extended to the doing of the act at that later time, *and* (b) that it must not have been withdrawn in the meantime.³⁹²

³⁸⁸ This point was made by Butler-Sloss LJ in the context of medical treatment in *Re MB (Medical Treatment)* [1997] 2 FLR 426.

³⁸⁹ Family Law Reform Act 1969, s.1.

³⁹⁰ SOA 2003, s.10.

³⁹¹ The elasticity of consent in terms of legal acceptance of capacity to consent is demonstrated by the 1985 Gillick case in the United Kingdom where a Lords majority ruled upon the potential capacity of under 16s to make their own decisions about medical treatment - See *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

³⁹² The Law Commission, n 323, para 2.11.

This clearly indicates that consent to the doing of ‘something’ must exist at the time of the act. As a basic principle, then, consent can be withdrawn at any time. UK domestic case law has confirmed this in the specific context of consent to sexual intercourse.³⁹³ Similarly, in a medical law context, consent can be withdrawn even after the signing of a consent form. This position is more desirable than any alternative, as to hold an agent to a past consent would in some situations clearly be unacceptable (save, for example, where a binding contract had been entered).

Conclusion

Human trafficking continues as a result of a melting pot of factors which link supply and demand. It is clear that the factors underlying the continuance of this activity in Europe - and worldwide - are many, and rest largely, although not exclusively, on poverty and lack of opportunity. The supply side is maintained through factors which are largely economic and gender-based; the economic marginalisation of women in impoverished regions, and the discrimination and lack of access to basic rights suffered by the same women. These various factors serve to ensure that a continual source of migrants is available to be smuggled, trafficked, or ‘consensually’ trafficked for the purpose of exploitation. Whether the individuals involved have in fact been smuggled, trafficked, or something in between the two, it seems clear that as long as these ‘push’ factors exist, and as long as the demand for sold sex exists, there will be a global business in sex trafficking and facilitated migration for the purposes of working in the sex trade.

³⁹³ See *Kaitamaki v R* [1984] 3 WLR 137 (PC) where it was confirmed that a person may withdraw consent to intercourse at any time, including whilst intercourse is taking place.

These ‘push’ factors, however, do not work alone to perpetuate exploitative illicit migration. The economic and social factors underpinning this activity are exacerbated by the presence of OCGs who see an opportunity for financial gain caused by the demand for sold sex in certain countries. The demand ensures a continuous search for more potential victims, whether these victims are recruited through kidnap, deception, or other means. Corruption within law enforcement institutions also plays a significant part, as does border control, and increased ease of travel and communication as a result of globalisation. The evidence indicates that although routes and transit countries can be identified at given times, the routes will continually change in response to their discovery and any subsequent interruption of trafficking activities.

A comprehensive strategy to combat human trafficking needs to come from all angles. These many and varied factors require a variety of legal and non legal responses, ranging from a legislative response which criminalises the traffickers, to measures geared toward prevention in countries of origin, transit, and destination. It is clear that a multi-pronged attack is necessary, which involves not only the criminalisation of traffickers and protection of victims, but international cooperation and coordination on what action to take. The legal anti-trafficking regime outlined in Part II of this Chapter indicates an increasing willingness by affected States to take part in a coordinated and effective international (and national) response to the trafficking phenomenon; thereby strengthening the anti-trafficking regime and moving ever closer to as unified a system as possible - a system which not only provides for prosecution and punishment of traffickers, but also prevention of trafficking activity and the provision of support, assistance and protection to victims.

Sex trafficking is an example of serious non-consensual exploitation, which sees the perpetrators taking advantage of some of the most economically marginalised

sections of society. Either way, the empirical evidence considered throughout this Chapter suggests that many of the individual migrants concerned at least embark upon their journey on a consensual basis; consenting to work in the sex trade, consenting to migrate and work in the sex trade, or initially consenting to the trafficking process with consent being rendered ineffective by deception or some other form of ‘means’.

The concept of consent is clearly central to determinations of who is, and who is not, a victim of human trafficking. These issues, therefore, are central to the inquiry made by this thesis and justify the focus on consent and victims of trafficking for exploitative facilitated migration. Although State obligations beyond solely those relating to victims are an integral part of the anti-trafficking regime, they are not central to this thesis and therefore will not be covered any further than they have been in this Chapter.

This Chapter has examined the contextual and legal background to human trafficking, including consideration of the ‘push’ factors underlying the continuance of human trafficking, and the influence of organised crime. The international anti-trafficking regime has been outlined, as have the obligations placed upon States by said regime, as well as the elements of the regime which are persuasive rather than obligatory.³⁹⁴ Furthermore, the notion of consent, which is integral to the enquiry made by this thesis, has been introduced and defined, and considered in a variety of legal contexts so that those which most aid the detailed analysis of the role of consent in human trafficking in Chapter 3 can be referred back to and drawn upon further.

³⁹⁴ For example, where Article 6(3) of the UN Trafficking Protocol asks that Parties ‘*consider* implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons’ (Emphasis added). See Part II, Section B, subsection ii, of this Chapter, above. As the discussion in that subsection indicates, the more encompassing provisions of the CoE Trafficking Convention – which the UK has ratified – place more solid obligations upon State Parties as regards victim support, assistance, and protection, as does the EU 2011 Directive, to which the UK Government has indicated an intention to opt in.

Now we know what States must do, it is necessary to examine what trafficking is in a legal sense,³⁹⁵ which will in turn pave the way for discussion of why the issue of consent³⁹⁶ is so fundamentally important if adequate protection of vulnerable parties and victims is to be successfully achieved.³⁹⁷ For criminal cooperation and human rights compliant measures to be possible, it has been necessary to reach legal consensus as to exactly what human trafficking consists of. This transnational activity requires transnational response, the starting point for which is an internationally agreed definition of what constitutes ‘trafficking in humans’. This will now be discussed in Chapter 2.

³⁹⁵ Discussed in Chapter 2.

³⁹⁶ Discussed in Chapter 3.

³⁹⁷ Discussed in Chapter 4.

Chapter 2

Human Trafficking: The Evolution of an International Legal

Definition

Introduction

Trafficking activity has prompted a variety of concerns and a variety of responses on international and national levels. Initial concerns States might have about unlawful entry itself into their territory are exacerbated by matters of national border security, the connections with organised crime, and the highly exploitative purpose of trafficking. Economic globalisation and the breaking down of political and geographical borders have facilitated labour migration in recent years. Migrants – regardless of gender - are increasingly seeking the means to move in order to work in a more lucrative and economically stable environment, in order to improve their standard of living. This myriad of people may have crossed international borders legally or illegally, they may be working in the destination State legally or illegally, and they may have other or additional reasons for doing so than work alone.

Some will have fully anticipated and consented to what is in store for them, while others will have been deceived about the manner in which their transport will be arranged or the nature of their prospective employment on arrival in the host state. It is necessary to ask what exactly it is about these differing processes and objectives which makes some of them ‘trafficking’ in the legal sense. As will be discussed throughout this Chapter, various international anti-trafficking and anti-slavery instruments have, over the past century, used differing and changing definitions and frameworks of

understanding as to exactly what constitutes ‘trafficking in persons’. The definition of human trafficking has evolved over time. The current position is represented in the various instruments outlined in Chapter 1.³⁹⁸

As has been explained, at the beginning of this century, the UN Trafficking Protocol provided us with a comprehensive definition which has been adopted in subsequent anti-trafficking instruments. Following two years of negotiations at the UN Centre for International Crime Prevention in Vienna, the Protocol was signed by over 80 Countries in December 2000. This represents the first globally accepted definition of ‘trafficking in persons’, with the same definition reproduced verbatim in the recent CoE Trafficking Convention,³⁹⁹ and almost the same in the recent EU 2011 Directive,⁴⁰⁰ (which varies only through the explicit inclusion of ‘begging’ as a form of exploitation – specifically under the umbrella of ‘forced labour’ - sufficient to make transportation for this purpose ‘trafficking’).

The definition provided by these instruments is of a more detailed and technical nature than those previously offered, extending the ‘purpose’ element of human trafficking and raising the matter of the relevance of consent (or lack thereof) of the victim. Because it is central to the discussion in this Chapter, it is useful to replicate the definition here, with the minor variation provided within the EU 2011 Directive being included in brackets. Accordingly, ‘Trafficking in persons’ is:

³⁹⁸ See Chapter 1, Part II, section A, subsection i, which addresses the three main instruments considered throughout this thesis – the UN Trafficking Protocol, the CoE Trafficking Convention, and the EU 2011 Directive, which form the legal ‘anti-trafficking regime’.

³⁹⁹ Article 4.

⁴⁰⁰ Article 2.

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, (including begging) slavery or practices similar to slavery, servitude or the removal of organs.....

The definition goes on to state that consent (to the exploitation) is irrelevant where any of the means set out in the above paragraph are employed, and that it is not necessary to prove that any of those means were employed where a child is concerned, a child being any person under eighteen years of age.⁴⁰¹

Human trafficking can therefore be broken down into three elements: the ‘action’ of recruitment, transportation etc, the ‘means’ of coercion of force etc, and the ‘purpose’ - that of ‘exploitation’ - which is expanded upon by a non-exhaustive list of what may constitute ‘exploitation’. Therefore, trafficking is, by definition, a tripartite process, and all the elements of the definition must be present in order for activity to come within the scope of the definition.

The aim of this Chapter is to analyse - in greater detail than previously done in the thesis - exactly what trafficking is according to current internationally accepted legal

⁴⁰¹ The notion of consent in the specific context of human trafficking raises a multitude of problems and issues which merit in-depth discussion; consequently the role of consent in human trafficking will be dealt with in a subsequent Chapter – Chapter 3.

definition. This will be achieved through tracing the development of legal definitions of trafficking and evaluating these definitions in terms of the three elements outlined above; the ‘action’, ‘means’, and ‘purpose’. Part I serves to give a very brief overview of the development of the relevant instruments addressing trafficking and slavery over the past hundred years, to show how we have reached the definition in use today. Part II discusses the first element mentioned above: the ‘action’, and its component parts. In Part III, the ‘means’ element of trafficking will be analysed. Part IV will deal with the final element of the process: the ‘purpose’ of ‘exploitation’.

I. Frameworks of Understanding: The Changing Face of ‘Trafficking’

Human trafficking has, for the most part, been dealt with by specific instruments and/or provisions specifically targeting trafficking, allowing for wider and less technical notions of ‘exploitation’ to be caught by the anti-trafficking instruments, rather than being subsumed by anti-slavery legislation. Some of these anti-trafficking instruments merely contain prohibitions⁴⁰² others contain a specific definition of ‘trafficking in persons.’⁴⁰³

This is without doubt the correct approach, for to simply equate trafficking and slavery is incorrect and provides an incomplete picture of the scope of trafficking. Anyway, the slave trade is the correct analogy, as opposed to slavery. For the purposes of this discussion, it must be accepted that slavery goes beyond formal slavery (that is a status – one persons being owned as property by another - identified and permitted by

⁴⁰² Such as The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), 1980, Dec. 18, 1979, 1249 U.N.T.S. 14. (Opened for signature in 1980, entry into force in September 1981), Article 6, and the Convention on the Rights of the Child, (adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990), Article 35.

⁴⁰³ Such as the three main instruments (the UN trafficking Protocol, the CoE Trafficking Convention, and the EU 2011 Directive) which form the anti-trafficking regime which is discussed throughout the thesis.

law) to include *de facto* slavery, the treatment of one person by another, private person which, while being illegal in national law, does not have the effect of altering the legal status of the victim, simply creating conditions analogous to those of one who is held as a slave.

Secondly, trafficking, and the slave trade, are both processes, but the elements of these processes differ at points. Slavery may be a 'purpose' element of either process - that is to say, it can occur as an end result of each (and clearly must be for anti-slave trade instruments). The definition of trafficking, however, goes much further than anti-slavery legislation in that it envisages a broad spectrum of activities which constitute the 'exploitation' which can occur as an end result (or 'purpose') of the trafficking process, such as slavery-like practices and forced labour. This kind of exploitation, combined with elements of movement of people and their control through 'means' such as coercion, constitutes human trafficking as currently understood.

The purpose of this discussion for the thesis is to establish so far as is possible the scope and parameters of trafficking activity, and its parallels with slavery (one of the commonly accepted characteristics of which is that a person may not consent to be made a slave and, of increasing importance, with respect to which States accept positive obligations to protect the victims). This will be done in order to provide a broader framework of understanding of the existence and evolution of the different types of human exploitation (consensual and non-consensual) which have become increasingly prevalent in recent years as a result of the recognition of trafficking activity, and the development of a definition of human trafficking. This will in turn facilitate detailed analysis of the role of consent within that framework, to be discussed in Chapter 3.

The earliest trafficking-specific instruments preceded the League of Nations Convention to Suppress the Slave Trade and Slavery, 1926 (1926 Slavery

Convention).⁴⁰⁴ The move to address sex trafficking began with the International Agreement for the Suppression of the ‘White Slave Traffic’ of 18 May 1904 (1904 Agreement),⁴⁰⁵ which was primarily concerned with Governmental coordination of information concerning ‘the procuring of women or girls for immoral purposes abroad’. Subsequently, the International Convention for the Suppression of the ‘White Slave Traffic’ (1910 Trafficking Convention)⁴⁰⁶ was signed on 4 May 1910. The preamble speaks of suppression of the activity known as ‘White Slave Traffic’ - the application of these early instruments merely to the ‘slave traffick’ of white people reflected the concern at the time over European women being recruited and exported for work in brothels.⁴⁰⁷

A lack of definitional clarity in early instruments means that the term ‘trafficking’ was to an extent used without discrimination; the meaning of the term was complicated by use of the terminology ‘white slave traffic’ in the 1904 Agreement and the 1910 Trafficking Convention, which heavily implies a cross over between the slave trade and the process of trafficking. Notably, the 1910 Trafficking Convention explicitly uses the word ‘slave’ in the Convention’s title, yet does not refer to ‘slave’, ‘slavery’ or ‘slave trade’ in the definition provided in Article 1,⁴⁰⁸ thereby raising somewhat of a question mark as to the suitability of the use of ‘slave’ in the title.

⁴⁰⁴ League of Nations Convention to Suppress the Slave Trade and Slavery (Signed at Geneva on 25 September 1926, into force 9 March 1927, in accordance with article 12) 60 LNTS 253, Registered No. 1414.

⁴⁰⁵ International Agreement for the Suppression of the ‘White Slave Traffic (18 May 1904, entered in to force 18 July 1905) 35. stat. 1979, 1. LNTS. 83 (hereafter ‘1904 Agreement’).

⁴⁰⁶ International Convention for the Suppression of the "White Slave Traffic" (May 4, 1910) 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20 (hereafter ‘1910 Trafficking Convention’), as amended by Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic (May 4 1949) 2 U.S.T. 1999, 30 U.N.T.S. 23 (entered into force June 21, 1951).

⁴⁰⁷ C H Hauge, ‘Prostitution of Women and International Human Rights Law: Transforming Exploitation into Equality’ (1995) 8 New York International Law Review 23, 34.

⁴⁰⁸ Article 1 of the 1910 Trafficking Convention provides the following definition: ‘Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries’. Article 2 replicates the

Further trafficking-specific legislation came into existence in 1933, when the International Convention on the Suppression of the Traffic in Women of Full Age (1933 Trafficking Convention)⁴⁰⁹ was signed. The instrument had the effect of extending pre-existing treaties to women of full age who had been trafficked, even with their consent. This Convention, drafted after the Slavery Convention, moved away from that employed in earlier trafficking Conventions, and avoided terminology such as ‘slave’ and ‘slavery’.⁴¹⁰

The abovementioned traffick-specific treaties were consolidated in 1949 with the enactment of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others, 1949⁴¹¹ (1949 Trafficking Convention) which drew upon the language used in the 1910 Trafficking Convention.⁴¹² Prostitution was considered legal under the 1949 Convention, thus the emphasis was taken away from the perceived immorality of prostitution and prostitutes, and placed upon punishment of those responsible for the trafficking.

Ordinary dictionary definitions give a representation of how the term ‘trafficking’ was/is viewed in a non-legal sense, according to popular understanding. In the narrowest sense, trafficking is defined as ‘the transportation of merchandise for the

definition to an extent, but takes it further by doing away with the statement ‘even with her consent’ and instead including a list of ‘means’ which must be proven to have been employed by the trafficker: ‘by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion’.

⁴⁰⁹ International Convention on the Suppression of the Traffic in Women of Full Age (11 October 1933, entered into force 24 August 1934) 150 L.T.S. 431 (hereafter ‘1933 Traffic Convention’).

⁴¹⁰ Article 1 of the 1933 Traffic Convention provides the following definition: ‘Whoever, in order to gratify the passions of another person, has procured, enticed or led away even with her consent, a woman or girl of full age for immoral purposes to be carried out in another country, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.’

⁴¹¹ Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others (approved by General Assembly resolution 317(IV) of 2 December 1949, entered into force 25 July 1951) (hereafter ‘1949 Trafficking Convention’).

⁴¹² Article 1 of the 1949 Trafficking Convention contains the following definition: ‘The Parties to the present Convention agree to punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person.’

purpose of trade’,⁴¹³ with the object of trafficking being ‘saleable commodities’.⁴¹⁴ The key, with regard to human trafficking, is in the word ‘commodities’; trade being done in objects or products which could be bought and sold, and ultimately disposed of, at the will of those involved in the commerce. Some non-legal definitions go further, referring to trafficking as ‘[to] deal or trade in something illegal’,⁴¹⁵ thereby implying exchanges of a covert and clandestine nature, a form of trade which could be applied equally to drugs, arms, humans or other relevant subjects.

The term has historically been applied to the buying and selling of humans. Writings from the early 17th Century refer to ‘[t]hose which made it a trafficke to buy and sell slaves’,⁴¹⁶ thus making a link between the trade in slaves and use of the term ‘trafficking’. Historical use of the word also demonstrates a link between trafficking and migrant prostitutes: ‘These traffickes, these common truls I mean, walke abroad.’⁴¹⁷ This perceived link follows the same route as early traffick-specific legal instruments, which assumed that the paradigmatic trafficked victim would be a female who was kidnapped, transported across the globe, and forced in to prostitution or sex work.

Since the drafting of early legal instruments, the word ‘traffick’ has, in legal fora, consistently been applied to the movement of a person from one location to another for the ‘purpose’ of some form of exploitation. Early traffick-specific instruments limited their application to situations of sexual exploitation, or specifically, the exploitation of prostitution of another. It may be this perceived link with prostitution and sexual exploitation which has led to trafficking law developing separately from that which

⁴¹³ Oxford English Dictionary Online, Additions Series <<http://www.oed.com/>> accessed 01 Sept 2006.

⁴¹⁴ Oxford English Dictionary Online, Additions Series <<http://www.oed.com/>> accessed 01 Sept 2006.

⁴¹⁵ Online Dictionary provided by Oxford University Press <<http://www.askoxford.com>> accessed 01 Sept 2006.

⁴¹⁶ Oxford English Dictionary Online, Additions Series <<http://www.oed.com/>> accessed 01 Sept 2006.

⁴¹⁷ Ibid.

specifically addresses the slave trade and labour law. The legal definition of today supersedes early examples. For example, various different ‘means’ of acquiring the victim are envisaged, ranging from outright kidnapping to more covert means such as the use of deception or other forms of coercion.⁴¹⁸ The scope of the ‘purpose’ element of human trafficking has been developed to include many more forms of ‘exploitation’ than solely that of a sexual nature.⁴¹⁹

The justification for drawing comparisons between trafficking and slave trade provisions throughout this Chapter is based upon the fact that both are clearly linked, in that they provide examples of non-consensual movement of persons coupled with human exploitation and control. Some commentators refer to human trafficking as contemporary slavery, or the new slave trade.⁴²⁰ This is resisted here as a comprehensive proposition on the basis that ‘exploitation’ sufficient for trafficking does not always amount to slavery (even in extended understandings of it), although it certainly can do in certain circumstances.⁴²¹

The point is that trafficking may, either in a philosophical sense or in popular understanding, represent a modern form of slavery and those engaged in the process be regarded as slave traders, but that in a legal sense it also goes further because it includes different types of exploitation (though including slavery, *sensu stricto*) between which distinctions can be made (albeit not always easily⁴²²). Trafficking can be said to be

⁴¹⁸ Discussed in Part III, below.

⁴¹⁹ See, Part IV, below.

⁴²⁰ See: *Prosecutor v Kunarac, Kovac & Vukovic*, Case No. IT-96-23-T & IT-96-23/1-A, Judgment 118 (June 12, 2002) at 536; S Scarpa, n 135, 4; F Gold, ‘Redefining the Slave Trade: Current Trends in the International Trafficking of Women’, (2003) 11 *University of Miami International & Comparative Law Review* 99, who refers to human trafficking as ‘the twenty-first century’s slave trade’ at 100; L Kelly and L Regan, n 30, and the ‘Miami Declaration of Principles on Human Trafficking’ (2006) 1 *Intercultural Human Rights Law Review*, 11, which states that human trafficking is ‘a human rights violation that constitutes a contemporary form of slavery’.

⁴²¹ This is discussed in Part IV, section D, subsection iii, below.

⁴²² See, for example, Allain, who is critical of the ECtHR in *Rantsev* for not adequately engaging with the distinction between different types of human exploitation such as slavery and servitude - J Allain,

‘based’ upon slavery, but trafficking is not synonymous with the slave trade, the only ‘purpose’ of which was slavery. Non-consensual exploitation is clearly a central defining characteristic of trafficking activity; the ‘purpose’ is always exploitation of some form, and this element breaks down into the non-exhaustive forms outlined within the definition which seems to envisage a spectrum of exploitative activities; the condition of slavery being the most serious.

The remainder of this Chapter will examine in detail the component parts of the trafficking definition; those of the ‘action’, ‘means’, and ‘purpose’.

II. The ‘Action’

A. Evolution of the ‘Action’ Element

The three elements of ‘action’, ‘means’ and ‘purpose’ have become more clearly defined as the legal definition of trafficking in humans has evolved. The first part of the process, the ‘action’, is evident both in the current definition of the slave trade contained in the 1926 Slavery Convention - in that instrument, the ‘action’ is constituted by ‘capture, acquisition or disposal’⁴²³ - and in the 1910 Trafficking Convention, where the ‘action’ element remains the same for women over or under age, and can be identified as ‘procured, enticed, or led away...’ This terminology is of a different nature to that used in the 1926 definition of the slave trade. The language of the Slavery Convention is more in keeping with the characteristic of ownership which

‘*Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery*’ (2010) *Human Rights Law Review* 10:3, 546 – 557.

⁴²³ Article 1(2) of the 1926 Slavery Convention (n 404) states that ‘The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.’

is central to slavery as a ‘purpose’ element of the slave trade, and accordingly implies a more solid degree of permanence through use of terms such as ‘disposal’.

The terms ‘procurement’, ‘enticement’ and ‘led away’, as used in the 1910 Trafficking Convention, carry implications of a more tentative and coercive nature; the use of persuasion and trickery, which will be examined further at a later point as regards the ‘means’ element of the trafficking process.⁴²⁴ Although trafficked victims may frequently be viewed as possessions or commodities by the trafficker(s) or at least the ultimate recipient of the victim, this does not necessarily always constitute ‘ownership’ in the sense that slavery and the slave trade implies.⁴²⁵ The terminology used for both definitions, but that of the slave trade in particular, implies a restriction upon movement and therefore a deprivation of liberty. The terminology used by the 1910 Trafficking Convention is more in keeping with old-fashioned ideology, which saw ‘innocent’ women being led astray and introduced into prostitution.

The language of the 1910 Trafficking Convention was replicated in Article 1 of the Convention for the Suppression of the 1949 Trafficking Convention. The definition and the instrument were subject to some criticism⁴²⁶ and it has now been superseded by the definition contained within the three main legal instruments considered throughout this thesis.⁴²⁷

The ‘action’, ‘means’ and ‘purpose’ elements of trafficking are clearly visible in the definition featuring in the more recent instruments, i.e. the UN Trafficking Protocol

⁴²⁴ See Part III of this Chapter.

⁴²⁵ See, J Allain ‘The Parameters of ‘Enslavement’ in International Criminal Law’ (2009) Symposium on the New Development of International Criminal Law, Beijing China; J Allain, ‘The Definition of Slavery in International Law’ (2009) Harvard Law Journal, Vol. 2 No. 2; J Allain, ‘R v Tang: Clarifying the Definition of ‘Slavery in International Law’ (2009) Melbourne Journal of International Law 246; J Allain, ‘*Rantsev v Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery’ (2010) Human Rights Law Review 10:3, 546 – 557.

⁴²⁶ The European Parliament labelled the 1949 Traffic Convention ‘obsolete and ineffective’ as a result of the lack of emphasis on coercion and deception: see Resolution on Trafficking in Human Beings [1996] OJ C 032, P. 0088, A4-0326/95.

⁴²⁷ I.e. the UN Trafficking Protocol, the CoE Trafficking Convention, and the EU 2011 Directive.

etc. The definition appears to be based on definitions of the slave trade but is tailored and expanded specifically to address human trafficking. The ‘action’ element in the current definition can be identified as ‘recruitment, transportation, transfer, harbouring or receipt of persons’.

‘Recruitment’ can be elaborated upon, but mainly with direct reference to the ‘means’ aspect of trafficking,⁴²⁸ as the subjects of trafficking are frequently recruited through, for example, a fraudulent job advertisement or a false promise from someone they trust.

‘Transportation’ and ‘transfer’ can take many forms, from legitimate border crossing to the use of totally covert means; one account provided by a particular trafficked victim describes use of a type of canoe which is undetectable by radar.⁴²⁹

The inclusion of ‘harbouring’ illustrates that those retaining the subject in any way play just as guilty a part in the process as those who acquired the subject in the first place, as do those who ‘receive’ the subject. Once again, the terminology of the trafficking definition implies that action of a less forceful nature than that intimated within the Slavery Convention may suffice, illustrating the potential differences of degree between the different ‘purpose’ elements of trafficking envisaged by the trafficking definition, to be discussed later.⁴³⁰

Along a similar vein, the language of the current internationally recognised trafficking definition seems to be supportive of an ‘Autonomy’⁴³¹ perspective than that used in early traffick-specific or slavery-specific instruments. This, coupled with the

⁴²⁸ See Part III of this chapter for a discussion of the ‘means’ element of human trafficking

⁴²⁹ Francis Loncle, ‘Eastern Europe Exports Flesh to the EU: The Natasha Trade’, *Le Monde Diplomatique*, (December 2001).

⁴³⁰ The terminology used in the trafficking definition makes it clear that that it is possible to consent to exploitative activity, but that any instance of the ‘means’ shall render the consent irrelevant. The ‘Autonomy v Paternalism’ perspectives (as to consent to sex work) are discussed in Chapter 3, Part IV, section A *et seq.*

⁴³¹ Discussed in Chapter 3, Part IV, section A.

inclusion of a ‘means’/lack of consent element, indicates changing frameworks of understanding of human trafficking, and may also (speculatively) indicate recognition of increased consensual economic migration⁴³² to, say, work in the sex trade.

B. ‘Transportation’

i. The Requirement of Border Crossing

Modern disputes over trafficking definitions include the issue of whether international borders must be crossed in order for the activity to constitute trafficking.⁴³³ This part of the process constitutes part of the ‘action’ element. The definition of ‘slave trade’ in the 1926 Slavery Convention did not make explicit mention of the necessity to cross international frontiers; thus one might assume that a slave might be acquired and sold within the same country, and that such activity might still constitute ‘trade’ within the meaning of the Convention. Restricting the Convention to purely cross-border situations would not be in the interests of effectiveness of eliminating slavery.

Regarding trafficking, the instruments drafted within the early twentieth century appeared to incorporate an element of international border crossing. The 1904 Agreement relates to the ‘procuring of women or girls for immoral purposes abroad.’ Article 3 of the Agreement specifically refers to repatriation, which indicates that cross-border activity was envisaged when the Agreement was drafted. The 1910 Trafficking Convention does not specifically state that borders must be crossed, although it does state that perpetrators ‘shall ... be punished, notwithstanding that the various acts

⁴³² Potentially through illicit channels, thereby engaging the legitimate interests of the State as regards protecting border integrity.

⁴³³ F Gold, n 420, 103.

constituting the offence may have been committed in different countries’,⁴³⁴ and it also envisages extradition of perpetrators.⁴³⁵

The ambit of the 1933 Trafficking Convention was confined solely to international trafficking of women of full age, even with their consent, from one country to another, thereby establishing a need to cross international borders in order for the crime to constitute trafficking. Evidently, ‘a state could therefore conceivably tolerate on a national level what it condemns and seeks to prevent at an international level’.⁴³⁶ This statement should not, however, be accepted as given. The reality of the situation is perhaps more likely to be that States would deal with purely internal situations according to the relevant domestic legislation regarding sexual offences, assuming this is what is meant by ‘immoral purpose’, and assuming that States had such legislation in place at the time. It was the international aspect of trade in humans which was seen as the problem and targeted accordingly.

The 1949 Trafficking Convention does not openly further this trend of requiring a cross-border element. No explicit or implicit mention is made of the need for international borders to be crossed in order for the activity to qualify as trafficking. Subsequent proposed definitions took this further; a coalition of Non Governmental Organisations (NGOs) named the Human Rights Caucus⁴³⁷ referred to the ‘action’ element within its definition as ‘[The] recruitment, transportation within or across borders, purchase, sale, transfer, harbouring or receipt of persons’. Similarly, the International Organisation for Migration (IOM) defines the ‘action’ element of

⁴³⁴ Article 2.

⁴³⁵ Article 5.

⁴³⁶ UNHCHR, D Weissbrodt and Anti-Slavery International, ‘Abolishing Slavery and its Contemporary Forms’, (2002 United Nations New York and Geneva) HR/PUB/02/4, 19.

⁴³⁷ Members of the Human Rights Caucus include: International Human Rights Law Group, Foundation Against Trafficking in Women, Global Alliance Against Traffic in Women, Asian Women’s Human Rights Council, La Strada, Ban-Ying, Fundacion Esperanza, Foundation for Women, KOK-NGO Network Against Trafficking in Women, Women’s Consortium of Nigeria, Women, Law & Development in Africa (Nigeria).

trafficking as when ‘A migrant is illicitly engaged (recruited, kidnapped, sold etc) and/or moved, either within national or across international borders’.⁴³⁸

Article 4 of the UN Trafficking Protocol reverts back to the pre-1949 position and states that the offences must be ‘transnational in nature’. The transnational nature of the Trafficking Protocol illustrates the international dimension of trafficking, as did the 1933 Trafficking Convention, and recognises the potential for the trafficking process to take place through a chain of people across international borders, and, therefore to involve transnational organised crime.

Article 2 of the CoE Trafficking Convention explicitly states that both national and transnational trafficking is caught by the definition, and goes further in stating that no connection with organised crime is necessary, which seems to be a deliberate attempt to distance itself from the more restrictive terms of the Trafficking Protocol. The involvement of international OCGs features as a central concern of the Trafficking Protocol, the transnational element of which renders it inapplicable to purely internal situations. To do so is to render it less effective, as both purely internal situations, and situations where an already trafficked person was recruited again and moved on within one country, would fall outside of this definition, and thus be left to be addressed only by national law.

The EU 2011 Directive makes specific provision as regards Member States establishing jurisdiction over trafficking offences where ‘the offence is committed in whole or in part within their territory’,⁴³⁹ thereby indicating that even wholly internal trafficking falls within the scope of the Directive. Similarly, UK domestic legislation enacted to address human trafficking – the Sexual Offences Act 2003 – contains

⁴³⁸ International Organization for Migration ‘Trafficking in Migrants, IOM Policy and Responses’ Working Paper (March 1999).

⁴³⁹ Article 10(1)(a).

provisions which specifically refer to trafficking for sexual exploitation into,⁴⁴⁰ within,⁴⁴¹ and out of⁴⁴² the UK.

Instances of ‘internal’ trafficking are reported.⁴⁴³ However, that which may be termed ‘intra-state’ or ‘internal’ trafficking/non-consensual exploitation may frequently result in a remedy which lies in the hands of the State in question applying its national criminal law. That the State may deal with such cases according to national law may well have been (and still be) the usual situation. It is the attractiveness of foreign markets, the resulting profits, the disparity between economic conditions between States and the ease of transportation which have facilitated and even encouraged the transnational trade. However, States have seldom agreed on the need to deal with ‘intra-national’ or ‘internal’ trafficking/non-consensual exploitation, save where the activity reaches the standards of serious human rights violations, such as slavery and its related practices.

ii. Legality of Border Crossing

It is made clear in the Explanatory Report to the Council of Europe Trafficking Convention that entry of trafficked persons into a State’s territory need not specifically be illicit.⁴⁴⁴ Legal border crossing and lawful presence on national territory therefore do not negate a finding of human trafficking under the CoE Trafficking Convention. The UN Trafficking Protocol is silent as to whether lawful entry would be outside the offence of trafficking, and the *Travaux* do not elaborate upon this point. The EU 2011

⁴⁴⁰ SOA 2003, s. 57.

⁴⁴¹ SOA 2003, s. 58.

⁴⁴² SOA 2003, s. 59.

⁴⁴³ UNICEF, UNOHCHR, OSCE, ODIHR, ‘Trafficking in Human Beings in South Eastern Europe’, n 46, 116.

⁴⁴⁴ Explanatory Report to the CoE Trafficking Convention, n 248, para 80.

Directive makes no mention of limitations regarding the legality of border crossings – this is logical as requiring illicit entry into a State would render the Directive inapplicable to any EU nationals or residents who were then trafficked within the EU.

The issue of the legality of border crossing is one of the elements of this activity which distinguishes trafficking from smuggling of humans. The latter is defined by Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime (Smuggling Protocol)⁴⁴⁵ as:

... the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident...

The terminology used clearly requires international border crossing, and illegal entry into the host state. Smuggling is, therefore, a matter of facilitation of illegal migration. It is simply constituted by an ‘action’, without the need for any subsequent ‘means’ or ‘purpose’ to constitute the offence, in contrast to the definition contained within the Trafficking Protocol.⁴⁴⁶

The inclusion of lawful border-crossings within the concept of trafficking has practical advantages, as it includes the trafficking of those who have lawfully entered a State. These differences between trafficking and smuggling underpin the purposes of the separate regimes – one is aimed at combating the facilitation of illicit border crossings, the other is aimed at combating exploitation, and accordingly recognises that

⁴⁴⁵ Smuggling Protocol, n 5.

⁴⁴⁶ A separate ‘purpose’ of financial gain can be seen in the definition of smuggling, but this purpose is divorced from any context of using the smuggled individual for gain beyond payment for getting them from A to B.

even those legally present on the soil of a destination State may have been brought there to be subjected to exploitation.

C. The 'Action' – Some Conclusions

In establishing what trafficking actually is according to legal definition, it is made apparent by the trafficking definition that legality or otherwise of border crossing is not a problematic issue here. The inclusion of a transnational aspect in the Trafficking Protocol illustrates the recognition of the international dimension of this phenomenon. The trafficking of humans is an activity which frequently involves the crossing of international borders, and the Trafficking Protocol exists to supplement a Convention which targets transnational organised crime; activity which is, by definition, cross-border in nature. The inclusion of activity which does not cross international borders makes trafficking law more applicable and effective, to address many situations of exploitative coercive movement of persons. This ensures that 'human trafficking' includes those bought and sold within a State, although in reality cases of 'internal' trafficking may be dealt with according to national law.

The 'action' element of trafficking, although of a broader nature than its slave-trade counterpart, has not been subject to extensive change as the definition has evolved, predominantly a result of its being the least problematic element of the trafficking process in definitional terms. The language 'recruitment, transportation...' etc is sufficiently drafted to cover any acquisition of a person. The broader language used when compared with that of slave trade provisions, suggests an 'action' of a potentially less immediately forceful nature and therefore wider reach. The 'action' element of trafficking carries implications of what is to come; the underhandedness and

trickery employed by the trafficker which comprises the second element of the process: the ‘means’, which in turn qualifies the action and makes it part of human trafficking as distinguishable from the slave trade *per se*. This element will now be discussed.

III. The ‘Means’

A. Evolution of the ‘Means’ Element

The ‘means’ follows on from the ‘action’, and refers to the manner in which the action is executed - for example, a person is ‘recruited’ (action) through ‘force’ (means) for ‘exploitation’ (purpose). Both international trafficking and slavery legislation provide respective definitions which contain a ‘means’ element, although they differ somewhat in nature. The ‘means’ element of the slave trade, as contained in the 1926 Slavery Convention, is constituted by ‘all acts involved’ in the ‘capture, acquisition or disposal’ of the subject. Through the inclusion of ‘every act of trade and transport in slaves’, the definition covers the reduction of free men into slaves, and the movement, transportation, or sale etc. of those already enslaved.

As regards human trafficking, the ‘means’ element is more specific and is the most controversial element. Trafficking instruments have at times embraced and at times shied away from the inclusion of specific means within their definitions. The 1910 Trafficking Convention imposed a requirement for various ‘means’ to have been employed where the woman in question is over age⁴⁴⁷ - these means were ‘by fraud, or

⁴⁴⁷ ‘Over age’ refers to women over twenty completed years of age, as stated in the Final Protocol to the 1910 Trafficking Convention, n 406.

by means of violence, threats, abuse of authority, or any other method of compulsion’.⁴⁴⁸

This differential treatment, dependant on age, is fairly in keeping with the habitual distinction between those who were perceived to be immoral women – prostitutes – and pure and innocent women who were involuntarily brought into this market, the aim of the relevant legislation being to police the prostitutes rather than the traffickers. The terminology used i.e. ‘any other method of compulsion’ has the potential for wide construction, and would have reached a whole variety of ways of bringing pressure on to the victims. Unquestionably, it would be unreasonable to allow consent from those under age - minors should not be deemed capable of consenting to such activity - yet, by requiring that something extra in the case of older females, this instrument impliedly introduced the issue of consent, or lack thereof.

The ‘means’ element entirely disappeared with the introduction of the 1949 Trafficking Convention, which was, until fairly recently, the main instrument to combat sex trafficking as it was perceived at the time. The 1949 Convention was highly criticised for its lack of a ‘means’ element and it was evidently felt that the drafting of a future instrument should focus on coercion. Since then, almost every suggested definition after the 1949 Convention has included a list of means, such as those provided within the definition of trafficking contained in the UN Trafficking Protocol, the CoE Trafficking Convention, and the EU 2011 Directive. To reiterate, these are:

... 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

⁴⁴⁸ Article 1.

vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person...⁴⁴⁹

Some of the terms used within the provision are ambiguous, and are open to differing interpretations. Opinion from certain sources is that the definition would be problematic if incorporated into domestic law in its current state.⁴⁵⁰ Notably, the UK implementing legislation of anti-trafficking measures looks little like the international definition, as the different offences potentially comprising human trafficking are dealt with by a series of different provisions which ultimately do the same job.⁴⁵¹

In its (Unofficial) Annotated Guide to the Complete UN Trafficking Protocol (the Guide), the International Human Rights Law Group suggested a definition which it deemed suitable for inclusion in domestic legislation as it avoids confusing and ambiguous language: ‘Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by any means, for forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’⁴⁵² The terms ‘forced labour or services’ are intended to include prostitution in this context.⁴⁵³

⁴⁴⁹ UN Trafficking Protocol, Article 3, CoE Trafficking Convention, Article 4, EU 2011 Directive Article 2.

⁴⁵⁰ See, A D Jordan ‘Annotated Guide to the Complete UN Trafficking Protocol’ (May 2002, Updated August 2002) Ann D. Jordan Director, Initiative Against Trafficking in Persons, International Human Right Law Group, 9.

⁴⁵¹ Trafficking into, within and out of the UK are criminalised by sections SOA 2003 ss 57 - 59. According to these provisions, A commits an offence if he facilitates the entry, travel within, or departure from the UK of B, and A intends to or believes that another is likely to do something which would constitute a ‘relevant offence’, the latter being primarily (although not exclusively) an offence under Part 1 of the SOA 2003, such as, for example, controlling prostitution for gain (s53). SOA, s 60 also includes as ‘relevant offences’: ‘an offence under section 1(1)(a) of the Protection of Children Act 1978 (c. 37); an offence listed in Schedule 1 to the Criminal Justice (Children) (Northern Ireland) Order 1998 (S.I. 1998/1504 (N.I. 9)); an offence under Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 (S.I. 1978/1047 (N.I. 17)), or anything done outside England and Wales and Northern Ireland which is not an offence within any of paragraphs (a) to (d) but would be if done in England and Wales or Northern Ireland.’

⁴⁵² A D Jordan, n 450, 7.

⁴⁵³ Ibid.

The Guide goes on to state that the ‘means’ aspect of the trafficking is not important; the process of moving the person (action) and the subsequent exploitation (purpose) are the key aspects. The drafters of the UN Trafficking Protocol – and those of the instruments replicating the definition - evidently did not share this view, as the inclusion of an extensive list of means demonstrates. It is this aspect which differs so greatly in comparison to the 1926 Slavery Convention definition of the slave trade.

It is evident from the wording of the latter that particular means of ‘capture, acquisition or disposal’⁴⁵⁴ were not envisaged; the requisite means was constituted by ‘all acts involved’⁴⁵⁵ in capturing, acquiring or disposing of the subject. This statement is comparable to ‘by any means’, as contained in the above-mentioned trafficking definition proposed by the International Human Rights Law Group. The inclusion of a specific list of ‘means’ in the current definition muddies the waters from the perspective of identifying victims, as in a technical sense a specific ‘means’ may have to be identified to have been used against the victim in order for the putative victim to be deemed to have been trafficked. Where no such objective proof (of, say, coercion) is evident, this renders correct victim identification inherently problematic.⁴⁵⁶

Each element of the ‘means’ aspect as included within the UN Trafficking Protocol will now be considered in more depth.

⁴⁵⁴ Article 1(2) League of Nations Convention to Suppress the Slave Trade and Slavery (Signed at Geneva on 25 September 1926, into force 9 March 1927, in accordance with article 12) 60 LNTS 253, Registered No. 1414.

⁴⁵⁵ Ibid.

⁴⁵⁶ See Chapter 4, Part VI, for discussion of the mechanism for victim identification.

B. ‘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’

i. Threat, Force, Coercion and Abduction

Although deceptive means such as false adverts for employment (discussed below⁴⁵⁷) are frequent methods of recruitment used by traffickers, less subtle ways of recruitment are also identified.⁴⁵⁸ These include kidnap or abduction; use of force or coercion in the form of actual violence or the threat of violence, the involvement of family members in recruiting the victim, and drug and alcohol addiction. Some women and girls report being kidnapped; 20% of cases assisted by IOM Sofia⁴⁵⁹ in March 2000 – August 2001 were recruited this way.⁴⁶⁰

Coercion, and what exactly amounts to coercion, is a problematic element of the ‘means’ aspect of human trafficking. To coerce is to ‘persuade (an unwilling person) to do something by using force or threats; to obtain (something) by such means.’⁴⁶¹ According to the ordinary meaning of the word, factors which lead to a state of duress or compulsion could be included. Logical construction of the term would mean that coercion in the context of trafficking would solely include methods directly employed by the trafficker(s). A recent UK human trafficking case recognised coercion where

⁴⁵⁷ See section ii, below.

⁴⁵⁸ UNICEF, UNOHCHR, OSCE, ODIR, ‘Trafficking in Human Beings in South Eastern Europe’, n 46, 7.

⁴⁵⁹ As stated on the IOM website, ‘IOM Sofia offers information and advice regarding the legal regime, labour legislation, rights and responsibilities for employers and employees, and on mechanisms of support in cases of abuse, travelling abroad safely, possibilities for legal migration and immigration legislation and procedures as well as raising awareness on risks of irregular migration.’ See <<http://www.iom.int/jahia/Jahia/bulgaria>> accessed 01 June 2011

⁴⁶⁰ UNICEF, UNOHCHR, OSCE, ODIR, ‘Trafficking in Human Beings in South Eastern Europe’, n 46, 52.

⁴⁶¹ Oxford English Dictionary (Oxford University Press, Second Edition 2003).

there was ‘some evidence of threats and inhuman treatment and restriction of the women's liberties and confiscation of their passports.’⁴⁶² There is clearly the potential for broad scope and construction here.

It seems that psychological coercion is to be included within the scope of the term, which could potentially come about through threats, intimidation or bullying. In *United States v Jimenez-Calderon*⁴⁶³ the trafficked women were not allowed to leave the house or even speak to each other, and were subjected to psychological coercion through threats and ill treatment. Nonetheless, the US’s Trafficking Victim’s Protection Act of 2000 (TVPA),⁴⁶⁴ although criminalising the use of any form of psychological coercion to compel labour, has received some criticism. Kim states that:

... the TVPA’s open-ended prohibition on non-physical and non-violent coercion does not provide further guidance on the exact range of coercive tactics sufficient to meet the legal standard. Hence, while recognized as a key component of human trafficking, courts and legislatures have yet to define the legal dimensions of psychological coercion—leaving its scope ambiguous, and ultimately, difficult to enforce. The legal uncertainty of psychological coercion has the additional, graver consequence of marginalizing a class of coerced trafficked workers who might otherwise be eligible for protection and immigration relief under the TVPA.⁴⁶⁵

⁴⁶² *Regina v Lorenc Roci, Vullnet Ismailaj* [2005] EWCA Crim 3404.

⁴⁶³ *United States v Jimenez-Calderon*, 135 Fed. Appx. 562 (3d Cir. 2005). Indicted 9/26/02, Sentenced 8/7/03 & 5/4/04, D. New Jersey.

⁴⁶⁴ Trafficking Victim’s Protection Act of 2000, Public Law 106 - 386 - Oct. 28, 2000.

⁴⁶⁵ See K Kim, ‘The Coercion of Trafficked Workers’, Paper presented at the annual meeting of the Law and Society Association, Renaissance Chicago Hotel, Chicago, IL, May 27, 2010.

Psychological coercion, and exactly what it amounts to, suggests a potentially broad spectrum of tactics ranging from ‘strong’ to ‘weak’ pressure. The more easily dealt with cases will concern ‘strong’ forms of psychological coercion, which may also be ‘threats’ and therefore be caught by the trafficking definition in any case. Yet, there will be cases of a weaker nature where the degree of psychological coercion is less severe.⁴⁶⁶

Accounts provided by trafficking victims further illustrate this method (i.e. of psychological coercion):

(A) man came to the house and I refused to entertain him. My friend said that if I did not do it she would tell my family that I was a prostitute and that our family would be shamed in the village.⁴⁶⁷

Coercion of this form - through threats to reveal the nature of the employment to the family or community – can be a powerful tool because in some societies a sex worker would be rejected and considered to be ‘spoilt’ or ‘ruined’, and therefore unable to marry, or even to reintegrate with their community. This has the effect of alienating the victim from their place of origin, which keeps them under the control of the traffickers.

Physical force is a tool commonly employed by the traffickers. In *United States v Rojas*⁴⁶⁸ the defendants lured the victims, all women, from Mexico into the US on the promise of legitimate employment. On arrival in Atlanta, the women - at least one of whom was a minor - were forced to have sex with numerous men every night, through use of force in the form of physical violence and threats. Many of the terms used can be

⁴⁶⁶ For example if the threats/coercion are of an economic nature.

⁴⁶⁷ L Brown, n 120, 110.

⁴⁶⁸ *United States v. Rojas*, 356 F.3d 876, 879 (8th Cir. 2004) Indicted 1/28/04, Convicted 4/2004 & 8/27/04, Sentenced 11/23/04, N.D. Georgia.

illustrated by way of reference to accounts of experiences provided by trafficked victims. Empirical research conducted by Brown provides many examples, such as the following, which demonstrates the use of physical force: ‘My husband let his friends use me and they gave him money. At first I refused but then he would beat me. He was pleased with me when I earned money for him.’⁴⁶⁹

Clearly, the use of direct or indirect force and varying types of violent and non-violent coercion all feature as elements of human trafficking. The following section will consider some of the more non-violent types of ‘means’ – those of deception and fraud.

ii. Deception and Fraud

Many accounts provided by trafficked victims include details about the promise of a legitimate border crossing and employment of a specified nature upon arrival in the destination State, yet in reality the victim may be subject to illicit entry into the destination State and forced to work as a sex worker or some other form of labourer – a reality far from that which was promised. Such deception can render a situation of facilitated migration one of human trafficking. There can be a fine line between the two.

Europol state that:

The majority of identified trafficking cases involve women and girls who had no idea that they would be forced to work in the sex industry. Those females that are aware or have some suspicion that they will be prostituted also suffer in that the conditions they work in probably bear no relation to

⁴⁶⁹ L Brown, n 120, 74.

what was explained to them by the trafficker or pimp, with the amount of money they are allowed to keep being the main issue.⁴⁷⁰

There are ample anecdotal instances of such deceptive practice.⁴⁷¹ Brown provides an account of a fifteen-year-old Cambodian girl who came from an extremely poor family. She met a woman who appeared to be very rich and who promised her employment, yet she was deceived about the nature of her employment:

There was woman who sometimes came to our village. She was rich with jewels and beautiful clothes and she said she could find good jobs in the city for some of us girls. I wanted to go with her so when she came back I went for an interview with some others. There were two men with her and they asked us lots of questions. I was really happy because they chose me and two others to get jobs. We left the next day in a taxi and we went to Phnom Penh. We thought we were going to work in a shop but instead they sold all of us to different brothels.⁴⁷²

An IOM study reveals further examples of such deception:

When I arrived in Luxembourg a couple of young men were waiting for me. They took me to the club where I was supposed to work as a waitress. I showed the director my contract but he just shook his head and had me thrown out. I realized with horror that I'd been deceived ... Outside a car pulled up, a man spoke to me in Russian and I was forced inside ... I was

⁴⁷⁰ Europol, n 37, 33.

⁴⁷¹ See, L Brown, n 120.

⁴⁷² Ibid, 90.

taken to a locked brothel; it was like a prison. I was beaten and raped. Then I was forced to serve 10 to 15 clients a night ... I tried to escape to the Kyrgyz Embassy. I was caught and punished.⁴⁷³

Kelly⁴⁷⁴ draws upon examples from an IOM study which indicate the difficult technical nature of determining certain aspects of trafficking, and uses ‘deception’ as an example. The following case study is cited:

A young woman was studying in Tashkent and living in a hostel. A woman she did not know said that she was recruiting girls for summer jobs in the Israeli sex industry. When the young woman arrived she worked for several months and received no payment. When she raised this, her pimp (“balobay”) said she had been earning a percentage all along, but that he had been saving it for her. After eight months, she was picked up by the police for overstaying her visa. Her pimp promised to bring the money she was owed (9,000 Euros) to the jail. He never came and she wants to return to claim her money, but has been told by the Israeli authorities that if they pick her up again they will prosecute her.⁴⁷⁵

This account indicates initial consent, invalidated by deception. If the intention not to pay was always present, the consent was never valid as it could not be considered to

⁴⁷³ International Organization for Migration, ‘Trafficking in Women and Children from the Kyrgyz Republic’ (Irina, Case Study 6) (November 2000) 26
<http://iom.ramdisk.net/iom/images/uploads/Kyrgyzstan_Report%20on%20Trafficking_2000_En_1071070736.pdf> accessed 30 Nov 2008.

⁴⁷⁴ See International Organization for Migration ‘Fertile Fields: Trafficking in Persons in Central Asia’ (A report prepared by Liz Kelly, Child and Woman Abuse Studies Unit, London Metropolitan University April 2005).

⁴⁷⁵ Ibid, 67 – 68.

have been informed⁴⁷⁶ - one of the central requirements for a valid consent. As regards the abovementioned case study, Kelly notes that whether or not trafficking has occurred depends upon whether one can infer that there was deceit about earnings and the intention to pay, as there is no deception with respect to the nature of the 'work'.⁴⁷⁷ Therefore, it is necessary to determine what the individual must consent to, and at what point consent must be given in order for it to be valid. This is further discussed in Chapter 3.⁴⁷⁸

The *Travaux Préparatoires* to the UN Trafficking Protocol⁴⁷⁹ remain silent on the issue of deception. The Explanatory Report to the CoE Trafficking Convention provides little elaboration, stating that '[f]raud and deception are frequently used by traffickers, as when victims are led to believe that an attractive job awaits them rather than the intended exploitation.'⁴⁸⁰ As the Explanatory Report to that Convention indicates, the clearest form of deception occurs in relation to the nature of the work to be undertaken.⁴⁸¹ Newspaper advertisements for waitresses, nannies, or similar act as the initial part of the recruitment of the victim, and once passports have been handed over, the victim will find themselves in a very difficult position. These victims may be very reluctant to approach the authorities for help, due to their status as an illegal migrant worker or their mistrust of the authorities. The IOM documents numerous examples of passports and travel documents being confiscated, a method of control employed by many traffickers.⁴⁸²

⁴⁷⁶ Informed consent is discussed in Chapter 1, Part III, section A, subsection ii, and in Chapter 3, Part I.

⁴⁷⁷ International Organization for Migration, n 474, 68.

⁴⁷⁸ See Chapter 3, Part I.

⁴⁷⁹ United Nations General Assembly 'Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (2000) UN Doc A/55/383/Add.1.

⁴⁸⁰ Explanatory Report to the CoE Trafficking Convention, n 248, para 82.

⁴⁸¹ Ibid.

⁴⁸² International Organization for Migration, n 473, 24.

The UN Special Rapporteur on Violence against Women, its Causes and Consequences identifies two main patterns of trafficking for the purpose of prostitution. These are the ‘two step’ and ‘one step’ methods.⁴⁸³ The ‘two-step’ pattern has in the past been more common, and targets those women already working in prostitution, in order to recruit them so that they may be trafficked abroad. The ‘one-step’ pattern targets women and girls in their homes and villages to be trafficked for prostitution. This method frequently involves someone approaching the victim or her family, and deceiving them, for example, as to the nature of employment which they are offering the girl/woman in question. The latter method is more aggressive, and becoming prevalent as the demand for younger women increases as a result of, for example, fear of AIDS.⁴⁸⁴ In some societies, daughters may be sold by their families,⁴⁸⁵ and will often have no inkling as to the fate which is to befall them.⁴⁸⁶

Traffickers react to law enforcement measures, and take advantage of the freedom of movement within certain areas such as the EU. As new markets are identified, recruitment methods are adapted accordingly. Although there is frequently an awareness of the dangers of human trafficking, potential victims are not always willing to accept that they could actually be at risk. Interestingly, research by Europol finds that well-educated, urban dwelling Ukrainians are more likely to be trafficked.⁴⁸⁷ An IOM

⁴⁸³ See Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, (1994) United Nations Economic and Social Council E/CN.4/1997/47/Add.4 Commission on Human Rights, 53rd Session, Provisional Agenda Item 9(a)

<<http://www.unhcr.ch/Huridocda/Huridocda.nsf/0/043c76f98a706362802566b1005e9219?Opendocument>> accessed 01 July 2011.

⁴⁸⁴ International Organization for Migration, ‘Slavic women trafficked into slavery’, Trafficking in Migrants Quarterly Bulletin (Geneva, Switzerland, May 1995)

<http://www.iom.ch/IOM/Publications/books_studies_surveys/MIP_traff_women_eng.htm> accessed 01 Sept 2005.

⁴⁸⁵ UNICEF, UNOHCHR, OSCE, ODIR, ‘Trafficking in Human Beings in South Eastern Europe’, n 46, 52.

⁴⁸⁶ This is likely to be less of an issue in CEE in terms of ‘routes’ into the sex traffick market; economic and discriminatory factors are more of an issue, or a cause, as regards CEE women falling into this market – see, Chapter 1, Part I, section A.

⁴⁸⁷ Europol, n 37, 18.

survey⁴⁸⁸ conducted in Ukraine posed various questions to Ukrainian women, including whether it would be acceptable to work in the sex industry abroad. None of the women consulted said yes. They were also asked whether a job as a dancer or stripper would be acceptable. Some of them said yes, which indicates that the deceptive naming of jobs such as ‘entertainer’ can play an important part in the recruitment process.

Varying methods of recruitment are reported by victims of trafficking, but common themes emerge from these, almost always involving deception of some sort. Europol identify the following recruitment methods:⁴⁸⁹ false offer of employment; false representation of declared sex work; false promise of marriage or some other form of approach by a ‘lover boy’ (this method is frequently reported in Kosovo); and false allegation of criminal conduct and subsequent debt bondage, i.e. once the migrant is settled into their new employment, they are falsely accused of some crime such as theft of money from the employer, and forced into prostitution in order to repay the fictitious debt. A recent domestic case involving a Romanian father and son trafficking team provides a clear example of deception being used to recruit the women, who, like many before them, believed that the job offers of ‘waitress’ or ‘entertainer’ were legitimate.⁴⁹⁰

Recruitment methods reported by Moldovan women are various and include:⁴⁹¹ direct contact, whereby the victims or their families and peers are approached by traffickers; the use of newspaper advertisements; tourist agencies which offer migration services – some are legitimate, others are not; job agencies, many unlicensed, some

⁴⁸⁸ International Organization for Migration, ‘Slavic women trafficked into slavery’, n 484.

⁴⁸⁹ Europol, n 37, 19.

⁴⁹⁰ BBC News ‘Romanian Father and Son found guilty of sex trafficking’ (18 January 2011) <<http://www.bbc.co.uk/news/uk-12221632>> accessed 18 Jan 2011.

⁴⁹¹ UNICEF, UNOHCHR, OSCE, ODIHR ‘Trafficking in Human Beings in South Eastern Europe’ n 46, 25.

offering illegal work, some run by organised crime groups; and marriage agencies, a less popular medium.

In Romania, victims report recruitment methods including false promises of legitimate work, as well as more realistic offers of work in the sex industry. Bulgarian victims report similar methods, including the use of deceptive advertisements – in fact, 56% of cases assisted by IOM Sofia in March 2000 – August 2001 were recruited this way.⁴⁹² It is also reported that sex workers are sometimes directly approached, and girls – especially Roma – are sold by their families.⁴⁹³

Bulgarian victims report that the majority of recruiters originate from Bulgaria and Albania, and are mostly - although not exclusively - men. False promises of work is also reported as the most commonly used method of recruitment by traffickers in Bosnia-Herzegovina, and also Serbia, where the main motivation behind migration is reported to be economic gain.⁴⁹⁴ Research from 2001 found that many Serbian women did not expect to work in the sex industry,⁴⁹⁵ demonstrating a real lack of education about the dangers of trafficking. Adverts for entertainers or housekeepers are a popular medium in Montenegro.⁴⁹⁶ Data collected by IOM between November 1999 and December 2005 provides insight into the frequency or popularity of the abovementioned methods. Recruitment by a stranger or a friend was among those most commonly reported, with family involvement being among the least commonly reported.⁴⁹⁷

⁴⁹² Ibid, 52.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid, 64.

⁴⁹⁵ Report on a Survey; 'Voice to Victims of Sexual Exploitation in Serbia', (Beosupport 2001), *cited in* UNICEF, UNOHCHR, OSCE, ODIR 'Trafficking in Human Beings in South Eastern Europe', n 46, 87.

⁴⁹⁶ UNICEF, UNOHCHR, OSCE, ODIR 'Trafficking in Human Beings in South Eastern Europe' n 46, 87.

⁴⁹⁷ See IOM Counter Trafficking Database <<http://www.iom.int/jahia/Jahia/pid/748>> accessed 01 July 2011.

A worrying and growing trend is that women are increasingly being used in the recruitment process in source countries.⁴⁹⁸ Some of these women will have become involved as a result of prior participation in organised crime, and others will have previously been trafficked themselves at some point, but have found their way into the ‘admin’ side of things; once women have been involved in the sex industry, their life choices become much more limited, and so they may be enlisted to recruit new victims. The problems arising from the use of females in the recruitment process are obvious – the female recruiter is used as ‘bait’. Potential female migrants may be more likely to trust another woman.

It is possible that many potential migrants will be so keen to leave for a better life that they will go regardless of who the recruiter is, yet the inclusion of females in the recruitment process will ensure that as many persons as possible are recruited in order to be sexually exploited. Statistics from the Dutch National Rapporteur suggest that of those suspects arrested in 2002 – 2003, one quarter were female.⁴⁹⁹ Bosnia-Herzegovina in particular has a bad track record in this respect – Europol report that in 2004, almost 60% of identified recruiters were women.⁵⁰⁰ They were all of Bosnian nationality and the victims described them as friends. It has also been reported that in Serbia and Montenegro, couples have been used in the recruitment process.⁵⁰¹ These worrying accounts and trends all indicated that deception and abuse of trust all feature heavily in the trafficking phenomenon.

⁴⁹⁸ United Nations Office on Drugs and Crime ‘Global Report on Trafficking in Persons’ (February 2009) 6 <http://www.unodc.org/documents/Global_Report_on_TIP.pdf> accessed 01 July 2011.

⁴⁹⁹ Europol, n 37, 19.

⁵⁰⁰ Ibid, 30.

⁵⁰¹ Ibid.

iii. Debt Bondage

Although not explicitly mentioned within the trafficking definition, it is commonly accepted that debt bondage is another means of retaining control over the trafficked person.⁵⁰² It features heavily in many accounts provided by victims, which indicates that this method is frequently employed by those involved in the trafficking process.⁵⁰³

This practice is defined by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, 1956, (Supplementary Slavery Convention)⁵⁰⁴ as:

... the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt of the length and nature of those services are not respectively limited and defined.⁵⁰⁵

Debt bondage as a ‘means’ aspect of trafficking would likely fall under the overarching umbrella of ‘other forms of coercion’ used for the purpose of controlling and exploiting the victim. This relatively commonplace strategy is illustrated by the following account, provided by a Filipina woman:

⁵⁰² See L Brown, n 120, *passim*, which provides many accounts of trafficked victims who have been subjected to exploitation and control through debt bondage.

⁵⁰³ *Ibid.*

⁵⁰⁴ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956, entered into force 30 April 1957) (hereafter ‘Supplementary Slavery Convention’).

⁵⁰⁵ Article 1.

We were sent into a big compound surrounded by high fences and it was very heavily guarded. There were three houses in the compound and all were filled with other Filipina who looked at us. We were told that we had to work in a club so that we could pay back our airfare and the money that the club owner had paid for us. We had to entertain the client because how else could we pay back the debt? ⁵⁰⁶

iv. 'Other forms of Coercion' – The Limits of Coercion

The body of persons who are trafficked or smuggled are unlikely to come from affluent backgrounds, where choice of, and access to, education and employment is abundant and free from the constraints of gender discrimination. The flow of traffick victims typically moves from east to west; essentially from poorer States to richer western States. Persons from an economically impoverished state or area may have an effective lack of opportunity when it comes to education or employment, particularly if they are female, and therefore no effective 'choice'. Such an oppressive situation might result in making the decision to be trafficked, but it cannot easily be said that the woman 'freely chooses' her fate. After all, 'it's better to go and earn money to spend than to stay home and starve.'⁵⁰⁷ In 1994, a definition offered by the UN General Assembly acknowledged the potential role of economic hardship in the trafficking process: '[Trafficking is the] illicit and clandestine movement of persons ...largely from

⁵⁰⁶ L Brown, n 120, 115.

⁵⁰⁷ S Skrobanek et al, *The Traffic in Women: Human Realities of the International Sex Trade* (London: Zed Books 1997) 91.

developing countries with economies in transition...'⁵⁰⁸ According, the potential for recognition of 'economic coercion of circumstances' as a form of 'means' will now be discussed.

On the face of it, it is legitimate to recognise that 'we do not treat an ostensible consent as invalidated simply because the agent was faced with a choice between unattractive options.'⁵⁰⁹ Nonetheless, the role of extreme economic hardship in migration and trafficking situations should not be underestimated, as it has clearly a bearing on the decision to enter a migration/trafficking situation (and therefore has a bearing on the consent of the decision maker). Indeed, full consent requires a rational and autonomous agent - '[t]he scope for self-determination afforded to the disempowered is radically reduced ... by informal mechanisms that render certain choices too costly – financially, socially, or personally – to be realistic options.'⁵¹⁰

The Proposal for the recent EU 2011 Directive recognised that:

Social vulnerability is arguably the principal root cause of trafficking in human beings. *Vulnerability derives from economic and social factors such as poverty, gender discrimination, armed conflicts, domestic violence, dysfunctional families, and personal circumstances such as age or health conditions or disabilities. Such vulnerability is used by international organised crime networks to facilitate migration and subsequently severely exploit people by use of force, threat, coercion, or various forms of abuse such as debt bondage. In fact the high level of profits generated is a major*

⁵⁰⁸ Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, (1994) U.N. ESCOR E/CN.4/1997/47/Add.4 Commission on Human Rights, 53rd Session, Provisional Agenda Item 9(a), at 19 <<http://www.awf.or.jp/pdf/h0010.pdf>> accessed 11 Jan 2007.

⁵⁰⁹ D Beyleveld, and R Brownsword, n 321, 126.

⁵¹⁰ V E Munro, 'Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy', (2008) 41 Akron L. Rev 923, 930.

underlying driver. The demand for sexual services and cheap labour is a concurrent driver.⁵¹¹ (Emphasis added)

Nonetheless, some commentators are critical of the ‘victim’ stereotype. Murray holds that women are well aware of the terms and nature of their work when they opt to enter trafficking-related situations, and that ‘false promises’ are rare.⁵¹² Others are of a similar opinion; that trafficking typically involves women who voluntarily migrate to a country which is more economically prosperous than their origin state.⁵¹³ Clearly, there is a tension between how these women – trafficked and smuggled sex workers – are perceived by different bodies or persons.

Beyleveld and Brownsword note that:

... as relationships become less guided by paternalistic considerations or by status and, correspondingly, more guided by notions of individual freedom and right, the importance of consent will be increasingly voiced.⁵¹⁴

Accordingly, if we are to follow an ‘Autonomy’ stance and recognise the ability and right to contract oneself into exploitative sex work (which this thesis does), then it is of utmost importance that true consent is present. Due to the elasticity of the notion of

⁵¹¹ Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, (COM (2010) 95 Final) at 1.2.

⁵¹² See A Murray, ‘Debt Bondage and Trafficking: Don’t Believe the Hype’, in Doezma J. and Kempadoo K. (eds). *Global Sex Workers: Rights, Resistance and Redefinition*. (Routledge, New York 1998).

⁵¹³ See, for example, NV Demleitner, ‘The Law at a Crossroads: The Construction of Migrant Women Trafficked into Prostitution’, in Kyle, D. and Koslowski, R. (eds) *Global Human Smuggling: Comparative Perspectives*, (The Johns Hopkins University 2001) 257, 264. Similarly, empirical research conducted in Birmingham where police were interviewed regarding their thoughts on trafficked women found that the prevailing attitude was that they had consented (source: Statement by Sarah Garrat, Personal Communication on 14 February 2008, following research conducted by the Asylum and Immigration Research Team, Birmingham, into the treatment of victims of human trafficking once discovered in the destination state).

⁵¹⁴ D Beyleveld, and R Brownsword, n 321, 3.

consent,⁵¹⁵ valid consent – particularly in a coercive environment such as that of sex work – is problematic to determine. Consequently, and somewhat paradoxically, then, a paternal and protectionist stance which requires a high standard of informed consent in order for the autonomous decision of the sex worker to be recognised as valid, is perhaps needed.⁵¹⁶

This tension merits enquiry into the motivations for consent. As Bhabha asks: ‘How should coercion be characterised? Does someone with a gun to their head consent to hand over money when robbed? Most would say no.’⁵¹⁷ Such a choice is ‘tainted by compulsion, undesirableness (in the sense that neither option is desirable) and threat.’⁵¹⁸ Bhabha goes on to consider this analogy in a migration context, and asks whether ‘persecution, destitution, and ... prolonged family separation constitute “guns” to the head’.⁵¹⁹ As regards different types of pressure and graduations of forced choice, it has been stated that:

At one end of a spectrum, the pressure applied may be characterised as ‘strong’ while, at the other end, the pressure applied may be characterised as ‘weak’. Operating with such a construct, we might characterise the gunman’s threat to life as ‘strong’, threats to property (unless life-threatening) as less strong, and threats of a purely economic nature as relatively ‘weak’.⁵²⁰

⁵¹⁵ Discussed in Chapter 1, Part III, and throughout Chapter 3.

⁵¹⁶ This argument is developed in Chapter 3, Part IV.

⁵¹⁷ J Bhabha, ‘Trafficking, Smuggling and Human Rights’, (March 2005) Migration Information Source: Special Issue on Migration and Human Rights <<http://www.migrationinformation.org/Feature/display.cfm?id=294>> accessed 21 August 2007.

⁵¹⁸ D Beyleveld, and R Brownsword, n 321, 128.

⁵¹⁹ J Bhabha, n 517.

⁵²⁰ D Beyleveld, and R Brownsword, n 321, 139.

This reflects the more orthodox criminal law position, which would hold that ‘economic coercion of circumstances’ – although material to making a decision - does not invalidate consent. Coercion or compulsion as typically perceived would come directly or indirectly from another person.⁵²¹ Yet, it is clearly possible that someone who makes the choice to migrate in order to work in exploitative conditions is doing so simply as the result of a lack of other, meaningful or preferable choices, or perhaps due to a severe lack of options and dire economic circumstances.

Domestic and international prostitution debates highlight the difficult economic backgrounds of many who work in this profession.⁵²² This can likely be applied to many trafficking victims of all kinds: male and female, sex worker or labourer of another kind. Consent can be seen through an overly generic lens; it does not come with uniform ease or quality, and individual situations may not always be taken into account. Beyleveld and Brownsword consider the effect of external pressure which is applied by a person (or ‘agent’) to the consenting party, and state that ‘[a]ssuming that the external force or pressure is a causative factor in the choice made, this is the ideal-typical case of forced choice by reason of external pressure.’⁵²³ Can this be transplanted into a context where either a) the pressure comes from circumstances rather than an ‘agent’, or b) where the agent indirectly takes advantage of the circumstances but perhaps does

⁵²¹ Ibid, 127.

⁵²² See, J Doezma, ‘Forced to choose: Beyond the voluntary v. forced prostitution Dichotomy’, in Doezma J. and Kempadoo K. (eds) *Global Sex Workers: Rights, Resistance and Redefinition* (Routledge, New York, 1998); L L Lim, ‘Whither the sex sector? Some policy considerations’ in L L Lim, *The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia* (International Labour Office 1998); J Outshoorn n 43; N Lacey ‘Beset by boundaries: the Home Office review of Sex Offences’ (2001) *Criminal Law Review* 3; J Phoenix, *Making Sense of Prostitution*, (NacMillan Press, London, 1999); Justis- og Politidepartementet (Ministry of Justice and the Police) ‘Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences, An abbreviated English version, A Report by a Working Group on the legal regulation of the purchase of sexual services’ (Issued on 8 October 2004)

<http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing_sexual_services_in_sweden_and_the_nederlands.pdf> accessed 11 July 2011.

⁵²³ D Beyleveld, and R Brownsword, n 321, 137.

not directly apply external pressure? The former situation will now be addressed; the latter will be discussed in the subsequent section.⁵²⁴

The majority of the ‘means’ listed in the trafficking definition would largely be seen as threats or actions coming directly from the trafficker, but, ‘coercion’ or ‘abuse...of a position of vulnerability’ have the potential to be more broadly interpreted. Full consent requires the actor to be fully autonomous. If the conditions for a valid consent require ‘free agreement’,⁵²⁵ then ‘an agreement secured by duress will not suffice.’⁵²⁶ Could, for example, the potentially broad scope of the term ‘coercion’ include ‘economic coercion of circumstances’; i.e. the making of the choice to be trafficked, motivated by severe economic hardship, as opposed to coercion coming directly from the trafficker? This matter may have specific implications for the consent debate.

Several commentators support the position that ‘economic coercion’ should be included in the generic meaning of ‘coercion’ in the context of international trafficking instruments.⁵²⁷ The Supreme Court of India in 1982 conceded that ‘force’ in the context of ‘forced labour’ could feasibly not only include physical force but also ‘compulsion arising from hunger or poverty, want and destitution.’⁵²⁸ (Although once again, the compulsion would be linked to the ‘owner’, so to speak, as opposed to coming from circumstances independent of any compulsion from a human being). If it is to be accepted that trafficked victims come ‘largely from developing countries with economies in transition...’⁵²⁹ then consideration must be given to ‘economic coercion’

⁵²⁴ See subsection v, below.

⁵²⁵ Scottish Law Commission, n 336, para 2.10.

⁵²⁶ The Law Commission, n 323, para 2.10.

⁵²⁷ K Hyland, ‘Protecting Human Victims of Trafficking: An American Framework’, (2001) 16 Berkeley Womens Law Journal, 29, 49, also see J Bhabha, ‘Reforming Immigration Policy: Start by protecting rights, not borders’, *Boston Review Summer*, (2005).

⁵²⁸ *People’s Union for Democratic Rights and others v Union of India and others* [1983] 1 S.C.R. 456.

⁵²⁹ Definition offered by the Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, ‘Further Promotion and Encouragement of Human Rights and Fundamental

as an issue potentially vitiating consent, but bearing in mind that the circumstances of the particular incident will be decisive.

Spector notes that:

The radical feminist sees the prostitute who appears to “consent” to prostitution as so affected by systematic gender oppression that her choices are distorted – and even her sense of self shaped – by it. Whereas the liberal believes in the individual’s ability to transcend her oppressive circumstances somewhat by making a rational decision to do the best she can, considering. And to choose to do the best one can, considering, is to be free.⁵³⁰

Liberal ‘Autonomy’⁵³¹ advocates do not see poverty as coercive, but more a factor to be taken into account when making an informed decision to improve one’s material worth. Yet, if one’s economic situation is so dire that one feels impelled to make a certain choice, then that choice is automatically characterised as coercive,⁵³² although perhaps insufficiently for the purposes of the trafficking definition. Repeated involvement in trafficking could also be taken as evidence of the prevalence of ‘economic coercion’ in the decision to be trafficked, or at least to enter a situation of exploitative facilitated migration. Deportation or repatriation into a destitute and

Freedoms, Including the Question of the Programme and Methods of Work of the Commission Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms.’ (1997) UN Doc E/CN.4/1997/47/Add.4, at 19,

<<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/043c76f98a706362802566b1005e9219?Opendocument>> accessed 14 Feb 2008.

⁵³⁰ J Spector, *Prostitution and pornography: Philosophical debate about the sex industry* (Stanford University Press 2006) 426.

⁵³¹ The autonomy v paternalism debate as regards sex work will be discussed in Chapter 3, Part IV, section A *et seq.*

⁵³² See J Bhabha, n 517

hopeless situation may not be the most desirable option from the perspective of the trafficked person, who may still be making more money in exploitative conditions in the host state than they would in destitute conditions at home.

If 'coercion' is to be accepted to include economic coercion of circumstances, then this would considerably narrow the band of people who could be deemed to have given consent in a trafficking context. Economic coercion arguably renders the nature of the consent damaged; i.e. consent given in these circumstances cannot necessarily be equated to free will, or 'free agreement'.⁵³³ Munro notes that:

... critics have identified a tendency in certain strands of liberal theory to analyse social problems by removing actors from their everyday environment, stripping them of the characteristics and relationships that influence their choices, and placing them in a sterile legal world where complex dilemmas are resolved by detached models of distributive justice and invocation of self-interested and conflict-oriented claims.⁵³⁴

As has been demonstrated,⁵³⁵ trafficking or facilitated migration for the purpose of sexual exploitation (or exploitation *per se*) is contextual and involves coercive factors such as poverty and lack of opportunity for economic gain. These factors influence the choices and the 'consent' of those who opt to migrate or enlist the services of a trafficker/smuggler. Consequently, any consent given here should be viewed in its own context as opposed to being applied as an abstract conception or standard of consent.

⁵³³ See Law Commission, n 323 and also Scottish Law Commission, n 336, which endorsed the same definition of consent as 'free agreement'.

⁵³⁴ V E Munro, n 510, 928.

⁵³⁵ See, Chapter 1, Part I, section A.

‘Coercion’ as a ‘means’ element of human trafficking features to varying extents in the domestic legislation of Council of Europe member States who have ratified the CoE Trafficking Convention. The provisions contained within the Convention have been implemented into the domestic criminal codes, or similar, of the ratifying countries. Albania, for example, ratified the Convention on 6 February 2007, and Article 110/a of the Criminal Code defines ‘trafficking in persons’ as:

The recruitment, transport, transfer, hiding or reception of persons through threat or the use of force or other forms of compulsion, kidnapping, fraud, abuse of office or taking advantage of social, physical or psychological condition or the giving or receipt of payments or benefits in order to get the consent of a person who controls another person, with the purpose of exploitation of prostitution of others or other forms of sexual exploitation, forced services or work, slavery or forms similar to slavery, putting to use or transplanting organs, as well as other forms of exploitation.⁵³⁶

The English Translation of the Croatian Criminal Code, Article 178(2), envisages the following ‘means’:

Whoever, by force or threat to use force or deceit, coerces or induces another person to go to the state in which he has no residence or of which he is not a citizen, for the purpose of offering sexual services upon payment, shall be punished by imprisonment for six months to five years.⁵³⁷

⁵³⁶ Criminal Code of the Republic of Albania, Article 110/a, English translation provided by [legislationline.org](http://www.legislationline.org), a legislative database published and maintained by the OSCE Office for Democratic Institutions and Human Rights, available at <<http://www.legislationline.org>> accessed 03 March 2009.

⁵³⁷ Criminal Code of Croatia, Article 178(2), English translation provided by [legislationline.org](http://www.legislationline.org), *ibid*.

The relevant legislation in Cyprus envisages the following ‘means’:

Force, violence or threats...fraud...abuse of power or other kind of pressure to such an extent so that the particular person would have no substantial and reasonable choice but to succumb to pressure or ill-treatment⁵³⁸

None of these excerpts seem to clearly envisage economic coercion as being included in the ‘means’ element of human trafficking; the ‘means’ elements most clearly include direct measures coming from the trafficker, as opposed to from external circumstances. On the other hand, none of the provisions are phrased so as to explicitly exclude economic coercion.

In considering the potential to argue in favour of the recognition of ‘economic coercion of circumstances’ in a migration and trafficking context, one might look to drawing parallels with other areas of the law; most notably that relating to ‘duress of circumstances’, such as can be seen in the UK legal approach.⁵³⁹ As Simester and Sullivan note, ‘...it would be unacceptably Draconian to punish persons who have acted to avoid catastrophic harm to themselves, to those to whom they feel attached or feel responsible.’⁵⁴⁰ However, the force of the terminology used – ‘catastrophic harm’ – indicates that this principle is not easily transferable into a situation which is not necessarily readily recognised as reaching that standard. In an ‘economic coercion of circumstances’ context, such as is being explored here, the ‘harm’ caused by severe

⁵³⁸ Law No. 3(1) of 2000, *Combating of Trafficking in Persons and Sexual Exploitation of Children*, English translation provided by legislationline.org, *ibid*.

⁵³⁹ See, for example, A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, (Hart Publishing, 2010) 734.

⁵⁴⁰ *Ibid*, 725.

economic circumstances may be more difficult to categorise as comparably catastrophic to a threat of imminent death or serious harm caused directly or indirectly by another human being.

The domestic case law relating to duress of circumstances still indicates that the motivating factor comes from another person, albeit somewhat indirectly.⁵⁴¹ That is to say, the commission of an offence by A can be linked to some form of threat made by B. The threat need not be to A;⁵⁴² neither need it be dependent upon the commission by B of any specific offence, or indeed any offence.⁵⁴³ A threat made by a person which creates circumstances which lead A to commit an offence, is still somewhat different to the situation where A commits an offence due to pre-existing circumstances which are not attributable in any way to a person, such as severe economic circumstances.

A problem with any acceptance of economic coercion of circumstances as sufficient to constitute ‘coercion’ as part of the ‘means’ element of trafficking is that what is to be included in or excluded from this category is a matter of degree. At what point is one sufficiently poor to be deemed to have been economically coerced? Economic hardship may be suffered which does not go far enough to constitute economic coercion in this context. Is financial difficulty sufficient, or does one have to be on the brink of starvation? The latter may constitute ‘catastrophic harm’ but not in the way intended by orthodox criminal law. Can it be assumed that one has been economically coerced based upon their country or area of origin, or does determination of this matter merit enquiry into individual circumstances? We are presented here with a potentially broad spectrum, and the practicalities of determining such issues are likely to be arduous.

⁵⁴¹ See *Willer* [1986] 83 Cr App R (CA), *Conway* [1989] QB 290 (CA) and *Martin* [1989] 1 All ER 652 (CA).

⁵⁴² *Martin* [1989] 1 All ER 652 (CA).

⁵⁴³ See *Willer* [1986] 83 Cr App R (CA), *Conway* [1989] QB 290 (CA).

It is recognised here that inclusion of ‘economic coercion of circumstances’ as a form of ‘coercion’ for the purposes of human trafficking is a very ambitious argument – this form of coercion may be considered to be too ‘at arm’s length’. This is not to argue for States to accept the commission of ‘legalised immigration offences’, simply to ask that trafficking and smuggling be seen in their proper economic and social context, as economic hardship at home will, as has been argued, frequently feature at the beginning of the smuggling/trafficking chain.

This issue has to be approached very tentatively: as Kennedy recognises, ‘If we cut back the rules far enough, we would arrive at something like the state of nature – legalized theft.’⁵⁴⁴ Beyleveld and Brownsword ask:

... what do we say about those all-too-familiar cases where agents who are in extreme or necessitous circumstances are tempted by financial inducements or other forms of incentive to enter into deals which they would not seriously contemplate were it not for their indigent or exiguous circumstances? Are we seriously suggesting that such agents – say, organ sellers in the Third World or surrogate mothers or plea-bargaining defendants in the First World – thereby make unforced choices and give valid consents to the bargains into which they enter? Of course, we are not suggesting any such thing. The most that we are saying is that such transactions cannot be impugned simply because the choice made by the needy agent was given in response to an external element having a positive bearing on the agent’s interests.⁵⁴⁵

⁵⁴⁴ D Kennedy, ‘Distributive and Paternalist Motives in Contract and Tort law, with Special Reference to Compulsory Terms and Unequal Bargaining Power’ (1982) 41 *Maryland Law Review* 563, 582.

⁵⁴⁵ D Beyleveld, and R Brownsword, n 321, 135.

Consent in the face of ‘economic coercion of circumstances’ is morally, if not legally, suspect. Yet, this may not be enough to invalidate consent as a matter of law – the tenacity of this argument must be acknowledged – ‘the mere fact that the consent was induced by positive pressure does not equate to a forced choice.’⁵⁴⁶

To revisit the conditions for a valid consent which were analysed above,⁵⁴⁷ can consent given in the face of extreme economic coercion of circumstances be considered to be freely given? Arguably, it cannot. Yet, to recognise this as a factor comparable to direct coercion from a trafficker, capable of vitiating consent, is asking for an extension – although not a wholly unprincipled one – of the criminal law. Realistically this would not be accepted by States, which have a legitimate interest in protecting their borders against those individuals whom the States will simply view as economic migrants. Inclusion of ‘economic coercion of circumstances’ as a type of ‘coercion’ seems, therefore, to be somewhat of a tenuous concept, although inclusion of this category would benefit potentially vulnerable people and would go toward supporting the notion of consent as completely ‘free agreement’.⁵⁴⁸

It is submitted here that two counter-propositions on the duress of circumstances question may be made. First, it is clear that duress of this kind is not ordinarily a defence to the criminal law and so would not protect the ‘trafficked’ victim from criminal liability with respect to immigration offences in the absence of specific, trafficking-related exceptions. Further, distress of economic circumstances is precisely what border security is designed to protect against – the movement of economic

⁵⁴⁶ Ibid, 136.

⁵⁴⁷ Chapter 1, Part III.

⁵⁴⁸ The definition suggested by the Law Commission, n 323, para 2.10.

refugees. There is no evidence in general that States regard such people as other than illegal immigrants, susceptible to peremptory removal.⁵⁴⁹

This section has attempted (yet admittedly not succeeded) in sketching out a *prima facie* case for the extension of ‘coercion’ to include ‘economic coercion of circumstances’ so that the broadest possible notion of ‘coercion’ is used, which would clearly be of the most benefit to putative victims. Nonetheless, economic factors may simply be considered a material factor which influence the decision making process of the smuggled/trafficked person, and therefore this is insufficient to invalidate consent. Physical pressure or duress would likely be viewed more sympathetically than personal economic or financial pressure.⁵⁵⁰

Where the trafficker takes advantage of the ‘victim’s’ dire economic circumstances, this may arguably qualify as coercive in that it constitutes ‘abuse of a position of vulnerability’, as included as a ‘means’ element of human trafficking in the internationally accepted definition. This will now be explored.

v. Abuse of a Position of Vulnerability

As has been established, the current trafficking definition ‘extends beyond conventional criminal law notions of coercion and duress, or even of fraud and deception, to include exploitation by abuse of social or cultural authority or of a position of vulnerability.’⁵⁵¹

It seems clear - from the above discussion and the wording ‘force or other forms of coercion’ within the trafficking definition - that trafficking can occur without the means

⁵⁴⁹ A point which will be argued later is that States sometimes make exceptions to the removal policy with respect to specific individuals (not technically refugees) on humanitarian grounds, and that a case may be made for something similar for smuggled women or ‘consensually trafficked’, on a case-by-case. See, Chapter 4, Part IX, section B.

⁵⁵⁰ D Beyleveld, and R Brownsword, n 321, 143.

⁵⁵¹ B E Hernandez-Truyol, and J E Larson ‘Sexual Labour and Human Rights’, (2006) 37 Columbia Human Rights Law Review, 391 – 445, 432.

of any actual physical force, i.e. psychological coercion may well suffice. The terminology ‘position of vulnerability’ in the definition is uncertain, because a situation amounting to just that could be brought about by a variety of factors and circumstances. Perhaps the most obvious example would be where a member of a certain family or community is told what to do by a family member, or influential member of the community. If it is culturally unacceptable for the subject to do otherwise, the result is that they are effectively compelled to obey.

Abuse of a position of power or vulnerability or authority⁵⁵² can be illustrated by reference to the case of *Larissis and Others v Greece*,⁵⁵³ where a military officer was accused of proselytising those who were his subordinates. The thrust of the case against him was that ‘the accused took advantage of the trust inherent in the relationship between a subordinate and a superior.’⁵⁵⁴ Accordingly, his conviction for proselytising was not an unjustified interference with his right to practice his religion under Article 9 ECHR. It is not inconceivable that a putative traffick victim could be subject to pressure in a similar way.

The UN Trafficking Protocol requires signatory States to try to alleviate factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.⁵⁵⁵ This could be construed to mean that poverty, economic difficulty and gender discrimination constitute positions of vulnerability, as used within the trafficking definition. Such circumstances leave the individual open to abuse by the trafficker, who may take advantage of such a situation

⁵⁵² The Europol Convention States that “‘traffic in human beings” means subjection of a person to the real and illegal sway of other persons by using violence or menaces or by *abuse of authority* or intrigue, especially with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children.’ (Emphasis added) See ‘Europol Convention: Consolidated version’

<http://www.aedh.eu/plugins/fckeditor/userfiles/file/Protection%20des%20donna%20et%20des%20enfants/Europol_Convention_Consolidated_version.pdf> accessed 23 June 2011.

⁵⁵³ *Larissis and Others v Greece* (App nos. 23372/94, 26377/95, 26378/94) (1998) ECHR 13.

⁵⁵⁴ *Larissis*, *ibid*, para 15.

⁵⁵⁵ Article 9.

when recruiting potential victims, and use the economic vulnerability of the victim as a tool of persuasion. Accordingly, the knowledge of the trafficker (as to the ‘victim’s’ position of vulnerability) would be relevant here.

Although economic hardship may be a factor in many instances of trafficking, the wording of the Interpretative Notes for the Official Records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto⁵⁵⁶ appear to imply abuse coming more directly from the trafficker, as opposed to the trafficker taking advantage of a situation which already exists (such as economic hardship), although broad interpretation could lead to an alternative reading. We know from the *travaux* to the Trafficking Protocol that the phrase ‘abuse of a position of vulnerability’ is, from the perspective of the victim, ‘understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.’⁵⁵⁷

This elaboration provides little explanation or qualification of the meaning of the phrase in question, which is open ended. Is the trafficker to be held responsible for a) the economic situation of the would-be victim, or b) the taking advantage thereof? As to the first point, indeed he cannot be. As to the second point, the trafficking definition potentially has scope to include this. ‘Force’ can be treated as ‘power-play on the part of the intervening agent that is designed to elicit the consent of the target agent.’⁵⁵⁸ This is what takes place where the trafficker abuses the position of (economic and social) vulnerability of the victim.

⁵⁵⁶ United Nations General Assembly ‘Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto’ (2000) UN Doc A/55/383/Add.1.

⁵⁵⁷ *Ibid.*, 63.

⁵⁵⁸ D Beyleveld, and R Brownsword, n 321, 131.

The CoE Trafficking Convention Explanatory Report provides further illumination on the terminology:

By abuse of a position of vulnerability is meant abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, *social or economic*. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited.⁵⁵⁹ (Emphasis added)

As made explicit in the excerpt, the Explanatory Report to the CoE Trafficking Convention recognises that vulnerability may be, among other things, social or economic.⁵⁶⁰ The Report goes on to state that a wide range of means, coming directly from the trafficker, must be contemplated, including 'abusing the economic insecurity or poverty of an adult hoping to better their own and their family's lot.'⁵⁶¹ Similarly, as regards the national definitions of human trafficking considered above,⁵⁶² reference to 'taking advantage of social ... condition' in the Albanian Criminal Code seems to indicate that the trafficker taking advantage of the victim's dire economic circumstances could suffice as a more direct 'means' or form of coercion. Indeed, '[t]he lack of viable economic alternatives that makes people stay in an exploitative work

⁵⁵⁹ Explanatory Report to the CoE Trafficking Convention, n 248, 83.

⁵⁶⁰ Ibid.

⁵⁶¹ Ibid, 84.

⁵⁶² See subsection iv, pp 147 – 148, above.

relationship does not in itself constitute forced labour though it may constitute a position of vulnerability as defined by the Palermo Protocol.⁵⁶³

The phrase used in the *Travaux* to the Trafficking Protocol⁵⁶⁴ is replicated verbatim in the text proper of the EU 2011 Directive,⁵⁶⁵ as opposed to in any preamble, *Travaux*, or explanatory reports. This sets the Directive apart from the other two main instruments considered throughout this thesis, and is significant in that it brings the issue of ‘abuse of a position of vulnerability’ more to the forefront of the discussion of the scope of the ‘means’ capable of invalidating consent here. The 2002 EU Framework Decision also included specific mention, in the text proper, of the meaning of ‘abuse of a position of vulnerability’, using largely the same terms.⁵⁶⁶ The preamble to the EU 2011 Directive states that ‘factors that could be taken into account when assessing the vulnerability of a victim include, for example, gender...’ thereby expanding upon previous instruments which have largely concentrated on other criteria as to what constitutes ‘vulnerability’, such as social or economic vulnerability. However, as the discussion in Part I of Chapter 1 indicated, such criteria (i.e. lower social or economic status linked to gender) are frequently not mutually exclusive.

Accordingly, these explanations (as to the meaning of ‘abuse of a position of vulnerability’) imply that a person may be vulnerable as a result of lack of economic opportunity or financial difficulties, or being rejected by their community for one reason or another. Consequently, they may be particularly vulnerable to persuasion or veiled coercion from traffickers and smugglers, and therefore agree to be transported

⁵⁶³ B Andrees, International Labour Organization, ‘Forced Labour and Human Trafficking: Handbook for labour inspectors’ (International Labour Office 2008) 13 <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_097835.pdf> accessed 11 April 2011.

⁵⁶⁴ That abuse of a position of vulnerability is ‘understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved’ - see UN Doc A/55/383/Add.1, n 479.

⁵⁶⁵ Article 2(2).

⁵⁶⁶ Article 1(c).

and exploited in some manner. This indicates abuse of a position of vulnerability at an early, almost pre-trafficking stage – the beginning of the chain.

The recent Project Acumen report, compiled by the Association of Chief Police (ACPO), recognised ‘economic reasons’ to be a prevalent ‘operational indicator’ as form of ‘recruitment by abuse of a position of vulnerability’ in trafficking amongst the sample of migrants used, thereby indicating abuse of economic vulnerability right at the start of the trafficking chain.⁵⁶⁷ In terms of abuse of a position of vulnerability in this context, the abuse or coercion would be based upon the lure of money to be made, rather than the threat of money to be withheld. For various reasons, including the fact that the abuse took place in the country of origin, it may be difficult to show objective proof of abuse of a position of vulnerability in this context. This category of ‘means’ may be meant to be reserved for more arguably clear cut cases such as those outlined in the opening paragraph to this section – the exertion of abuse and/or control by a community leader, for example.

With respect to those victims already in another country than that of their origin - perhaps as a result of already having been trafficked or having been moved part way along the trafficking chain, abuse of a position of vulnerability may include various factors to be taken into account. These factors include: the victim being far from home; potentially on the wrong side of the immigration law in the destination state; not being a native speaker of the language of that state; and being reliant upon economic gain for survival just as any person might. The potential for broad construction of this term means that it may be capable of encompassing situations where an otherwise ‘smuggled prostitute’ becomes a ‘trafficked prostitute’ due to the imposition of ‘economic coercion’ on the part of the trafficker when *in situ*.

⁵⁶⁷ Project Acumen, n 92, 27.

An example of UK domestic case law is useful here to illustrate the application (by an agent) of external pressure of an economic nature in order to coerce sex workers to take on more work than they were happy to. In *R v Moir (Sharon Carol)*⁵⁶⁸ the defendant had run an escort agency primarily from her home. She had approximately 350 women on her books, and on any given day there were 10 to 12 women working. The agency retained a third of the sum paid by customers. Moir continued to maintain that she was unaware that the women were having sex with customers and said they were merely being paid for their time. She argued that there was no evidence of force or coercion of the women, and maintained that those involved in the use of the brothel had done so voluntarily.

While there was no evidence of physical force or coercion, in passing sentence the judge had emphasised the economic coercion used by Moir to force the women to work, by denying them future work if they refused a customer at the end of a shift. Therefore, Moir used the threat of withholding money in order to indirectly coerce the girls to work. Yet, this case shows recognition of the role of economic factors in coercive practices, and lends weight to the ‘abuse of a position of vulnerability’ argument which is advanced here, albeit more clearly supporting the argument as regards those already in the destination State.

The divide between consent and the various ‘means’ elements of the trafficking definition, such as coercion, is not clear and absolute, and whether or not a position of vulnerability encompasses circumstances of economic hardship or extreme poverty remains to be tested. Coercion is not present in every exploitative situation, yet it becomes necessary to show lack of consent in trafficking cases. If a person feasibly has

⁵⁶⁸ [2007] EWCA Crim 3317.

no other options, then the exploitative situation becomes coercive.⁵⁶⁹ Yet, coercion is clearly not the sole ‘means’ element provided within the trafficking definition – the issue is whether there is/was a lack of free and informed consent on the part of the victim.

An example of abuse of a position of vulnerability can be found when examining the mail order bride industry. It has been suggested that the position of mail order brides has come to ‘strongly resemble the international trafficking of women’.⁵⁷⁰ This industry promotes the commodification of women through offering catalogues of potential brides who can be purchased by the (predominantly western) male consumer. These women will frequently have joined such agencies as a result of social pressure to marry, or financial hardship through lack of opportunity for economic gain.⁵⁷¹ Once the opportunity to marry has been bought by the consumer, the women will be transported from their country of origin, frequently economically impoverished countries such as the Philippines, and subjected to conditions which in some circumstances amount to sexual exploitation or involuntary servitude.⁵⁷²

On strict application of the terms of the trafficking definition, one can conclude that the ‘action’ of ‘recruitment, transportation....’ has been satisfied. One could argue that the women or girls consented through joining the agency. This could be counteracted through asserting abuse of a position of vulnerability, if taking advantage of her economic hardship is to be so deemed. If the bride is effectively used as a domestic servant, does this then amount to trafficking? The answer to this question is ‘possibly’, as there is evidence⁵⁷³ to suggest that some mail-order brides do indeed

⁵⁶⁹ J Bhabha, n 517.

⁵⁷⁰ D R Lee, ‘Mail Fantasy: Global Sexual Exploitation in the Mail-Order Bride Industry and Proposed Legal Solutions’, (1998) 5 Asian Law Journal 139, 141.

⁵⁷¹ Ibid, 143.

⁵⁷² Ibid, 140.

⁵⁷³ See, ‘Bride Trafficking Unveiled’ 9 May 2011, CurrentTV.

experience levels of exploitation by their ‘husbands’ once in the destination State which may reach the trafficking threshold, and furthermore it could be argued that that some of these brides may not be truly informed as to what they are consenting to.⁵⁷⁴

Nonetheless, not all such brides will experience situations which could be classed as sufficiently coercive or exploitative for the purpose of the trafficking definition. Consequently, although the mail-order bride industry may objectively be seen as inherently exploitative, this industry *per se* will not be caught by the technical trafficking definition,⁵⁷⁵ yet individual cases might.⁵⁷⁶

C. The ‘Means’ – Some Conclusions

The development of the ‘means’ aspect of the trafficking process has been far from smooth. The introduction of this element in the earliest trafficking instruments, and the subsequent disappearance of it with the 1949 Trafficking Convention, demonstrated a lack of consensus as to what trafficking actually is in a legal sense. The fact that the 1949 Convention was so strongly criticised for its lack of ‘means’ rendered inevitable the reintroduction of this element in future international standards.

The main point of tension with the ‘means’ element as it stands today in the trafficking definition is a result of a lack of case law - the separate ‘means’ or forms of coercion are yet to all be fully interpreted. A wide range of ‘means’ is contemplated,

⁵⁷⁴ Ibid.

⁵⁷⁵ Similarly, mail order brides may not fall within the scope of Article 1(c)(i) of the Supplementary Slavery Convention which relates to a woman being promised for marriage by a third party in return for some form of payment of consideration, as the Article states that the woman must be ‘without the right to refuse’. Although women who join mail order bride agencies may have done so because they feel backed into a corner as a result of lack of opportunity for economic gain in their home states, in the sense of the definition provided by the Supplementary Slavery Convention they theoretically retain the right to refuse any particular offer. Theory may not translate easily into practice here, however.

⁵⁷⁶ On this topic, see J Jones, ‘Trafficking Internet Brides’ *Information & Communications Technology Law*, Vol. 20, No. 1, March 2011, 19–33.

which ‘reflect differences of degree rather than ... nature’.⁵⁷⁷ The ‘means’ identifies the deceptive and at times purely brutal methods of recruiting and retaining control over the victim employed by the trafficker. The coercion element is what distinguishes human trafficking from exploitative migration of a lesser form; i.e. where one consents to migrate into a situation of exploitative employment.⁵⁷⁸

The (Unofficial) Annotated Guide to the Complete UN Trafficking Protocol⁵⁷⁹ is misplaced in making the assertion that the ‘means’ element is not important; for without the ‘means’, there is no trafficking. One who trafficks a human being who is deemed capable of choice cannot be treated in the same fashion as one who trafficks an inanimate object.⁵⁸⁰ The distinction must be made between the agent who kidnaps his victim, and the agent who aids a person in his migration into exploitative circumstances. This illustrates the fact that, where human beings are concerned, responsibility must be apportioned accordingly. If no physical force or other relevant form of coercion is employed, then the ‘agent’ who would otherwise be labelled a trafficker is perhaps no more than a facilitator in the exploitative migration process, or perhaps a perpetrator of serious exploitation which, due to the presence of or appearance of consent, falls below the standard of ‘human trafficking’.

The final element of the trafficking definition – the ‘purpose’ – will now be analysed.

⁵⁷⁷ Explanatory Report to the CoE Trafficking Convention, n 248, 84.

⁵⁷⁸ See Chapter 3, Part IV, section E, for discussion of consent to harm and/or exploitation.

⁵⁷⁹ A D Jordan, n 450, 7.

⁵⁸⁰ See for example The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (adopted June 2001 by United Nations General Assembly Resolution A/RES/55/255) which defines illicit trafficking as: ‘the import, export, acquisition, sale delivery, movement or transfer of firearms....’ thus demonstrating only an ‘action’ element.

IV. The ‘Purpose’

A. Evolution of the ‘Purpose’ Element of Trafficking

The ‘purpose’ of trafficking is that which the trafficked victim is ultimately to be used for. This element is clearly evident in both slave trade and trafficking definitions. The ‘purpose’ element of the former was ultimately to reduce the victim to, and to hold the victim in, a state of slavery as defined in the 1926 Slavery Convention. The explicit scope of the ‘purpose’ element of the trafficking definition is much wider in comparison, as human are trafficked for ‘exploitation.’

Contemporary definitions of human trafficking include forced labour and even slavery as a ‘purpose’ element of trafficking, as well as sexual exploitation and the exploitation of prostitution. The latter were the sole ‘purpose’ elements envisaged by earlier traffick-specific instruments. Until the 1949 Trafficking Convention, the subject of trafficking was specified as involving either a woman or a child. That Convention altered the terminology so that the terminology was gender neutral and the subject was a trafficked ‘person’. The most recent accepted definition of ‘trafficking in persons’ extends the ‘purpose’ element, so that it may be much more encompassing in terms of the potential subjects of trafficking and the types of coerced exploitation experienced. According to the definition, one is trafficked, through the relevant ‘action’ and ‘means’:

... 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.⁵⁸¹

The Explanatory Report to the CoE Trafficking Convention states that '[n]ational legislation may therefore target other forms of exploitation but must at least cover the types of exploitation mentioned as constituents of trafficking in human beings.'⁵⁸² The Explanatory Report observes that the types of exploitation included in the definition are broad because 'criminal activity is increasingly diversifying in order to supply people for exploitation in any sector where demand emerges.'⁵⁸³ Evidently, the 'purpose' element hinges on 'exploitation' or at least the intention to exploit. Consequently, a broad interpretation – and therefore a broad scope of the reach of the trafficking definition – may be possible.

B. The Interrelation of Treaty Obligations – Interpretation of the 'Purpose'

The wording of the trafficking definition used within the main instruments discussed throughout this thesis raises some issues with regard to interpretation of the 'purpose' element, which is broadly 'exploitation', with the definition going to give an inexhaustive list of what this may comprise. Aust states that 'treaties ... are the product

⁵⁸¹The trafficking of human organs goes beyond the ambit of this thesis and therefore will not be considered here

⁵⁸² Explanatory Report to the CoE Trafficking Convention, n 248, 85.

⁵⁸³ Ibid, 86.

of negotiations leading to compromises to reconcile, often wide, differences.’⁵⁸⁴ Accordingly, unclear or undefined wording may be the product of concessions made in order to secure signatures and ratifications.

As will be discussed,⁵⁸⁵ some terms of the trafficking definition have been deliberately left undefined.⁵⁸⁶ Others, however, directly reproduce the wording used in various international human rights treaties - forced labour or services, slavery or practices similar to slavery, and servitude.⁵⁸⁷ These terms are not defined within the instruments comprising the international anti-trafficking regime, and so we must look elsewhere. As a point of common sense, since both the UN and CoE have drafted human rights treaties which pre-date their respective anti-trafficking instruments and use the same terms (such as ‘slavery’ etc), it would seem logical on the face of it that these terms would be intended to have the same meaning. However, whether these terms and concepts are so readily interchangeable so that they might have the same meaning in both criminal and human rights law instruments, is not a matter so simplistically disposed of and therefore merits further discussion.

To the very greatest extent, judicial interpretation of the relevant texts will be carried out by national courts (though it should not be overlooked that interpretation by officials will be a necessary step before any proceedings begin – their conclusions may or may not be upheld by the courts). The Explanatory Report to the CoE Trafficking Convention explicitly states that:

⁵⁸⁴ A Aust, *Modern Treaty Law and Practice*, Second Edition (Cambridge, 2007) 184.

⁵⁸⁵ See section C, below.

⁵⁸⁶ For example, specificities regarding the defining of prostitution and the exploitation thereof, and ‘sexual exploitation’, were deliberately avoided, due to a lack of uniform approach to addressing prostitution between States. These terms are therefore ‘without prejudice’ as to how the domestic law in different States deals with prostitution.

⁵⁸⁷ The various human instruments addressing these specific rights will be discussed at a later point in this Chapter – see section D, below.

It was understood by the drafters that, under the Convention, Parties would not be obliged to copy *verbatim* into their domestic law the concepts in Article 4, provided that domestic law covered the concepts in a manner consistent with the principles of the Convention and offered an equivalent framework for implementing it.⁵⁸⁸

Consequently, the terms used to elucidate the minimum standards of ‘exploitation’ envisaged by the legal anti-trafficking regime may vary between contracting parties, particularly where sexual exploitation is concerned. Yet, some concepts such as slavery and servitude may have more settled (or conversely, more disputed⁵⁸⁹) meanings due to their definition in legal instruments, as well as their interpretation and application through case law. These meanings and definitions will be brought out throughout the discussion in the latter part of this Chapter.

The legal anti-trafficking regime raises the issue of the interrelation between treaty obligations arising under different instruments – those which address criminal law, and those which address human rights law. Although the terminology for parts of the ‘purpose’ element of human trafficking and the forms of ‘exploitation’ provided therein are clearly borrowed from international human rights law, this would mean that, in principle, one could not be binding as to the meaning of the other. State criminal law – be it of national or international origin – must, in its interpretation, take into account the human rights obligations of the State. To do anything less is to run the risk of discordance and lack of harmony between national law and human rights obligations. For example, failure by a State to criminalise torture could lead to that State being

⁵⁸⁸ Para 70.

⁵⁸⁹ See for example, the various writings of J Allain, who is at times critical of the interpretation and application of the specificities of ‘slavery’ or ‘servitude’ in case law – see J Allain, n 425.

unable to impose punishment for conduct by private actors, while itself being subject to obligations relating to non-torture under its human rights obligations. Such a situation would be incomprehensible and ineffective in combating the very problems identified.

It is increasingly so that the interpretation of international treaties is done so with regard to other international obligations of the parties concerned. The quest for coherence in a decentralised international system is a strong motivating factor, as such an approach both provides a means of reducing the chances of States facing incompatible obligations, and also increased likelihood of coordinated and coherent strategies to combat international problems such as human trafficking. In the fields of international criminal law and human rights, the impact of other obligations – explicit or implied – is undeniable. There is, however, a principle of treaty interpretation which is of increasing importance, and is located in Part III,⁵⁹⁰ Section 3⁵⁹¹ of the Vienna Convention,⁵⁹² specifically in Articles 31 and 32. The principles embodied in those two articles have been held by the International Court of Justice to reflect customary international law.⁵⁹³

Article 31 of the Vienna Convention states as a general rule of interpretation that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ Interpreting a treaty according to its object and purpose encapsulates ‘the duty of giving effect to the expressed intention of the parties, that is, their intention as *expressed in the words used by them in the light of the surrounding circumstances*.’⁵⁹⁴ (Emphasis in the original) The object and purpose of one of the main anti-trafficking instruments – the CoE Trafficking Convention, is stated as the following:

⁵⁹⁰ Part III of the Vienna Convention deals with ‘Observance, Application and Interpretation of Treaties’.

⁵⁹¹ Part III, section 3 of the Vienna Convention deals specifically with ‘Interpretation of Treaties’.

⁵⁹² Vienna Convention, n 22.

⁵⁹³ *Libya v Chad* [1994] ICJ Reports 6, para 4.

⁵⁹⁴ A McNair, *Law of Treaties*, (Oxford: Clarendon Press 1961) 365.

... to prevent and combat trafficking in human beings, while guaranteeing gender equality; to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution; to promote international cooperation on action against trafficking in human beings.⁵⁹⁵

The text of the EU 2011 Directive (although not a treaty, yet a relevant instrument to the discussion since it uses almost entirely the same definition of trafficking) makes it clear that it shares the abovementioned objectives,⁵⁹⁶ thus clearly pointing to human rights standards by referring specifically to them.

The ‘context’ referred to in Article 31(1) of the Vienna Convention is elaborated upon in subsection (2), and includes preamble and annexes, as well as ‘any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty’⁵⁹⁷ and ‘any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.’⁵⁹⁸ The scope of these provisions may include, for example, ‘primary criteria’⁵⁹⁹ to interpretation such as explanatory reports.⁶⁰⁰ To interpret and elucidate the terms used within the CoE Trafficking Convention, for example, the Explanatory Report to that Convention refers specifically to the main international human rights instruments for the purposes of defining certain terms used

⁵⁹⁵ Article 1.

⁵⁹⁶ See EU 2011 Directive, n 10.

⁵⁹⁷ Article 31(2)(a).

⁵⁹⁸ Article 2(b).

⁵⁹⁹ A Aust, n 584, 187.

⁶⁰⁰ A Aust, *ibid*, 191.

within that Convention, such as forced labour,⁶⁰¹ slavery⁶⁰² and servitude.⁶⁰³ This indicates that these terms are intended to be interpreted according to the meanings given by the human rights and labour instruments referred to.⁶⁰⁴ The preamble of that Convention also specifically refers to the point that ‘trafficking in human beings may result in slavery for victims...’, and that trafficking ‘constitutes a violation of human rights and an offence to the dignity and the integrity of the human being’, thereby invoking the language of internationally accepted human rights instruments from the outset.

Also poignant for the purpose of the discussion here, though, is Article 31(3) of the Vienna Convention which states that when interpreting the terms of treaties, not only should the context be taken into account but, according to subsections (a) – (c) respectively, also ‘any subsequent agreement between the parties regarding the

⁶⁰¹ Para 89 of the Explanatory Report to the CoE Trafficking Convention (n 248) states that although the Convention does not define ‘forced labour’, nonetheless ‘there are several relevant international instruments, such as the *Universal Declaration of Human Rights* (Article 4), the *International Covenant on Civil and Political Rights* (Article 8), the *ILO Convention concerning Forced or Compulsory Labour* (Convention No.29), and the 1957 *ILO Convention concerning the Abolition of Forced Labour* (Convention No.105)’. Para 90 of the Explanatory Report goes on to state that ‘Article 4 ECHR prohibits forced labour without defining it. The drafters of the ECHR took as their model the ILO Convention concerning Forced or Compulsory Labour (No.29) of 29 June 1930, which describes as forced or compulsory “all work or service which is exacted from any person under the menace of any penalty and for which the person has not offered himself voluntarily”’. Para 92 goes on to recognise that forced services is not to be distinguished from forced labour, citing *Van der Müsselle v. Belgium* (judgment of 23 November 1983, Series A, No.70, paragraph 37) as authority for this position.

⁶⁰² Para 93 of the Explanatory Report to the CoE Trafficking Convention (n 248) states that ‘Slavery is not defined in the Convention but many international instruments and the domestic law of many countries define or deal with slavery and practices similar to slavery (for example, the *Geneva Convention on Slavery* of 25 September 1926, as amended by the New York Protocol of 7 December 1953; the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery* of 7 September 1956; the *ILO Worst Forms of Child Labour Convention* (Convention No.182))’.

⁶⁰³ Paragraph 95 of the Explanatory Report to the CoE Trafficking Convention (n 248) states that ‘The ECHR bodies have defined “servitude”. The European Commission of Human Rights regarded it as having to live and work on another person’s property and perform certain services for them, whether paid or unpaid, together with being unable to alter one’s condition (Application No.7906/77, D.R.17, p. 59; see also the Commission’s report in the *Van Droogenbroeck* case of 9 July 1980, Series B, Vol. 44, p. 30, paragraphs 78 to 80). Servitude is thus to be regarded as a particular form of slavery, differing from it less in character less than in degree. Although it constitutes a state or condition, and is a “particularly serious form of denial of freedom” (*Van Droogenbroeck* case, judgment of 24 June 1982, Series A, No.50, p.32, paragraph 58), it does not have the ownership features characteristic of slavery.’

⁶⁰⁴ See n 601, n 602, and n 603, above.

interpretation of the treaty or the application of its provisions’,⁶⁰⁵ ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’,⁶⁰⁶ and ‘any relevant rules of international law applicable in the relations between the parties.’⁶⁰⁷

As regards the second point relating to ‘subsequent practice’ in subsection (b), there is clear evidence in certain case law of human rights standards being applied in human trafficking cases.⁶⁰⁸ The third abovementioned point relating to subsection (c), i.e. ‘any relevant rules of international law applicable in the relations between the parties’, is particularly pertinent here, as it would indicate that regard may be had to pre-existing international law, and also to contemporary law.⁶⁰⁹ Simply put, Article 31(3)(c) ‘identifies the different circumstances in which the interpreter may use matter from the body of law outside the treaty.’⁶¹⁰ Yet, ‘the formulation eventually adopted offers no guidance for its modern application.’⁶¹¹ The meaning and exact scope of ‘relevant rules of international law’ is undefined, but the unqualified nature of the terminology might strongly suggest that treaties are to be included.⁶¹² As Gardiner notes:

⁶⁰⁵ Article 31(3)(a).

⁶⁰⁶ Article 31(3)(b).

⁶⁰⁷ Article 31(3)(c).

⁶⁰⁸ See *Rantsev v. Cyprus and Russia* (app no. 25965/04) [2010], although, as stated in the judgment at H30(d), ‘It was not necessary for the Court to identify whether the treatment about which the applicant complained constituted “slavery”, “servitude” or “forced and compulsory labour”’. It found that trafficking itself, within the meaning of art.3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (“the Palermo Protocol”) and art.4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings (“the Anti-Trafficking Convention”) fell within the scope of art.4’ Allain has notably been critical of the ECtHR’s approach in that case – see, J Allain, ‘*Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery*’ (2010) *Human Rights Law Review* 10:3, 546 – 557, 546, where the author states that ‘(w)ith the determination of the Court that obligations emanating from Article 4 of the ECHR come into play because trafficking is based on slavery, the Court reveals itself as not having truly engaged with the legal distinctions that exist between these two concepts’.

⁶⁰⁹ A Aust, n 584, 195, also see, C McLaughlan ‘The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) *International and Comparative Law Quarterly*, 54: 279-320.

⁶¹⁰ R Gardiner, *Treaty Interpretation*, (Oxford 2008) 250.

⁶¹¹ *Ibid*, 256.

⁶¹² *Ibid*, 262.

Even though not hierarchical, or invariably to be applied sequentially, the general rule in Article 31 is conceptually clear: progression from terms to context, though any agreements at the time of conclusion of a treaty, to subsequent agreements, subsequent practice, and thence to relevant rules of international law.⁶¹³

The European Court of Human Rights (ECtHR) has notably been sensitive to this principle of interpretation. This is exemplified in its application of the meaning of ‘slavery’ as being that provided within the 1926 Slavery Convention in recent trafficking cases such as *Rantsev*,⁶¹⁴ and similarly in *Siliadin*⁶¹⁵ where the ‘Other International Conventions’ part of the ‘Relevant Law’ section of the judgment referred to the 1926 Slavery Convention⁶¹⁶ and the Forced Labour Convention.⁶¹⁷

Article 32 of the Vienna Convention further provides that where it is necessary to confirm the meaning of terms resulting from the application of Article 31, or where the interpretation according to Article 31 leads to a meaning which is ambiguous, obscure, manifestly absurd or unreasonable, then ‘[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.’ This could therefore include *Travaux Préparatoires* and/or interpretative notes to the *Travaux*, where they exist.⁶¹⁸ Materials such as *Travaux* are dealt with by Article 32 of the Vienna Convention since they are not

⁶¹³ Ibid, 251.

⁶¹⁴ *Rantsev v. Cyprus and Russia* [2010] (application no. 25965/04).

⁶¹⁵ *Siliadin v France* – (app no. 73316/01) [2005] ECHR 545 (26 July 2005).

⁶¹⁶ 1926 Slavery Convention, n 404.

⁶¹⁷ Forced Labour Convention (adopted June 28 1930, entered into force 1 May 1932) 39 U.N.T.S. 55, ILO CR 155.

⁶¹⁸ See, for example, UN Doc A/55/383/Add.1, n 479.

‘primary criteria’⁶¹⁹ for interpretation. Nonetheless, Article 32 provides for the use of materials to ‘confirm’ meanings borne of Article 31 interpretation, or, if there is ‘ambiguity’ or ‘manifest absurdity’ such as is referred to above, recourse to supplementary materials⁶²⁰ under Article 32 may be used to ‘determine’ the meaning of a treaty provision as opposed to simply having a confirmatory role.⁶²¹

The interpretative notes to the Trafficking Protocol give less explicit signposting, although direct reference to the Supplementary Slavery Convention of 1956,⁶²² is made in the context of the potential for illegal adoption to fall within its scope.

The EU 2011 Directive weaves an interpretational path which leads us to recognised human rights instruments, in stating that:

This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and notably human dignity, the prohibition of slavery, forced labour and trafficking in human beings, the prohibition of torture and inhuman or degrading treatment or punishment...⁶²³

Thus, the Directive points us to the human rights standards laid down in the Charter of Fundamental Rights (The EU Charter), which has a specific provision relating to slavery, forced labour, servitude and trafficking.⁶²⁴ The Charter in turn states that:

⁶¹⁹ A Aust, n 584, 187.

⁶²⁰ Aust states that this section may include ‘other treaties on the same subject matter adopted either before or after the one in question which use the same or similar terms.’ See A Aust, n 584, 200.

⁶²¹ A Aust, 584, 197.

⁶²² Supplementary Slavery Convention, n 504.

⁶²³ EU 2011 Directive, (n 10) Preamble, para 33.

⁶²⁴ Article 5 of the EU Charter of Fundamental Rights deals with prohibition of slavery and forced labour, and states that: 1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour. 3. Trafficking in human beings is prohibited.’ Charter of Fundamental Rights of the European Union [2000] OJ C364/01, reprinted [2010] OJ C83/389 <http://www.europarl.europa.eu/charter/pdf/text_en.pdf> accessed 11 June 2011.

This Charter reaffirms ... the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.⁶²⁵

Consequently, to interpret the terms enshrined in the trafficking definition contained within the EU 2011 Directive, we are pointed to the EU Charter, and through that to other sources – international obligations, ECHR rights, and ECtHR jurisprudence.

Due to the increasing importance of the interpretational rules laid down in Part III, Section 3 of the Vienna Convention, coupled with the direct and indirect signposting from the anti-trafficking instruments, it appears that it is possible to draw upon pre-existing international human rights instruments in order to interpret the meanings of some of the terms used within the trafficking definition. With respect to each ‘purpose’ element of trafficking, then, the obligations of States under the relevant human rights treaties and instruments may be used to interpret, elucidate and supplement obligations arising under the trafficking instruments. This activity can then be criminalised and the needs and rights of victims better identified and protected. Further, these treaties help identify the obligations of States who are not party to the specific anti-trafficking instruments.

⁶²⁵ Preamble, Charter of Fundamental Rights of the European Union, *ibid.*

The following sections of this Chapter will deconstruct and analyse the specific and non-exhaustive forms of exploitation provided within the definition of human trafficking.

C. Sexual Exploitation and the Exploitation of the Prostitution of Others

Many traffick-specific instruments include ‘sexual exploitation’ and ‘the exploitation of prostitution’ as ‘purpose’ elements of trafficking. Certain of these instruments – even fairly recent ones - solely envisage sexual exploitation or prostitution as the ‘purpose’ element of human trafficking.

The Council of Europe has seen a fair amount of recent activity in the fight against trafficking. Recommendations concerning trafficking⁶²⁶ and the sexual exploitation of children and young adults⁶²⁷ have been issued, as well as the commencement of projects to support regional action to combat trafficking. In a Recommendation in 2000, the Committee of Ministers offered the following definition of human trafficking, which notably only envisaged sexual exploitation as a ‘purpose’ element of trafficking:

... the procurement by one or more natural or legal persons and/or the organisation of the exploitation and/or transport or migration – legal or

⁶²⁶ Council of Europe Committee of Ministers, Recommendation R (2000)11 adopted by the Committee of Ministers of the Council of Europe to member states on action against trafficking in human beings for the purpose of sexual exploitation; Council of Europe Parliamentary Assembly, Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe member states; Council of Europe Parliamentary Assembly, Recommendation 1523 (2001) on domestic slavery; Council of Europe Parliamentary Assembly, Recommendation 1526 (2001) on a campaign against trafficking in minors to put a stop to the east European route: the example of Moldova; Council of Europe Parliamentary Assembly, Recommendation 1545 (2002) on a campaign against trafficking in women

⁶²⁷ Council of Europe Committee of Ministers, Recommendation R (91) 11 adopted by the Committee of Ministers of the Council of Europe on Sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults; Council of Europe Committee of Ministers, Recommendation R (2001)16 adopted by the Committee of Ministers of the Council of Europe to member states on the protection of children against sexual exploitation.

illegal – of persons, even with their consent, for the purpose of their sexual exploitation, inter alia, by means of coercion, in particular violence or threats, deceit, abuse of authority or of a position of vulnerability.⁶²⁸

The Council of Europe clearly has a human rights based agenda. The Recommendation states that trafficking is offensive to human dignity, and constitutes ‘a violation of human rights.’⁶²⁹ Although not specifically stated by the definition offered, trafficking was at this point seen by the Council of Europe as an issue predominantly affecting women and girls.⁶³⁰ This position still holds true to an extent, as although not limited expressly to women and girls in its applicability, the recent CoE Trafficking Convention directly replicates the definition of trafficking provided by the UN Trafficking Protocol which targets trafficking of humans ‘especially women and children’.⁶³¹ The recent EU 2011 Directive furthers this trend by referring to ‘the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes.’⁶³²

Aside from the excerpt from the Recommendation (above), other examples exist of definitions solely inclusive of sex work, or specifically prostitution. Southern Asia, for example comprises a pivotal hub of trafficking activity. It was concluded at the ninth South Asian Association for Regional Cooperation (SAARC) summit that the feasibility of a regional Convention should be explored. This culminated in the Convention on Preventing and Combating Trafficking in Women and Children for

⁶²⁸ Council of Europe Committee of Ministers, Recommendation R (2000)11 adopted by the Committee of Ministers of the Council of Europe to member states on action against trafficking in human beings for the purpose of sexual exploitation, Appendix, at I.1.

⁶²⁹ Ibid, Preamble.

⁶³⁰ Ibid, Appendix, at II.2.

⁶³¹ UN Trafficking Protocol, n 8.

⁶³² EU 2011 Directive, n 10, Preamble, para 3.

Prostitution (SAARC Convention).⁶³³ Article 1(3) provides a definition of trafficking,⁶³⁴ which puts minimal emphasis on consent, and restricts the ‘purpose’ element of this regional Convention to prostitution.

The terms used within the UN Trafficking Protocol, the CoE Convention and the EU 2011 Directive - ‘the exploitation of the prostitution of others’ and ‘sexual exploitation’ - are clearly broader than just referring to ‘prostitution’, and are left wholly undefined by the instruments. Today, both remain undefined by international law. Both the Interpretative notes for the *Travaux Préparatoires* to the Trafficking Protocol and the Explanatory Report to the CoE Trafficking Convention indicate that these terms are addressed solely in the context of trafficking in persons, and that this is ‘without prejudice to how States Parties address prostitution in their respective domestic laws,’⁶³⁵ reflecting the varied and contrasting views on this matter which are held from State to State.

During negotiations, over one hundred country delegations had input into the UN Trafficking Protocol, and between them were unable to reach agreement upon definition of these two terms; consequently, the decision to leave them undefined was the only viable route to progress. The main reasons behind the disagreement were the differing policies and laws to be found within many countries as regards adult sex work. As with so many treaties, compromise was necessary in order to obtain signatures and ratification.

All delegations were in agreement that trafficking involves slavery, servitude, and forced labour, but the meaning of sexual exploitation lacks international consensus. The

⁶³³ South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (Done at Kathmandu on 5 January 2002).

⁶³⁴ Article 1(3) provides that ‘‘Trafficking’ means the moving, selling, or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking...’

⁶³⁵ UN Doc A/55/383/Add.1, n 479, 64.

compromise allows the individual governments of each delegation to treat voluntary adult sex work in the way that it sees fit. Reaching this compromise was not an easy process; some delegates and NGOs felt that even legal and voluntary adult prostitution should be categorised as a ‘purpose’ element of trafficking, and lengthy debate ensued. The notion that voluntary or non-coerced participation in labour of any form is trafficking was rejected by the majority of those involved.⁶³⁶

The institutions of the EU have taken part in some substantial action in the fight against trafficking, including the funding of certain initiatives such as the STOP⁶³⁷ and Daphne⁶³⁸ programs. The European Commission have noted that action to combat human trafficking was restricted because of ‘the lack of common definitions of crime, incrimination, and sanctions.’⁶³⁹ In 2001, Communications were sent from the Commission to the European Council and the European Parliament concerning the subject of human trafficking. The Commission issued a proposal for a Framework Decision on combating human trafficking,⁶⁴⁰ which contained trafficking definitions. What is particularly interesting about the definitions proffered is that sexual exploitation and labour exploitation are addressed separately. Article 1 addresses labour exploitation in the following way:

⁶³⁶ A D Jordan states that ‘While such work can be abusive and exploitative, it is only trafficking if it amounts to the internationally recognised human rights violations of forced labour, slavery, or servitude.’ See A D Jordan, n 450, 8.

⁶³⁷ STOP was launched as an incentive and exchange programme to support public officials and NGOs in their actions to combat human trafficking and the exploitation of children. This programme was adopted by the Council of the European Union in November 1996. See EUROPA Press Releases ‘Prevention and fight against trafficking in human beings – A European strategy since 1996’ <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/02/191&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 17 Aug 2007.

⁶³⁸ This programme was conceived with a view to raising public awareness regarding violence and sexual exploitation and abuse against women and children. Daphne has a broader scope than STOP because it is not solely aimed at victims of trafficking. See EUROPA Press Releases ‘Prevention and fight against trafficking in human beings – A European strategy since 1996’ <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/02/191&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 17 Aug 2007.

⁶³⁹ Commission communication on combating trafficking in human beings, the sexual exploitation of children and child pornography [2001] OJ C 357/11.

⁶⁴⁰ Proposal for a Council Framework Decision on combating trafficking in human beings [2001] OJ C 62 E/324.

Each Member State shall take the necessary measures to ensure that the recruitment, transportation or transfer of a person, including harbouring and subsequent reception and the exchange of control over him or her is punishable, where the fundamental rights of that person have been and continue to be suppressed for the purpose of exploiting him or her in the production of goods or provision of services in infringement of labour standards governing working conditions, salaries and health and safety...

Article 2 contains the definition for addressing sexual exploitation:

Each Member States shall take the necessary measures to ensure that the recruitment, transportation or transfer of a person, including harbouring and subsequent reception and the exchange of control over him or her is punishable, where the purpose is to exploit him or her in prostitution or in pornographic performances or in production of pornographic materials...

These definitions include at least some qualification as to what constitutes labour exploitation and sexual exploitation, and are therefore less open-ended than other instruments referred to. Although these definitions do not specify slavery as a ‘purpose’ element of human trafficking, they do use comparable language to that used in the 1926 Slavery Convention: reference to ‘the exchange of control over him or her’ is reminiscent of ‘The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.⁶⁴¹

⁶⁴¹ 1926 Slavery Convention, (n 404) Article 1(1).

In a Recommendation, the Council of Europe viewed sexual exploitation as a ‘purpose’ element of trafficking as a form of slavery.⁶⁴² The overlaps between human trafficking and the slave trade are apparent, but, similarly to labour exploitation, it is not universally accepted that sexual exploitation in the context of trafficking is a form of slavery, as it does not in every instance display the ownership characteristics to the extent that the status of slavery does. Therefore, although sex trafficking may in some or even many cases result in slavery, it does not in every case. However, trafficking in persons constitutes exploitation of a serious form, and consequently warrants specific criminal sanction.

As mentioned above, ‘exploitation’ is the key. The African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981⁶⁴³ (African Charter), for example, does not specifically use the language ‘traffick’ or ‘trafficking’, but instead refers to ‘exploitation’ and ‘slavery’ in Article 5.⁶⁴⁴ One might infer that human trafficking would be caught by this definition. The Article incorporates rights which are generally treated separately in international and regional treaties. The African Charter, however, makes no mention of forced or compulsory labour, which is explicitly addressed by the central anti-trafficking instruments discussed throughout the thesis. The wording of the Article makes the correct distinction that ‘exploitation’ is not to be equated with ‘slavery’, for although ‘slavery’ is always ‘exploitation’, the reverse is clearly not the case. The terminology ‘[a]ll forms of exploitation’ might be read to include sexual exploitation.

⁶⁴² Council of Europe Committee of Ministers ‘Recommendation R (2000)11 adopted by the Committee of Ministers of the Council of Europe to member states on action against trafficking in human beings for the purpose of sexual exploitation’ (Adopted by the Committee of Ministers on 19 May 2000, at the 710th meeting of the Ministers’ Deputies).

⁶⁴³ The African [Banjul] Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986).

⁶⁴⁴ Article 5 states that ‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.’

Overall, the relevant anti-trafficking instruments provide very little illumination as to the parameters of what may actually constitute ‘sexual exploitation’. The 2002 EU Framework Decision included specific mention in the text of ‘exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.’⁶⁴⁵ The 2011 Directive does not include this qualification, and gives no guidance as to what constitutes ‘sexual exploitation.’ The Explanatory Report to the CoE Convention refers to various other Council measures to combat sexual exploitation⁶⁴⁶ (which largely apply to children), and provides minimal illumination as to what might constitute sexual exploitation, in referring to ‘... sexual exploitation ... in the form of pornography, prostitution, sexual slavery, sexual tourism and trafficking in human beings...’⁶⁴⁷ thereby creating somewhat of a circular definition.

Domestic (UK) cases involving trafficking frequently invoke more than one legal provision;⁶⁴⁸ consequently a case concerning trafficking for sexual exploitation in the UK may include, for example, the offence of trafficking (s57 – 59 SOA 2003) coupled with the offence of controlling prostitution for gain (s53 SOA 2003).⁶⁴⁹

One might assume that, provided that a requisite standard of ‘exploitation’⁶⁵⁰ is met, any work⁶⁵¹ of a sexual⁶⁵² nature may be capable of constituting sexual

⁶⁴⁵ 2002 EU Framework Decision, (n 213) Article 1(d).

⁶⁴⁶ Such as Council of Europe Committee of Ministers, Recommendation R (91) 11 adopted by the Committee of Ministers of the Council of Europe on Sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults’ (Adopted by the Committee of Ministers on 9 September 1991 at the 461st meeting of the Ministers’ Deputies), and Council of Europe Committee of Ministers, Recommendation R (2001) 16 adopted by the Committee of Ministers of the Council of Europe to member states on the protection of children against sexual exploitation’ (Adopted by the Committee of Ministers on 31 October 2001 at the 771st meeting of the Ministers Deputies).

⁶⁴⁷ Council of Europe Committee of Ministers, Recommendation R (2001) 16, *ibid*.

⁶⁴⁸ This is because domestic anti-trafficking law is scattered across a plethora of provisions – see Chapter 1, Part II, section A, subsection i.

⁶⁴⁹ See, for example, *R v Nualpenyai (Atchara)* [2010] EWCA Crim 692.

⁶⁵⁰ See Chapter 3, Part VI, section B, where a definition of exploitation offset against accepted labour standards in the destination State is proposed.

⁶⁵¹ Whether or not sex work constitutes a legitimate form of labour will be discussed in Chapter 3, Part IV, section B.

⁶⁵² What exactly constitutes ‘sexual’ in this context is unclear, but one might look for guidance in, for example, Section 78 of the Sexual Offences Act 2003 which states that: ‘For the purposes of this Part

exploitation – prostitution, lap dancing, pornography, etc. The terms were clearly left broad for a reason, as social and cultural variants may determine certain activities as inherently or not remotely sexual in nature. The same may be said of ‘exploitation’ – that which is considered exploitative clearly varies between countries; this is evident in the many and varied approaches to prostitution taken within the legislative frameworks of these countries.⁶⁵³

D. ...Forced Labour or Services, Slavery or Practices Similar to Slavery, Servitude...

It has been established that current international legal definition of human trafficking includes the ‘purpose’ elements of forced labour, slavery, and servitude as examples of ‘exploitation’. Accordingly, Pitorowicz observes that ‘While not all slavery involves (trafficking in human being), (trafficking in human beings) will almost always involve slavery or slavery-like practices’.⁶⁵⁴ These elements warrant further exploration.

i. Elucidating Some Elements of the ‘Purpose’ – The International Legal Framework

Forced labour is addressed and defined in various instruments, of which the International Labour Organization (ILO) has drafted several. This practice is not defined by the three main anti-trafficking instruments considered in the thesis; the definition remains that provided by the ILO Conventions. The Forced Labour

(except section 71), penetration, touching or any other activity is sexual if a reasonable person would consider that— (a) whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual, or (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.’

⁶⁵³ In Sweden, for example, prostitution is seen as violence against women an inherently exploitative, therefore criminal sanction is aimed at the purchaser of sexual services. This can be contrasted with the regulated sex sector which can be seen in operation in the Netherlands.

⁶⁵⁴ R Piotrowicz, n 243, 179.

Convention, 1930⁶⁵⁵ requires State Parties to agree to work towards eradicating the existence of forced labour practices. Article 2 defines ‘forced or compulsory labour’ as ‘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.’ Forced labour is not further defined by the Trafficking Protocol, CoE Trafficking Convention, or the EU 2011 Directive.⁶⁵⁶ As regards ‘forced services’, the Explanatory Report to the CoE Trafficking Convention indicates that ‘[f]rom the standpoint of the ECHR ... there is no distinction to be made between the two concepts.’⁶⁵⁷ Potentially, then, ‘services’ could be read to include sex work.

Similarly, as regards the Abolition of Forced Labour Convention, 1957,⁶⁵⁸ Article 1 requires that ILO members who ratify the Convention undertake to ‘suppress and not to make use of any form of forced or compulsory labour.’ The applicability of the Forced Labour Convention to situations of human trafficking is questionable and would require developmental interpretation, as the Convention does not at any point specifically use the language ‘trafficking’, neither does it specifically include prostitution or sex work under the overarching term of ‘forced labour’. Sexual and labour exploitation in the context of trafficking are dealt with separately in many instruments. A definition proposed by the Organization for Security and Co-operation in Europe (OSCE) makes no explicit mention of sex work at all.⁶⁵⁹

⁶⁵⁵ Forced Labour Convention (adopted June 28 1930, entered into force 1 May 1932) 39 U.N.T.S. 55, ILO CR 155.

⁶⁵⁶ Paragraph 11 of the preamble to the EU 2011 Directive, for example, points directly to the 1930 ILO Convention No. 29 concerning Forced or Compulsory Labour. Also see Part IV, section B of this Chapter on the interrelation of treaty obligations.

⁶⁵⁷ Explanatory Report to the CoE Trafficking Convention, n 248, 92.

⁶⁵⁸ Abolition of Forced Labour Convention, (adopted 25 June 1957, entered into force 17 January 1959) 320 U.N.T.S. 291.

⁶⁵⁹ A definition offered by the Organization for Security and Co-operation in Europe ‘Supplementary Human Dimension Meeting on Human Trafficking: Final Report’, Vienna, 18-19 March 2002 defines human trafficking as ‘All acts involved in the recruitment, abduction, transport (within or across borders), sale, transfer, harbouring, or receipt of persons, by the threat or use of force, deception, coercion (including abuse of authority), or debt bondage, for the purpose of placing or holding such

Hernandez-Truyol and Larson⁶⁶⁰ propose that prostitution should be studied under a labour paradigm i.e. as an exercise of the right to work, even though it (may) contain elements of servitude. Although addressing both issues within the same definition, the trafficking definition continues the trend of separating prostitution from forced labour. This will continue to be the case unless ‘sexual labour’⁶⁶¹ is globally recognised as a legitimate form of labour. This issue – as to whether sex work constitutes a legitimate form of labour – will be discussed in full in Chapter 3.⁶⁶²

At a similar time to the 1949 Trafficking Convention, the Universal Declaration of Human Rights (UDHR)⁶⁶³ was drafted. The relevant provision is Article 4, which states that: ‘No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms’. The provision does not explicitly include forced labour as a form of, or practice related to, slavery. Forced labour was addressed at this time through the two abovementioned ILO Conventions.

During drafting of the UDHR, it was debated whether to even include a freestanding Article 4, because of the obvious overlaps between slavery, inhuman treatment, and the deprivation of liberty. Inclusion of the Article, however, indicates that this right was deemed to be of notable importance and significance, and that there may be differences of nature and/or degree between the practices mentioned. Accounts of the experiences of victims of trafficking will frequently touch upon elements of some or all of the above.⁶⁶⁴

person, whether for pay or not, in involuntary servitude, forced or bonded labour, or in slavery-like conditions, in a community other than the one in which the person lived at the time of the original deception, coercion or debt bondage.’

⁶⁶⁰ B E Hernandez-Truyol, and J E Larson ‘Sexual Labour and Human Rights’, (2006) 37 Columbia Human Rights Law Review, 391 – 445, 391

⁶⁶¹ Ibid.

⁶⁶² See Chapter 3, Part IV, section B.

⁶⁶³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (hereafter ‘UDHR’).

⁶⁶⁴ See, L Brown, n 120, *passim*.

Such practices were also addressed in a multilateral treaty drafted between 1947 and 1966 – the ICCPR.⁶⁶⁵ Article 8 prohibits slavery, servitude, and forced labour. As with the UDHR, inclusion of the word ‘involuntary’ to directly precede ‘servitude’ was rejected, for reasons mirroring those given during UDHR drafting debates; that one should not be able to contract oneself into bondage.⁶⁶⁶ Forced/compulsory labour is explicitly prohibited by Article 8(3) of the ICCPR, which gives examples of practices which are deemed not to constitute this, such as work or services required of a person under detention in consequence of a lawful order of a court.⁶⁶⁷ Forced/compulsory labour is not defined within the instrument, although during drafting reference was made to Article 2 of the ILO Forced Labour Convention (above). The common element of slavery, the slave trade, and servitude in the ICCPR, is that they are prohibited regardless of whether the person concerned has offered their consent. Suggestions of addressing forced labour as a wholly separate issue were rejected.

The ICCPR essentially replicates the corresponding UDHR provision, but it takes it further with the separate inclusion of servitude,⁶⁶⁸ and the explicit inclusion of forced or compulsory labour,⁶⁶⁹ thus paving the way for broader scope of inclusion of slavery-related practices. Sex work and sexual exploitation are not explicitly included under the umbrella of forced labour according to these provisions, yet this may be overcome by developmental interpretation. The development of provisions and definitions relating to slavery and – in particular - its related practices, have appeared to tend toward a more inclusive nature, so further development and expansion of scope is not an impossible or even improbable aspiration.

⁶⁶⁵ ICCPR, n 279.

⁶⁶⁶ Although this is questioned by some – see B E Hernandez-Truyol, and J E Larson, n 551, 418 – 419.

⁶⁶⁷ Article 8(3)(c)(1).

⁶⁶⁸ Article 8(1) addresses slavery, Article 8(2) addresses servitude.

⁶⁶⁹ Article 8(3).

Slavery and servitude were dealt with separately in the ICCPR, as it has been observed that slavery, in the legal sense, is a technical term which requires strict limited construction, as it ‘implied the destruction of the juridical personality ...whereas servitude was a more general idea covering all possible forms of man’s domination of man.’⁶⁷⁰ This once again makes a notable effort to separate slavery, the central characteristic of which is ownership, from related practices which are also considered to undermine human dignity. Thus, servitude covers other forms of ‘bondage’ or human domination which do not constitute slavery.⁶⁷¹

One interesting point to be drawn from the ICCPR drafting debates is that ‘slave trade’ is also to be construed in a limited manner. A proposal to substitute the phrase for ‘trade in human beings’, which may have encompassed the trafficking of women for sexual exploitation, was rejected, as it was thought that the clause should only deal with the slave trade as such.⁶⁷² From this, one might infer that trafficking of women for sexual exploitation was still predominantly seen as a separate issue which it was necessary to address in its own right. The main international instrument to address sex traffick remained the explicit prohibition contained in the 1949 Trafficking Convention, and the implicit prohibition contained in the UDHR.

Respective provisions of the ECHR⁶⁷³ and the American Convention on Human Rights, 1969⁶⁷⁴ prohibit slavery, servitude, and forced or compulsory labour. Interpretation of the ECHR makes it clear that there are positive obligations on States with respect to dealing with such practices. These positive obligations have some reach

⁶⁷⁰ M J Bossuyt ‘Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights’ (Dordrecht; Lancaster : Nijhoff, 1987) 167

⁶⁷¹ Ibid.

⁶⁷² Y Dinstein ‘Liberty: Freedom from slavery and forced labour’, in L Henkin (Editor) *The International Bill of Rights: The Covenant on Civil and Political Rights*, (New York, Columbia University Press, 1981) 127.

⁶⁷³ Article 4.

⁶⁷⁴ American Convention, Article 6, which also prohibits trafficking in women.

in terms of, for example, Articles 2⁶⁷⁵ and 3⁶⁷⁶ ECHR, and can reasonably include criminalisation of such practices, which would be reflected in the national laws of Parties to the Convention.

ii. Begging

The 2011 Directive contains a broader definition of the forms of ‘exploitation’ which may form the ‘purpose’ element of human trafficking, in that it specifically includes ‘begging’, and ‘the exploitation of criminal activities’. The preamble to the Directive justifies inclusion of this element.⁶⁷⁷

Although this appears to be a response to the prevalence of trafficking for organised begging, it does not seem wholly necessary to include begging specifically as a ‘purpose’ element of trafficking. Developmental interpretation may have included this practice under the guise of ‘forced labour’, provided that all of the elements of forced labour or services were present. There is however evidence of, for example, Roma people being trafficked for the purpose of forced begging,⁶⁷⁸ so specific inclusion of this manifestation of the ‘purpose’ element of human trafficking is not an unwelcome development.⁶⁷⁹ This expands somewhat on the definition offered in the Trafficking

⁶⁷⁵ Article 2 ECHR addresses the right to life.

⁶⁷⁶ Article 3 ECHR addresses the right to be free from torture and inhuman or degrading treatment.

⁶⁷⁷ EU 2011 Directive, (n 10) Preamble, para 11, states that ‘in order to tackle recent developments in the phenomenon of trafficking in human beings, this Directive adopts a broader concept of what should be considered trafficking in human beings than under Framework Decision 2002/629/JHA and therefore includes additional forms of exploitation. Within the context of this Directive, forced begging should be understood as a form of forced labour or services as defined in the 1930 ILO Convention No. 29 concerning Forced or Compulsory Labour. Therefore, the exploitation of begging, including the use of a trafficked dependent person for begging, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur.’

⁶⁷⁸ See CARE, n 219, and BBC News, ‘Children removed in Ilford People-trafficking raids’ (14 October 2010) <<http://www.bbc.co.uk/news/uk-england-london-11524732>> accessed 15 Oct 2010.

⁶⁷⁹ The preamble goes on to state, as regards the latter issue of ‘the exploitation of criminal activities’ that ‘The expression ... should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.’ See EU 2011 Directive, (n 10) Preamble, para 11.

Protocol and CoE Trafficking Convention, and may have specific ramifications for trafficked victims who have committed criminal offences purely as a result of having been trafficked and therefore subjected to, for example, force or coercion.⁶⁸⁰

iii. The Relationship between Slavery and Trafficking

In the context of the trafficking definition, the definition of slavery remains that provided by the 1926 Slavery Convention: ‘The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.⁶⁸¹ The definition of ‘slave trade’ provided within the Convention can be broken down into the elements of ‘action’ ‘means’ and ‘purpose’, although the ‘means’ is much less clearly defined than it is in the trafficking definitions offered by the UN Trafficking Protocol and reproduced in subsequent instruments. The 1926 Slavery Convention defines the ‘slave trade’ as:

All acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade and transport in slaves.⁶⁸²

What appears to be common to slavery and its related practices is the element of control, of ownership, which is a central characteristic of slavery. It is the status of commodification – the subject is essentially reduced to a possession which can be

⁶⁸⁰ See Chapter 4, Part VII.

⁶⁸¹ Article 1(1).

⁶⁸² Article 1(2).

bought and sold or ultimately disposed of – which is the defining factor. Related or comparable practices can be distinguished from slavery on this basis. For example, in *Siliadin v France*⁶⁸³ the subject was effectively used as a domestic servant. It was held by the ECtHR that, since the evidence did not suggest that a genuine right of ownership having the effect of reducing her to an object, had been held over her, Ms Siliadin had not been held in slavery. It was held that she had, however, been subject to forced labour and held in servitude within the meaning of Article 4 ECHR.⁶⁸⁴

Subsequent instruments which address the slave trade, such as the ICCPR, solely contained prohibition, thereby accepting the 1926 Convention Slavery definition as adequate. The only real elaboration upon the definition came from the 1956 Supplementary Slavery Convention,⁶⁸⁵ which called for the abolition of certain practices, ‘whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention.’⁶⁸⁶ The practices referred to include debt bondage⁶⁸⁷ and serfdom,⁶⁸⁸ as well as:

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

⁶⁸³ *Siliadin v France* (app no. 73316/01) [2005] ECHR 545.

⁶⁸⁴ This can be contrasted with the *Kunarac* judgment, where forced labour was deemed to fall within the remit of ‘enslavement’ – see *Prosecutor v Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic* (Appeal Judgment) Case Nos. IT-96-23 & IT-96-23/1-A 12 June 2002, 542.

⁶⁸⁵ Supplementary Slavery Convention, n 504.

⁶⁸⁶ Supplementary Slavery Convention, Article 1.

⁶⁸⁷ Defined in Article 1(a) of the Supplementary Slavery Convention (n 504) as ‘the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined’.

⁶⁸⁸ Defined in Article 1(b) of the Supplementary Slavery Convention as ‘the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status’.

- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.⁶⁸⁹

The words ‘trafficking’ or ‘traffick’ in the context of early legal definitions such as that provided within the 1910 Trafficking Convention arguably carried different connotations than they do today. During the Temporary Slavery Commission’s deliberations, the actual word ‘traffic’ only crops up briefly, and is explained as ‘the transformation of free men in to slaves’.⁶⁹⁰ This loosely covers the entire process of action, means, and purpose, to the exclusion of those already enslaved. ‘Trafficking’, however, was not explicitly defined by the Temporary Slavery Commission, nor was it explicitly included in the 1926 Slavery Convention.

Although the Temporary Slavery Commission appeared to push for a broader definition of slavery than that adopted,⁶⁹¹ as did certain of the Governments of respondent countries during the drafting of the 1926 Slavery Convention,⁶⁹² the consensus among certain members was that to address the disguised forms of slavery

⁶⁸⁹ Article 1.

⁶⁹⁰ League of Nations 6.B.4 Temporary Slavery Commission: Minutes of the first (and Second) Session(s), Geneva, 1924-5, 7.

⁶⁹¹ Ibid.

⁶⁹² Germany, for example, proposed that conditions resembling slavery, such as trafficking, be included: see League of Nations, Draft Convention on Slavery, Replies of Governments, Reply from the Government of Germany, League of Nations Doc. A.10(a).1926.VI (July 22, 1926), reprinted in *Publications of the League of Nations*, VI.B. Slavery, 1926. VI.B. 3,4 (1926).

would take the Commission beyond the ambit of its competence.⁶⁹³ Consequently, trafficking for the purpose of exploitative sex work or labour was explicitly excluded from the ambit of the 1926 Slavery Convention, and so the resultant chosen definition became the narrow, specific definition of slavery as we know and understand it to be today, exclusive of related ‘lesser’ forms of exploitation. It is, however, clear that the two related yet distinct practices of slave trading and trafficking have not consistently been viewed distinctly. As well as this confusion being evident in some academic commentary,⁶⁹⁴ comments on Article 4 UDHR made it clear that ‘slavery’ was intended to encompass the trafficking of women and children,⁶⁹⁵ evidently without explicit mention. The slave trade and the resulting ‘purpose’ element of slavery amount to a form of exploitation. Trafficking according to current legal definition goes beyond this, in that it covers a broader spectrum of ‘purpose’ elements which are all forms of ‘exploitation’, of which slavery is one.

Allain⁶⁹⁶ considers the relative meanings of ‘slavery’ and ‘enslavement’ against an international criminal law backdrop, and makes a variety of salient points, noting in particular that the definitions provided in the 1998 Rome Statute⁶⁹⁷ of the International Criminal Court and the 2002 Elements of Crimes⁶⁹⁸ are somewhat contradictory on the points of slavery and sexual exploitation, and sex trafficking. Article 7 of the former

⁶⁹³ See M Van Rees, League of Nations 6.B.4 Temporary Slavery Commission: Minutes of the first (and Second) Session(s), Geneva, 1924-5, 10.

⁶⁹⁴ See S Scarpa, n 135, and F Gold, n 420.

⁶⁹⁵ Report of the Working Group on the Declaration of the second session of the Commission on Human Rights, E/CN.4/57, 1947; and summary records of the Third Committee of the third session of the General Assembly, UN docs. A/C.3/SR. 109 and 110, 1948.

⁶⁹⁶ See, J Allain ‘The Parameters of ‘Enslavement’ in International Criminal Law’ n 425, and J Allain, ‘The Definition of Slavery in International Law’ n 425, 239.

⁶⁹⁷ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9

⁶⁹⁸ Elements of Crimes under the Rome Statute of the International Criminal Court, available at http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf accessed 28 Jan 2010.

includes ‘enslavement’ as a crime against humanity,⁶⁹⁹ as well as sexual slavery and enforced prostitution.⁷⁰⁰ The Article expands upon the meaning of enslavement as ‘(T)he exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children’,⁷⁰¹ thereby recognising that enslavement can occur during the process of trafficking in human beings. Aside from that extra consideration, the definition mirrors closely that provided within the 1926 Slavery Convention. The Elements of Crimes provides a somewhat broader definition, and refers to the elements of ‘enslavement’ as:

... (the exercise of) any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.⁷⁰²

Further to this, Allain⁷⁰³ notes, the abovementioned provision of the Elements of Crimes has a footnote annexed to it, which provides that:

It is understood that such a deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, The Slave Trade, and Institution and Practices Similar

⁶⁹⁹ Article 7 of the Rome Statute provides a list of acts which will constitute crimes against humanity ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.

⁷⁰⁰ Article 7 of the Rome Statute, subsections (c) and (g) respectively.

⁷⁰¹ Rome Statute of the International Criminal Court, Article 7(2)(c).

⁷⁰² Elements of Crimes, Article 7(1)(c).

⁷⁰³ See J Allain ‘The Parameters of ‘Enslavement’ in International Criminal Law’ n 425, 239.

to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.⁷⁰⁴

This expansion of ‘enslavement’ reads as though intended to include both slavery and institutions and practices which are similar, such as servitude, but which do not in themselves necessarily constitute actual slavery. Thus, a broader notion of ‘enslavement’ is apparently postulated, which goes beyond just ‘slavery’ as recognised by the 1926 Slavery Convention. Accordingly, the abovementioned provisions imply that one who is trafficked can be deemed to be ‘enslaved’; one who is trafficked could be deemed to be a ‘slave’, even if one who is trafficked and enslaved is not necessarily a slave in the 1926 Slavery Convention sense. Similarly, the *Kunarac* judgment concluded that:

... indications of enslavement include exploitation: the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.⁷⁰⁵

Literally, to enslave is to ‘make (someone) a slave.’⁷⁰⁶ Further, to enslave is to ‘cause (someone) to lose their freedom of choice or action.’⁷⁰⁷ The apparent lack of clarity as to the meanings of ‘slavery’ and ‘enslavement’, against a backdrop of trafficking and slavery, does serve to cloud the meaning of ‘slavery’ as traditionally

⁷⁰⁴ Footnote to Elements of Crimes, Article 7(1)(c).

⁷⁰⁵ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic* (Appeal Judgment) Case Nos. IT-96-23 & IT-96-23/1-A 12 June 2002, 542.

⁷⁰⁶ Oxford English Dictionary (Oxford University Press, Second Edition 2003).

⁷⁰⁷ *Ibid.*

understood (according to current international legal definition). Although slavery can (according to current international legal definition) occur as a ‘purpose’ element of trafficking, it is clearly not the sole ‘purpose’ element of trafficking.

Allain observes that:

From the preparation of the 1926 definition onwards, attempts have been made to obfuscate the term “slavery” and to distance its legal definition from a definition that might instead be consonant with any type of exploitation.⁷⁰⁸

Between the variants of ‘exploitation’ provided within the trafficking definition such as servitude,⁷⁰⁹ and slavery,⁷¹⁰ there may be differences of degree⁷¹¹ but there are also differences of nature. Consequently, trying to assimilate these different forms of exploitation into the definitive terms of ‘slavery’ is not necessarily possible, if the full reach of illegal trafficking is to be caught. As defined, slavery can only occur where ‘any or all of the powers attaching to the right of ownership are exercised’⁷¹² and forms of human exploitation which fall short of this standard cannot be deemed actual slavery.⁷¹³ They may, however, still feasibly be within the scope of the definition of trafficking.

The UN Secretary General in his 1953 report noted the following, which was contained within a governmental communication:

⁷⁰⁸ J Allain, ‘The Definition of Slavery in International Law’ n 425, 242.

⁷⁰⁹ *Siliadin v France* - 73316/01 [2005] ECHR 545 (26 July 2005)

⁷¹⁰ *Hadijatou Mani Koraou v The Republic of Niger* [2008] ECW/CCJ/JUD/06/08.

⁷¹¹ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic* (Appeal Judgment) Case Nos. IT-96-23 & IT-96-23/1-A 12 June 2002.

⁷¹² Article 1(1), 1926 Slavery Convention, n 404.

⁷¹³ For further discussion of this issue, see J Allain, ‘The Definition of Slavery in International Law’ n 425, 239.

(A) person is a slave if any other person can, by law or enforceable custom, claim such property in him as would be claimed if he were an inanimate object; and thus the natural freedom of will possessed by a person to offer or render his labour or to control the fruits thereof or the consideration therefrom is taken from him. The term also seems to imply a permanent status or condition of a person whose natural freedom is so taken away, for from the proprietary interest of the other person in the person to whom that status attaches is implied a right of disposal by sale, gift or exchange.⁷¹⁴

Thus, in the case of *Siliadin v France*⁷¹⁵ this standard was – in the opinion of the ECtHR - not met, as the treatment of the individual had not had the effect of reducing her to an object. This begs the question as to what ‘ownership’ actually is. Arguably, its characteristics include possession, the right to use, and the right to make income from the object.⁷¹⁶ To own is to be able to buy, sell, and perhaps go so far as to destroy, although as Allain observes, the killing of slaves was criminalised under Roman law.⁷¹⁷

Clearly, ownership relates to established proprietary rights, that is, as rights over property, although in the context of slavery falling short of legal right of possession - the abolition of *de jure* slavery by the 1926 Slavery Convention negates legal right of possession of a human being in States which are party to the Convention. The meaning of ‘*the powers attaching to the right of ownership*’ (emphasis added)⁷¹⁸ in the Convention definition can be taken to mean what would otherwise be powers of actual

⁷¹⁴ United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of. Servitude (Report of the Secretary-General), UN Doc. E/2357 (Jan 27, 1953).

⁷¹⁵ *Siliadin v France* - 73316/01 [2005] ECHR 545 (26 July 2005).

⁷¹⁶ See A M Honore, ‘Ownership’, in AG Guest (ed.) *Oxford Essays in Jurisprudence*, (Oxford 1961), 112 – 24.

⁷¹⁷ J Allain, ‘The Definition of Slavery in International Law’ n 425, 258.

⁷¹⁸ Article 1(1).

ownership, if such ownership were legal.⁷¹⁹ Thus, if one treats a human being in a fashion that would be acceptable if that human being was a legally owned object, one is exercising ‘the powers attaching to the right of ownership.’

The characteristics of the powers referred to include the abovementioned characteristics of ownership: the ability to buy, sell or transfer the individual; property rights to the fruits of any labour of the individual; and permanence in that the status or condition cannot be terminated by the individual who is subject to it.⁷²⁰ As recognised by Weissbrodt:

In the modern context, the circumstances of the enslaved person are crucial to identifying what practices constitute slavery, including: (i) the degree of restriction of the individual’s inherent right to freedom of movement; (ii) the degree of control of the individual’s personal belongings; and (iii) the existence of informed consent and a full understanding of the nature of the relationship between the parties.⁷²¹

As stated previously ‘exploitation’ is a key element of human trafficking. It would seem clear that ‘exploitation’ *per se* does not hit the specific standard of slavery, yet it seems clear that trafficking can, in certain circumstances, amount to *de facto* slavery in the sense of the definition 1926 Slavery Convention, i.e. where ‘any or all of the powers attaching to the right of ownership are exercised’, that is to say, where the

⁷¹⁹ J Allain, ‘The Definition of Slavery in International Law’ n 425, 261.

⁷²⁰ United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude, n 714.

⁷²¹ UNHCHR, D Weissbrodt and Anti-Slavery International, n 436, para 21.

powers of ownership are exercised with respect to a trafficked person *as if* said person were legally owned.⁷²²

Consideration of *R v Tang*⁷²³ may aid this discussion. This recent case, heard by the High Court of Australia, has provided an insight into the application of the abovementioned definition and characteristics of slavery to a situation of human trafficking. Allain observes that this decision has ‘brought much depth of understanding to the parameters of what constitutes “slavery” both in the Australian context, but also in international law.’⁷²⁴ This case concerned application of the relevant sections of the Australian Criminal Code Act which address slavery.⁷²⁵ The Act uses a definition of slavery⁷²⁶ which is very similar to that provided within the 1926 Slavery Convention. Interestingly, Division 270 of the Criminal Code Act has provisions relating not only to slavery, but also to ‘trafficking in persons’,⁷²⁷ and to ‘sexual servitude’. Section 270.4(1) provides the following definition:

- (1) For the purposes of this Division, *sexual servitude*⁷²⁸ is the condition of a person who provides sexual services and who, because of the use of force or threats:
 - (a) is not free to cease providing sexual services; or
 - (b) is not free to leave the place or area where the person provides sexual services.

⁷²² This much is voiced by Hayne J in *R v Tang* [2008] HCA 39 (28 August 2008) 142.

⁷²³ *Tang* [2008] HCA 39 (28 August 2008).

⁷²⁴ J Allain, ‘R v Tang: Clarifying the Definition of ‘Slavery in International Law’ (2009) Melbourne Journal of International Law 246, 1.

⁷²⁵ Australian Criminal Code Act, Sections 270.1 – 270.3.

⁷²⁶ Section 270.1 states that ‘For the purposes of this Division, *slavery* is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.’

⁷²⁷ Section 271.2.

⁷²⁸ Emphasis in the original text.

The Act also has related provisions which address the use of threats⁷²⁹ and deception⁷³⁰ in the course of sexual servitude.

The facts of *Tang* concerned five women of Thai nationality who had voluntarily come to Australia to work in the sex industry. On arrival, they discovered that they had been ‘bought’ and consequently were required to work off the debt which consisted of more than double their ‘purchase’ price. Their passports were withheld, and their movement was restricted until their debt was paid off, at which point the restrictions were lifted, travel documents were returned, and they were given freedom of choice with respect to their hours of work.⁷³¹ The High Court, rather than defaulting to application of trafficking or sexual servitude provisions, applied Section 270 and considered the characteristics of slavery i.e. where ‘any or all of the powers attaching to the right of ownership’⁷³² were exercised.

A distinction was made between exploitative labour conditions and conditions of slavery,⁷³³ and although it was recognised that borderline cases would be problematic,⁷³⁴ the outcome of the present case indicates that the degree of control exercised over the victims went beyond any level of exploitation which is to be tentatively deemed acceptable, and in fact, went to far as to constitute slavery. Gleeson CJ indicated that the difference lay in the nature and extent of the powers attaching to the right of ownership that were exercised over the victim,⁷³⁵ and referred to treatment of the individual in terms that echo those explored above with reference to The UN

⁷²⁹ Australian Criminal Code Act, section 270.4 (2).

⁷³⁰ Australian Criminal Code Act, section 270.7.

⁷³¹ *Tang* [2008] HCA 39 (28 August 2008), para 17.

⁷³² Section 270.1 of the Australian Criminal Code Act, drawing upon the definition of slavery provided within Article 1(1) of the 1926 Slavery Convention.

⁷³³ *Tang* [2008] HCA 39 (28 August 2008), para 32.

⁷³⁴ *Tang* [2008] HCA 39 (28 August 2008), para 44.

⁷³⁵ *Tang* [2008] HCA 39 (28 August 2008), para 44.

Secretary General in his 1953 report,⁷³⁶ treating the individual as an object who might be sold – in other words, commodification.

Gleeson CJ also stated that in the present case it was unhelpful to draw boundaries between slavery and related practices such as servitude, as the boundaries are not necessarily clear-cut,⁷³⁷ and that traffickers ‘are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy’.⁷³⁸ This, however, seems inconsistent with the principle of ‘representative labelling’, so termed by Ashworth,⁷³⁹ but more commonly referred to as ‘fair labelling’.⁷⁴⁰ Slavery, servitude, debt bondage and other related practices have, for the most part, consistently been addressed separately⁷⁴¹ and therefore cannot easily be assimilated without further justification. For example, Allain is critical of the ECtHR judgment in *Rantsev* for not adequately engaging with the distinction between different types of human exploitation such as slavery and servitude,⁷⁴² as the Court in that case determined that trafficking is based upon slavery and therefore invokes the obligations which emanate from Article 4 ECHR.⁷⁴³ There is an inherent need for precision on these matters in a criminal context, particularly in terms of, for example, assessing the rights and needs of victims.

What can be taken from the *Tang* judgment, however, is that the reasoning is sound for the most part, and the law relating to slavery and the elements of the definition therein was consistently applied. This judgment therefore exemplifies that the trafficking process can, in certain circumstances where the high threshold is met i.e.

⁷³⁶ United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude, n 714.

⁷³⁷ *Tang* [2008] HCA 39 (28 August 2008), para 29.

⁷³⁸ *Tang* [2008] HCA 39 (28 August 2008), para 29.

⁷³⁹ See Ashworth, A., ‘The Elasticity of *Mens Rea*’ in C F H Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworth, 1981) 45, 53.

⁷⁴⁰ G Williams, ‘Convictions and Fair Labelling’ (1983) 42 Cambridge Law Journal 85.

⁷⁴¹ Although the *Rantsev* judgment muddied the waters somewhat here – see J Allain, ‘*Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery*’ (2010) Human Rights Law Review 10:3, 546 – 557.

⁷⁴² *Ibid*, 546.

⁷⁴³ *Ibid*.

where ‘any or all of the powers attaching to the right of ownership’ are exercised, result in the condition of slavery, as does the slave trade. However, due to the myriad types of ‘exploitation’ envisaged as ‘purpose’ elements of trafficking, the slave trade and the process of human trafficking may be compared, but cannot and should not be wholly equated. Human trafficking is for ‘exploitation’ and supersedes definitions of the slave trade and the condition of slavery.⁷⁴⁴

E. The ‘Purpose’ – Some Conclusions

The terminology used within the criminal anti-trafficking regime is clearly borrowed from human rights law and requires interpretation. Due to the increasing importance of the principles of interpretation enshrined in the Vienna Convention, elucidation of these elements using internationally recognised human rights standards allows us to gain a sounder understanding of the scope of the types of exploitation outlined in the ‘purpose’ element of the trafficking definition.

Evidently, the trafficking definition casts its net widely and envisages a spectrum of exploitative activities, so that a variety of ‘purposes’ fall within the ambit of the international legal definition of human trafficking. The status or condition of slavery, where ‘any or all of the powers attaching to the right of ownership are exercised’, sits clearly at one end of this spectrum, and represents the most severe form of exploitation

⁷⁴⁴ As a final point on the scope of the UN Protocol, the definition also extends to illegal adoption, where it ‘amounts to a practise similar to slavery as defined in Article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institution and Practises similar to Slavery.’ See United Nations General Assembly ‘Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto’ (2000) UN Doc A/55/383/Add.1, 66. In terms of illegal adoption, the ‘action’ is satisfied, and the issue of consent is irrelevant as the subject of the illegal adoption will be a child, so the ‘purpose’ element becomes the central focus. Thus, the illegal adoption of a child in order to use them as a domestic servant, for example, can be caught by the trafficking definition.

which may come about as a ‘purpose’ element of human trafficking. Along this spectrum sit the multitude of other forms of exploitation which form part of the trafficking process. This confirms that serious exploitation is the central characteristic of the ‘purpose’; the non-exhaustive definition of ‘exploitation’ provided by the current definition ensures that myriad activities are caught, so that States can make an effective attempt at tackling this global phenomenon and the serious forms of human exploitation that it involves.

Conclusion

The current internationally recognised definition of human trafficking has taken major steps in defining exactly what ‘trafficking in persons’ is in a legal sense. The definition is comparable to the legal definition addressing the slave trade, which can similarly be broken down into the three elements of ‘action’ ‘means’ and ‘purpose’. Both the slave trade and human trafficking are exploitative forms of trade in human beings. The fact that the purpose element of trafficking - as provided within the current internationally accepted definition of ‘trafficking in humans’ - now includes the status of slavery as a relevant form of exploitation, demonstrates that the trafficking definition intends to address severe forms of non-consensual exploitative migration in a broader sense than previously achieved by individual traffick and slavery-specific instruments. While sex work is not globally accepted to be a form of labour, the definition incorporated within the relevant instruments⁷⁴⁵ must remain on the fence by not defining sexual exploitation - a result of a need to secure signatures and ratifications etc to these landmark instruments.

⁷⁴⁵ I.e. The Trafficking Protocol, The CoE Trafficking Convention, and the EU 2011 Directive.

The ‘action’ element of human trafficking is phrased in necessarily broad terms, to encompass all situations where traffickers come into contact with putative victims. It has been established for the most part that international borders do not necessarily have to be crossed,⁷⁴⁶ nonetheless, that cases of ‘intra-state’ or ‘internal’ trafficking may well be dealt with according to national law. Furthermore, it has been established that entry into the destination State does not have to be illicit. This extends the scope, applicability, and therefore efficiency of the anti-trafficking regime.

The inclusion of the ‘means’ element into recent trafficking definitions has proven to be a controversial step, as it has the effect that otherwise ‘trafficked’ persons who have not been subject to force or coercion (or at least where there is no objective proof of such) arguably fall without of the scope of the trafficking definition. This raises further issues that warrant exploration, and so the role of consent (or lack thereof) in the context of human trafficking will be considered further in Chapter 3. The particulars of the ‘means’ element are not always clearly separable, yet nonetheless go toward establishing the definition of human trafficking as a non-consensual process, or at least a process where any consent given may be rendered ineffective by use of any of the ‘means’. This in turn relies upon objective proof of ‘coercion’, etc, being available in order for the ‘victim’ to be formally identified as trafficked – such is the centrality of the consent/coercion spectrum created by the trafficking definition.⁷⁴⁷

The analysis of ‘economic coercion of circumstances’⁷⁴⁸ recognises that it is indeed difficult to sustain an argument that these migrants who are subject to severe economic coercion of circumstances should be treated as trafficked victims. Such a paternalist stance is somewhat extreme and not particularly fashionable; neither is it

⁷⁴⁶ With the caveat under the Trafficking Protocol that the activity be ‘transnational’ in nature

⁷⁴⁷ The word ‘dichotomy’ is rejected here for reasons discussed in Chapter 3, Part III, section A, and instead a ‘spectrum’ is envisaged, as discussed in section B of the same Part.

⁷⁴⁸ Discussed in Chapter 2, Part III, section B, subsection iv.

likely to have a positive reception from States upon whom the anti-trafficking regime places obligations. Yet, due to the contextual nature of migration and trafficking and the role that economic hardship clearly has to play in the continuance of the phenomenon, it may be possible to retain a stance which recognises the autonomy of the ‘consensually trafficked’ (who have been subjected to exploitation of some form), yet simultaneously to recognise the potentially highly vulnerable position of the same, and to sketch out a *prima facie* case for such persons to have access to more favourable treatment than if they were simply viewed as economic migrants, in appropriate cases – this will be discussed in Chapter 4.⁷⁴⁹

Early traffick-specific instruments defined trafficking as a process which entailed a ‘purpose’ element solely comprised of exploitation of a sexual nature. It is now clear that non-consensual ‘exploitation’ *per se* is the defining element of this activity. The detailed trafficking definition works toward clarifying exactly which exploitative situations do and do not constitute human trafficking, and attempts to provide a clearer view of what the ‘purpose’ element of human trafficking is.

The evolution of the scope of this element of trafficking legislation can only enhance its effectiveness in combating the most severe forms of non-consensual exploitative migration, as it takes what has already been done in human rights and labour law instruments to address slavery and its related forms, sexual exploitation, and exploitation of labour, and creates instruments to address all of these aspects by criminalising them as acts committed by private individuals. The ‘purpose’ element of the anti-trafficking regime is supplemented by the pre-existing instruments which address slavery, forced labour etc, and recourse to these instruments as aids to

⁷⁴⁹ See Chapter 4, Part IX, section B.

interpretation of the ‘purpose’ elements of human trafficking can be justified by reference to Articles 31 and 32 of the Vienna Convention.

The analysis conducted throughout this Chapter indicates that all activity which can be deemed human trafficking falls along a spectrum of exploitation, which at an extreme point can cross into the realms of *de facto* slavery. With ‘exploitation’ being the central ‘purpose’ element of human trafficking, the definition provided within the relevant instruments takes a ‘broad brush’ approach, thereby encompassing a multitude of exploitative activities, provided that the other elements of the trafficking definition are present. We now know what human trafficking is in a legal sense. It is a tripartite process comprised of an ‘action’, ‘means’ and ‘purpose’, inclusive of a range of serious exploitative activities. The UN Trafficking Protocol has drawn upon previous instruments and years of debate, and the resulting definition - although not unproblematic - is comprehensive and appropriate, in that it sets the standard high enough to encompass the worst forms of exploitation, yet low enough to encompass those which may push the boundaries of the traditionally recognised conditions of slavery and its related practices.

This Chapter has established what human trafficking is, including the importance of the fairly new and inherently controversial ‘means’ element. This provides a sound basis to go on to analyse the specific and problematic role of consent in human trafficking, which will now be done in Chapter 3.

Chapter 3

The Role of Consent in Human Trafficking

Introduction

The discussion throughout previous chapters has established that lack of consent/presence of coercion etc is a necessary condition to establish the existence of trafficking according to legal definition, whether as an offence, as a condition for criminal cooperation, or to identify victims of trafficking. The issue of consent is a much-debated consequence of the requirement imposed by the ‘means’ element of trafficking – human trafficking is now defined explicitly with reference to lack of (full and genuine) consent, and the presence of factors invalidating consent. Correct determinations as to the presence or lack of consent are made all the more important where ‘social relationships are framed by a respect for human rights.’,⁷⁵⁰ as is the case in a smuggling/trafficking/exploitation nexus.

While it is evident through lack of inclusion of a ‘consent’ element in slave trade provisions that one may not contract oneself into bondage in the context of slavery, the potential to contract oneself into a form of bondage in the context of human trafficking is a contentious issue. Consequently, consent has come to play a pivotal role in trafficking debate. Where the ‘means’ element of human trafficking is not deemed to be satisfied, the activity falls outside of the scope of the trafficking definition, and this issue is left to be addressed by individual governments.

⁷⁵⁰ D Beyleveld, and R Brownsword, n 321, 2.

Apparent lack of coercion or other ‘means’ renders the activity *prima facie* consensual. Here, ‘trafficking’ becomes consensual facilitated migration for sex work or labour in exploitative conditions, and we are left with a body of ‘consensually trafficked’ persons. Consent in such a situation does not necessarily render the activity harmless or justified; the exploitative conditions still exist.

The aim of anti-trafficking legislation is to combat trafficking through imposing criminal responsibility on the traffickers and obligations on the State to protect the rights (including the human rights) of trafficked persons. Establishing consent in the context of human trafficking can be a problematic area which may constitute a barrier to obtaining successful prosecutions against traffickers, and an obstacle to protecting the rights of the ‘victims’ as the consequence of an individual being accorded, or not being accorded, victim status under the instruments which form the anti-trafficking regime.⁷⁵¹ Correct determinations of valid consent are paramount to securing adequate treatment and protection of victims.

Consequently, consent seems to serve to negate, or at least mitigate, the exact wrongfulness of transporting people and benefitting from their exploitation. If a person consents to border crossing in order to work under the control of another in exploitative conditions, then under the anti-trafficking instruments the act or process is not criminalised; therefore, this consent serves to operate as a defence for the putative trafficker. The (Unofficial) Guide to the explanatory notes to the Protocol attempts to expand upon the issue of consent within the context of human trafficking, stating that:

... despite evidence that that the victim consented to migrate, to carry false documents and to work illegally abroad, defendants cannot argue that the

⁷⁵¹ This issue is discussed at a later point in this Chapter, Part VI section C, and Part VII, *passim*, and the treatment of victims is specifically considered in Chapter 4, *passim*.

victim ‘consented’ to work in conditions of forced labour, slavery or servitude. By definition, these three crimes mean there is no consent. For example, a woman can consent to migrate to work in prostitution in a particular city, at a particular brothel, for a certain sum of money. However, if the defendant intended actually to hold the woman in forced or coerced sex work, then there is no consent because everything the defendant trafficker told the woman is a lie. No one can consent to a lie. Even if a person agrees to work in very bad conditions, for very little money, with very little freedom, he would still be a victim of trafficking if the trafficker intended to hold him in debt bondage, involuntary or forced conditions.⁷⁵²

This excerpt takes its cue from the trafficking definition, which recognises that consent to exploitation may be given.⁷⁵³ For trafficking to exist, it would appear that exploitative conditions alone are not sufficient. In order for the crime to constitute trafficking, there must be an element of force, or some form of broken agreement, which will suffice to satisfy the ‘means’ element of human trafficking and therefore vitiate any initial consent.

None of the central legal instruments⁷⁵⁴ using the recognised definition of human trafficking adequately provide for situations of ‘consensual’ human trafficking. Exploiting a person – and profiting from the exploitation - seems to be acceptable in terms of the trafficking definition, as long as no one was deceived and the exploitative situation was not enforced or altered from what was agreed. The definition seems to shift the focus from the end result of the offence to the nature of the offence; how the

⁷⁵² A D Jordan, n 450, 11.

⁷⁵³ This is evident through the explicit statement in the trafficking definition that ‘The consent of a victim ... to the exploitation ... shall be irrelevant where any of the means ... has been used.’

⁷⁵⁴ I.e. the Trafficking Protocol, The CoE Trafficking Convention, and the EU 2011 Directive.

end result, i.e. exploitation, was brought about. It has been suggested that the focus should surely be not on the consent of the victim, but on the harm done.⁷⁵⁵ Through the inclusion of the consent element, what we are left with is a category of persons who, through the giving of consent, have been ‘less than trafficked, but more than smuggled’. These persons – the ‘consensually trafficked’ – may have recourse to ordinary human rights law and domestic criminal law for protections and standards of treatment, but are currently entitled to no specific provision under the anti-trafficking regime.

This Chapter aims to analyse the role of consent (or lack thereof) in human trafficking. Part I will revisit and draw upon the conditions for a valid consent which were discussed in Chapter 1,⁷⁵⁶ with the discussion here focussing specifically on valid consent in a trafficking context. Part II will consider how the inclusion of the ‘consent’ element in human trafficking came about, and Part III will discuss the reality of consent in human trafficking while challenging the dichotomous approach which some take to the consent/coercion debate in a trafficking context.⁷⁵⁷ Part IV analyses the Autonomy v Paternalism perspectives as regards sex work and exploitation. This will involve consideration of what one is, or should be, capable of consenting to in this context, and includes an analysis of sex work as a legitimate form of labour and what this means for trafficked/smuggled sex workers. The effects of recognising consent in a trafficking context will then be addressed in Part V – this will include consideration of the potential for consent to act as a defence for would-be traffickers, and a barrier to securing adequate support and protection for putative victims. Finally, alternatives to

⁷⁵⁵ B Balos ‘The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation’, 27 *Harvard Women’s Law Journal* 137, 149.

⁷⁵⁶ See Chapter 1, Part III.

⁷⁵⁷ See, for example, J Doezma, ‘Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy’, in Doezma J. and Kempadoo K. (eds) *Global Sex Workers: Rights, Resistance and Redefinition* (Routledge, New York, 1998), and J Bhabha, n 517.

the current situation offered by the anti-trafficking regime will be suggested in Part VI, so that the specific ramifications of this debate from the perspective of putative victims can be built upon and discussed further in the Chapter 4.

I. The Requirements of a Valid Consent in the Context of Human Trafficking

The various aspects of a valid consent were analysed at an earlier point in this thesis.⁷⁵⁸ These aspects will now be considered and applied in the specific context of human trafficking. As will be seen from the analysis which follows throughout this Chapter, it may not necessarily be appropriate in the context of trafficking for sexual exploitation to base determinations of valid consent upon a ‘consent threshold that centres on such theoretically contested, and malleable, concepts as ‘freedom,’ (and) ‘capacity.’’⁷⁵⁹

A. Consent must be ‘Freely’ Given

As established in Chapter 1,⁷⁶⁰ the Law Commission and Scottish Law Commission view ‘freely’ given consent as ‘...*agreement* to what is done’⁷⁶¹ and that this agreement must be ‘free and genuine agreement to the act in question’.⁷⁶² Furthermore, that ‘agreement’ can be given in situations where it is not ‘real’, ‘full’, or ‘valid’.⁷⁶³ In the most basic sense in a trafficking context, ‘free’ consent is that which is free from any form of coercion or other ‘means’, or more specifically as stated in the trafficking definition, that which is free from:

⁷⁵⁸ See Chapter 1, Part III.

⁷⁵⁹ V E Munro, n 510, 926.

⁷⁶⁰ See Chapter 1, Part III, section A, subsection i.

⁷⁶¹ The Law Commission, n 323, para 2.9.

⁷⁶² Ibid, para 2.12.

⁷⁶³ Scottish Law Commission, n 336, para 2.38.

... 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...⁷⁶⁴

The meaning of each of these terms was explored in Chapter 2.⁷⁶⁵ The ‘consensually trafficked’ person must, therefore, give clearly un-coerced consent, and must exercise autonomous agency, free from the influences of external pressure such as force, etc, being applied by the trafficker. This, as will be argued, is not without its complications.

Abramson asserts that the existence of full, free consent in the context of human trafficking is problematic, as it ‘ignores the real difference in choices between rich and poor, male and female, and educated and uneducated.’⁷⁶⁶ This statement extends beyond consideration of lack of consent in the face of more obvious forms of coercion, such as force, and harks back to the discussion in Chapter 2 of, ‘economic coercion of circumstances’,⁷⁶⁷ in which case it was argued that the notion of ‘free’ consent is morally suspect where the consenting agent was motivated by severe poverty. Yet, it must be concluded in a metaphorical sense that no matter how hungry, one may not steal the loaf.

With respect the views of MacKinnon, which are heavily paternalistic as regards consent – particularly in a sexual context - Hernandez-Truyol and Larson note that ‘[w]ith characteristic boldness, she (MacKinnon) suggests that “rape law takes women’s usual response to coercion – acquiescence, the despairing response to

⁷⁶⁴ Article 3 of the UN Trafficking Protocol, Article 4 of the CoE Trafficking Convention, and Article 2 of the EU 2011 Directive.

⁷⁶⁵ See Chapter 2, Part III.

⁷⁶⁶ K Abramson, n 14, 475.

⁷⁶⁷ See Chapter 2, Part III, section B, subsection iv.

hopelessness to unequal odds – and calls that consent’’.⁷⁶⁸ Those who suffer more greatly from poverty and lack of opportunity for economic gain, may well have fewer options and therefore less ability to truly exercise ‘free agency’, and instead ‘acquiesce’ or make a choice as a ‘despairing response to hopelessness to unequal odds’. It is difficult to view consent in such a situation as truly being ‘freely’ given. Yet, this is insufficient according to both present definition, and the analysis in Chapter 2,⁷⁶⁹ to invalidate consent and render the putative victim as formally trafficked.

Also following the analysis in Chapter 2⁷⁷⁰ regarding ‘abuse of a position of vulnerability’, it seems that there may indeed be scope for invalidation of consent where the exercise of authority of, say a community leader is abused. Furthermore, where the trafficker(s) take advantage of the economic or social vulnerability of the victim in order to recruit them, there may also be the potential for ineffective or invalidated consent, yet this may turn on the facts of each case. The use of abuse of a position of vulnerability based upon persuasive tactics (on the part of the trafficker) as regards the lure of good fortune in the sex trade abroad may be less persuasive to States than in the case where the ‘victim’ is already in a situation of exploitation – which may have been entered consensually at first – and is then subjected to abuse of a position of vulnerability or authority through economic-based threats or coercion, such as in the *Moir* case.⁷⁷¹ The use of such tactics in that case clearly rendered the ‘consent’ of the sex workers invalidated as it was not ‘freely’ given.

Establishing the existence of ‘freely’ given consent in a trafficking context is clearly problematic. This is the case not least because of the intricacies of the ‘means’ element of the trafficking definition, but also in the face of external pressures – such as

⁷⁶⁸ B E Hernandez-Truyol, and J E Larson, n 551, citing C MacKinnon, *Toward A Feminist Theory of the State* (Harvard 1991) 168.

⁷⁶⁹ Chapter 2, Part III, Section B, subsection iv.

⁷⁷⁰ Chapter 2, Part III, Section B, subsection v.

⁷⁷¹ [2007] EWCA Crim 3317, discussed in Chapter 2, Part II, Section B, subsection v.

those of an economic form – which do not come from the trafficker. Nonetheless, it would appear from the preceding analysis that invalidation of ‘freely’ given consent is dependent upon some form of positive action from another agent, which would require some objective proof of activity interfering with the freedom of any consent given.

Furthermore, it seems that the standard of interference may be set too high in certain circumstances, such as in a trafficking or sex trade context, which comprises an inherently coercive environment,⁷⁷² which may obscure the coercive reality and lead to the appearance of freely given consent. Ostensible forms of coercion such as force can clearly render ineffective any consent given, but where the force used is not sufficiently evident to the objective observer, this renders genuine ‘freely’ given consent difficult to determine here.

B. Consent must be ‘Informed’

In the context of consent to exploitation, one might ask whether ‘where a choice touches on a person’s most basic interests ... do we (or should we) set a higher threshold for free and informed consent than where lesser interests are at stake...’,⁷⁷³

Exploitative conditions of any type of work may encroach upon a person’s basic interests. Therefore, not only do the parameters of ‘Autonomy versus Paternalism’ in this context merit discussion,⁷⁷⁴ but it may be possible to ask for a higher standard of free and informed consent.

⁷⁷² As regards discussion of ‘free’ consent in an inherently coercive environment, see Human Rights Watch, ‘No Escape: Male Rape in U.S. Prisons’, in particular see the section entitled ‘Consent and coercion in Prison’, <<http://www.hrw.org/legacy/reports/2001/prison/index.htm>> accessed 12 June 2011.

⁷⁷³ D Beyleveld, and R Brownsword, *Consent in the Law*, (Hart Publishing, 2007) 11

⁷⁷⁴ See Part IV, section A *et seq*, below, for discussion of the Autonomy v Paternalism perspectives.

In a trafficking context, the definition provides that the existence of any of the stipulated ‘means’ will render invalid a consent ‘to the intended exploitation’.⁷⁷⁵ Therefore, the parameters of the ‘exploitation’ are relevant to the idea of the putative victim being considered to be ‘informed’. Here, the notion of informed consent raises the question of exactly what the putatively trafficked person will be consenting to, and how informed she has to be – particularly when bearing in mind that she may have little to no knowledge of the ‘typical’ conditions to be faced in the sex sector of the destination State. The law – and those executing it – must take care to distinguish between genuine consent, and situations where there is merely the appearance of consent.⁷⁷⁶ Human trafficking against a backdrop of illicit economic migration and people smuggling renders it more difficult to distinguish between real and apparent consent.

Addressing this question (as to how well-informed the putative victim must be) a person ‘will not have had the capacity to agree by choice where their understanding and knowledge were so limited that they were not in a position to decide whether or not to agree.’⁷⁷⁷ In the context of human trafficking, given the tripartite nature of trafficking, then for the consent to be considered informed and genuine, the nature, quality, and purpose of the act or process must be agreed upon and the facts on which it was based must be maintained.

Some subsequent change in conditions from those which were agreed will potentially satisfy the ‘means’ element, and render the activity capable of being caught

⁷⁷⁵ Article 3 UN Trafficking Protocol, Article 4 CoE Convention, Article 2 EU 2011 Directive.

⁷⁷⁶ The Anti Trafficking Monitoring Group note that ‘In many cases, victims may *appear* “free”. Sometimes, they might get paid some money. However, often these appearances merely mask the coercion: debt bondage, control over people’s identity or immigration status, threats and other psychological pressures are very real factors that control behaviour as much as any physical imprisonment. These forms of coercion leave serious psychological consequences.’ See The Anti Trafficking Monitoring Group, ‘Wrong Kind of Victim’ (June 2010) 17.

⁷⁷⁷ P Rook Q.C and R Ward, n 386, para 1.94.

by the trafficking definition. This will be easier to establish where for the ‘purpose’ element of human trafficking, the objective standards of ‘slavery’ or ‘servitude’,⁷⁷⁸ for example, are met. By definition, apparent initial consent would surely be rendered ineffective by a change from what was agreed which led to circumstances where the characteristics of these practices were endured. There will however exist cases of a more borderline nature which will not be unproblematic.

Jordan states that:

A woman can consent to migrate to work in prostitution in a particular city, at a particular brothel, for a certain sum of money. However, if the defendant intended actually to hold the woman in forced or coerced sex work, then there is no consent...⁷⁷⁹

This quote lays down a potential standard of informed consent in a trafficking context. In a this context, then, consent to be transported from point A to point B in order to work in the sex industry as a prostitute is *prima facie* capable of constituting a valid consent. Nonetheless, this is a too simple formula which does not take full account of the intricacies of smuggling and trafficking of humans. Accordingly, a consent to be transported to work as a prostitute can be valid but if the conditions of ‘work’, such as pay, are different to those agreed, then this no longer qualifies as informed consent, and the consent is invalidated – there is deception. The initial giving of consent no longer subsists; it is damaged, changed from the initial state in which it was offered – it can no longer be considered to be informed, due to the change from what was agreed.

⁷⁷⁸ See Chapter 2, Part IV, section D, for a full discussion of these ‘purpose’ elements of the trafficking definition.

⁷⁷⁹ A D Jordan, n 450, 11.

In order for consent to be real and informed, sufficient of the conditions of ‘work’ must have been agreed upon, free from the constraints of any form of coercion. Research conducted into victims of trafficking into Israel estimates that in ‘... 70% of the cases the women are aware of the fact that they will be selling their bodies in prostitution but they are not aware of the harsh conditions that await them when they arrive in Israel.’⁷⁸⁰ If we ask for a higher standard of informed consent here, it is rendered more palatable to respect the autonomous choices of the migrant sex worker/would-be trafficked person.⁷⁸¹

There may be some responsibility on the consenting individual to gather information prior to giving consent. One might query how much responsibility is to be placed upon the migrant to determine the details of the arrangement to which they are consenting. It cannot be assumed that all putative victims, particularly those living in rural areas,⁷⁸² will have an adequate understanding of the risks associated with migration and trafficking. It may also not be suitable to expect the putative victim to have sound knowledge of the conditions of sex work in the destination State.

While retaining a stance which recognises the autonomy of the individual to agree to sex work (or even exploitative sex work), a sufficiently paternalistic stance – which requires a higher, more stringent standard of informed consent - is not an unreasonable proposition where exploitation, which interferes with the basic interests of human beings, is the intended outcome of the activity in question. The ‘Autonomy’ and

⁷⁸⁰ L G Gold and N B Ami ‘National NGOs Report to the Annual UN Commission on Human Rights: Evaluation of National Authorities activities and actual facts on the Trafficking in Persons for the purpose of prostitution in Israel, (On behalf of Awareness Centre, Machon Toda’a, Representative of the IAF in Israel 2004) 8.

⁷⁸¹ Furthermore, many women who are exploited in the sex trade, whether or not trafficked, are dependent upon drugs – the economic need to fund their habits and the possibility that any decisions are less than genuine and informed ought to be taken into account if consent is so crucial a matter.

⁷⁸² It has been reported that those from rural areas are more likely to underestimate the risk of being trafficked, see GfK Ukraine, n 46, 5.

‘Paternalist’ stances associated with sex work will be addressed at a later point in this Chapter.⁷⁸³

Autonomy is a difficult matter in terms of the choice to engage in exploitative sex work; that is, sex work in conditions which meet a standard of ‘exploitation’,⁷⁸⁴ as opposed to sex work *per se*. In the context of exploitation, the exploiter cannot be said to have the best interests of the exploited at heart, therefore it may be justifiable to require a high standard of informed consent.

Various areas of the law which employ notions of informed consent were explored in Chapter 1.⁷⁸⁵ The notion of ‘informed consent’ in certain contexts concerns different issues. For example, informed consent in a medical, family or contractual context may raise issues of bodily integrity, personal relationships, and harm to an individual. These are clearly of a less ‘arm’s length’ nature than informed consent in a commercial contractual sense, and therefore more fitting as basis of comparison in a sex trafficking context, particularly when considering the nature of the ‘work’ to be undertaken and the risks involved. The trafficking/smuggling type of ‘transaction’ or agreement needs to be treated more tentatively because of the issues outlined at the start of this paragraph. Furthermore, it needs to be treated so because of the potentially risky nature of such a ‘transaction’, and also potentially because women (or perhaps sex workers in general) are more vulnerable (note the ‘gender perspective’, or similar, alluded to in some of the main anti-trafficking instruments discussed in this thesis),⁷⁸⁶ and, ultimately, because of the inherently personal nature of the ‘work’ or ‘services’ to be provided.

⁷⁸³ See, Part IV, below.

⁷⁸⁴ See, Part VI, section B, below, where a definition of ‘exploitation’, as offset against accepted labour standards in the destination State, is proposed.

⁷⁸⁵ See, Chapter 1, Part III, section A, subsection ii.

⁷⁸⁶ Notably the UN Trafficking Protocol refers in its title to ‘especially women and children’, and the EU 2011 Directive refers in the preamble, para 3, to the ‘gender-specific phenomenon of trafficking’.

Notably, ‘informed consent is a normative variable, not an empirical constant.’⁷⁸⁷ If it is treated as an empirical constant, then the law serves as somewhat of a blunt tool in terms of protecting the vulnerable. In summary, it is argued here that a high standard of informed consent is called for in the case of trafficked persons. To reiterate what was stated in Chapter 1,⁷⁸⁸ ‘the level or kind of consent that might be sufficient to ground enforcement in one type of situation may not be sufficient in another.’⁷⁸⁹ Borderline cases of trafficking may, in absence of a requirement of a high standard of informed consent, otherwise simply be deemed as cases of human smuggling. Because the consequences for the victim are so serious, the putative victim should have been informed as to many aspects of the process before it can be said that she has consented. Only then can she be said to have demonstrated the ‘informed exercise of a choice, and (had) an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.’⁷⁹⁰

On the basis of the analysis in this section, and as noted by Jordan, it is not entirely unprincipled to ask that the requisite standard of informed consent may at the least be that ‘... a woman can consent to migrate to work in prostitution in a particular city, at a particular brothel, for a certain sum of money.’⁷⁹¹ The purpose and nature of the act(s) consented to must be maintained as agreed, so that the consent elicited can be considered to be informed. The fact that establishing such matters is resource intensive, and demanding evidentially, is not necessarily sufficient to lower the standard required here, particularly if effective protection of victims of trafficking and sexual exploitation is to be achieved.

⁷⁸⁷ P H Schuck, n 385, 956.

⁷⁸⁸ See Chapter 1, Part III, Section A, subsection ii, page 97.

⁷⁸⁹ B Bix, n 368, 5.

⁷⁹⁰ *Canterbury v Spence* 464 F 2d 772 (DC Cir 1972).

⁷⁹¹ A D Jordan, n 450, 11.

C. Capacity and Understanding

This clearly relates to mental capacity – the consenting agent must have the capacity to understand that which she is consenting to. A consistent theme is how trafficking definitions deal with minors – namely that those under 18 are not to be deemed capable of consenting in this context. Although the competence of minors to make their own decisions may at times be recognised in certain areas of the law, there is to be no grey area resembling ‘Gillick Competence’⁷⁹² here. Where mental capacity to consent is lacking in an adult, a consent cannot be considered to be valid. As stated in Chapter 1,⁷⁹³ adults may be assumed to have the mental capacity to consent, but this assumption can be rebutted.⁷⁹⁴

D. The Timing of Consent

Migration situations will frequently be difficult to categorise. The ‘means’ element of trafficking fundamentally distinguishes this activity from smuggling, as the latter requires no form of coercion. This element of trafficking demonstrates the involuntary nature of this activity, whereas the fact that there is no need to demonstrate ‘means’ where smuggling is concerned implies activity of a more voluntary nature.⁷⁹⁵

⁷⁹² The elasticity of consent in terms of legal acceptance of capacity to consent is demonstrated by the 1985 Gillick case in the United Kingdom where a Lords majority ruled upon the potential capacity of under 16s to make their own decisions about medical treatment - See *Gillick v. West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

⁷⁹³ See, Chapter 1, Part III, section A, subsection iii.

⁷⁹⁴ This point was made by Butler-Sloss LJ in the context of medical treatment in *Re MB (Medical Treatment)* [1997] 2 FLR 426.

⁷⁹⁵ T Obokata, ‘Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors Under International Human Rights Law’ (2005) *International Journal of Refugee Law*, 17(2) 394 – 415, 394.

Whether one has been trafficked or smuggled, whether one has consented or been coerced, is a question of both interpretation and timing, and any consent given must subsist at the time of the act consented to.⁷⁹⁶ Initial consent may indeed be given in many circumstances. However, what one has ‘consented’ to will frequently be far from the realities facing the migrant on arrival. Is her position at the point of departure or the point of arrival a better indicator of the migrant’s intentions? From a human rights perspective, for victims of human trafficking, it is surely the point of arrival.⁷⁹⁷ In order to adequately cater for victims, it is submitted here (and developed in Chapter 4)⁷⁹⁸ that, provided there is at least some evidence that a woman is putatively a victim, we should start from a presumption of trafficking (and therefore of coercion or lack of consent for adults).

It has been established that in a trafficking context there may frequently be an initial consent, but if this consent is obtained through, or followed by, subsequent deception, then it can no longer be accepted as a valid consent. If the deceptive intention was always present, the consent was never valid. If consent must be subsisting, then it follows that it can be withdrawn at any point,⁷⁹⁹ although this may not always be straightforward in principle and in practice.

Research conducted in Birmingham, UK, indicates that local police believe that many ‘victims’ of trafficking are complicit in the process, and knew what they were getting into.⁸⁰⁰ This may indicate how belief by law enforcement authorities in the

⁷⁹⁶ The Law Commission, n 323, para 2.11.

⁷⁹⁷ J Bhabha, n 517.

⁷⁹⁸ See, Chapter 4, Part IX, section B.

⁷⁹⁹ The Law Commission in 1998 stated that ‘...an agreement to an act should not be regarded as a consent to that act unless it is *subsisting* at the relevant time. If what is relied on is past agreement, this will mean *both* (a) that, when previously given, the agreement must have extended to the doing of the act at that later time, *and* (b) that it must not have been withdrawn in the meantime.’ See, The Law Commission, n 323, para 2.11.

⁸⁰⁰ Statement by Sarah Garrat (Personal Communication on 14 February 2008, following research conducted by the Asylum and Immigration Research Team, Birmingham, into the treatment of victims of human trafficking once discovered in the destination state).

giving of consent by the ‘victim’, can rest on the giving of initial consent, and fail to take into account the scope for subsequent vitiation of consent by deceptive or coercive conditions.

The difficulty inherent in determining this matter is exemplified in an account provided in Chapter 2,⁸⁰¹ which refers to a victim who agreed (and therefore consented) to be recruited (the ‘action’) in order to work in the Israeli sex industry (the ‘purpose’), and yet subsequently received no money from her pimp. There was no deception about the nature of the ‘work’.⁸⁰² Yet, it may be argued that the deception as regards the nature of the payment, occurred at a later point in the process, or was perhaps the intention of the exploiter all along. Whether this is sufficient to vitiate consent and therefore render a situation of otherwise consensual facilitated migration - possibly into an exploitative situation – one of human trafficking, is a central factor and further highlights the problematic nature of the consent requirement in this branch of the sex trade.

A female co-trafficker cited in the UK Action Plan on Tackling Human Trafficking makes the following observation:

The girls I’ve met ... some of them don’t even have a clue what they’re doing, why they came ... some of them know why they’re coming ... right, some of them knew that they were going to work as prostitutes but they didn’t know they were going to be controlled by Albanians to start with, or

⁸⁰¹ Chapter 2, Part III, section B, subsection ii, page 134, which refers to an excerpt provided by International Organization for Migration, n 474, 67 – 68.

⁸⁰² International Organization for Migration, n 474, 68.

some of them thought they were going to work for themselves as prostitutes.⁸⁰³

The Explanatory Report to the CoE Trafficking Convention provides some illumination on this point of the timing of consent:

The question of consent is not simple and it is not easy to determine where free will ends and constraint begins. In trafficking, some people do not know what is in store for them while others are perfectly aware that, for example, they will be engaging in prostitution. However, while someone may wish employment, and possibly be willing to engage in prostitution, that does not mean that they consent to be subjected to abuse of all kinds. For that reason Article 4(b) provides that there is trafficking in human beings whether or not the victim consents to be exploited.⁸⁰⁴

The above qualifications make for a broad view as to when, and for what, consent must be given. This encompassing view recognises that initial consent to migrate in order to work in prostitution can potentially be rendered ineffective by deception with respect to factors other than solely the strict nature of the ‘work’ to be undertaken. This indicates that the scope of the consent must be determined, i.e. the specific extent of what has been consented to. The excerpts illustrate the point that consent to sex work does not equal to consent to exploitation. The justificatory scope of consent in such situations should have limits placed upon it.⁸⁰⁵

⁸⁰³ Female co-trafficker, cited in Home Office and Scottish Executive, ‘UK Action Plan on Tackling Human Trafficking’ (March 2007) 27.

⁸⁰⁴ Explanatory Report to the CoE Trafficking Convention, n 248, 97.

⁸⁰⁵ See Part IV, section E, below, where consent to harm and/or exploitation is discussed.

II. The Move toward Inclusion of a ‘Consent’ Element in Human Trafficking Definitions

The relevant instrument preceding the Trafficking Protocol, namely the 1949 Trafficking Convention,⁸⁰⁶ deemed consent irrelevant through inclusion of the words ‘even with the consent of that person’. The Convention simply focused upon the ‘action’ and the ‘purpose’ elements of trafficking as they are understood today; although at the time the ‘purpose’ element was limited to prostitution or the exploitation of the prostitution of others. Since there was no ‘means’ element, it was not necessary to establish lack of consent.

The 1949 Convention had followed the pattern set by the 1933 Trafficking Convention,⁸⁰⁷ which states that trafficking of a woman or girl occurs ‘even with her consent’, by including no list of specific ‘means’ and thereby providing that traffickers could not rely upon consent as a defence to the crime contained in the treaties. Prostitution itself was not considered illegal under the 1949 Convention, thus the emphasis was taken away from the perceived immorality of prostitution and prostitutes, and placed upon punishment of those responsible for the trafficking. This approach accepts that, even if there is consent, there is also the simultaneous existence of inherently exploitative activity, which needs to be punished accordingly.

⁸⁰⁶ n 411, above.
⁸⁰⁷ n 409, above.

Some more recent definitions of trafficking in persons solely concentrate on commercial sex work.⁸⁰⁸ Others envisage trafficking for a wider ‘purpose’ such as the definition offered by the UN General Assembly in 1994, which described trafficking as:

... the illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations, for the profit of recruiters, traffickers and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment and false adoption.⁸⁰⁹

The above definition makes no mention of consent. It does explicitly mention force, the presence of which would serve to vitiate consent in any case, but the fact that consent is not even mentioned means that the problems inherent in requiring lack of consent to be shown⁸¹⁰ may be less likely to arise. During drafting debates surrounding the trafficking Protocol, NGOs offered their own definitions. Many combined an element of ‘action’ such as movement or transport, with an element of ‘purpose’ such as exploitative labour of some sort. Trafficking has – as we know - now evolved to become a strict combination of all three constituents of ‘action’, ‘means’, and ‘purpose’.

⁸⁰⁸ See, for example, Article 1(3) of the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, which envisages trafficking ‘with or without ... consent’, n 633, above.

⁸⁰⁹ ‘Traffic in women and girls’, UNGA Resolution 49/166 (24 February 1995) U.N. Doc. A/RES/49/166.

⁸¹⁰ The problems that come with requiring lack of consent to be proven are discussed in Part VI of this Chapter, below.

Whether consent to exploitation of any form should be recognised is an interesting point for debate.⁸¹¹ Hernandez-Truyol and Larson state that ‘[t]he presence of consent or voluntariness alone is not enough to fend off the dispossession, exploitation, and alienation of human bondage: “mere exemption from servitude is a miserable idea of freedom”’.⁸¹² To allow consent of the transported woman to exclude from trafficking the movement of women to conditions of exploitation (in the context of exploitative facilitated migration), would create a body of persons who risk serious exploitation, or, who have been seriously exploited, yet who fall outside of the scope of the international legislation enacted to combat trafficking.

Nonetheless, trafficking according to current legal definition consisting of all three elements of the process, and ‘trafficking’ (if it can be so called), consisting only of the ‘action’ and ‘purpose’ elements, are not the same. Although both situations result in exploitation and must be legally addressed, it is questionable whether they should be deemed identical and therefore capable of being addressed in the same way by the same instrument(s), with the same definition. This is particularly so when framed in terms of the principle of ‘fair labelling’.⁸¹³ The concern of this normative principle is, as Ashworth states:

... to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are

⁸¹¹ See Part IV, section E, below, for discussion of this issue.

⁸¹² Rep. Holman of Indiana, Cong. Globe, 38th Cong., 1st Sess. (2962 1864), speaking in the debate over the enactment of the Thirteenth Amendment, *Cited in* B E Hernandez-Truyol, and J E Larson, n 551, 424.

⁸¹³ Initially identified as ‘representative labelling’ by Ashworth, and re-named ‘fair labelling’ by G Williams, n 740.

subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.⁸¹⁴

Accordingly, application of this principle would determine that those who facilitate migration into an exploitative situation where consent has been given, and those who traffick humans, should indeed not be treated in the same way in terms of criminal sanction. These two activities signal different degrees of wrongdoing; therefore this should be reflected in the legislative response. However, this does not avoid the problems inherent in determining the existence of a valid consent in either context, if anything, it would make the enquiry more important.

III. The Consent/Coercion ‘Dichotomy’: The Reality of Consent in the Context of Human Trafficking

A. The Consent/Coercion ‘Dichotomy’

In a trafficking context, the consent debate is frequently flawed due to the supposition that there are only two situations: consent OR coercion/force. It is argued here that the reality is a spectrum with one of the two states at either end. Munro states that the excessive and inherent ambiguity of consent ‘means that it is simply not useful in the delineation of the law itself.’⁸¹⁵ Coercion, force, or other ‘means’ elements of the trafficking definition are capable of vitiating consent, that is, they can impair the quality of consent. In some circumstances they may go so far as to negate consent, that is, to

⁸¹⁴ A Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 5th ed, 2006) 88 - 90.

⁸¹⁵ V E Munro, n 510, 940.

fully invalidate it. These respective terms – vitiate, negate – also sit on a spectrum as to what degree they damage the quality of consent.

The perceived coercion/consent ‘dichotomy’ assumes a rather clean line between cases, which does not necessarily reflect reality. In the 2000 Report, the UN Special Rapporteur on Violence against Women states that it is ‘the non-consensual nature of trafficking that distinguishes it from other forms of migration’;⁸¹⁶ thus, trafficking is largely characterised by the lack of consent, whereas smuggling, also addressed by a Protocol⁸¹⁷ annexed to the UN Organised Crime Convention, is seen as being characterised by a more voluntary nature – smuggled persons are considered to have ‘willingly engaged in a criminal enterprise.’⁸¹⁸

Bhabha⁸¹⁹ also points out the flawed distinction made by the trafficking definition through its presupposition of solely the two states of either consent or coercion. It is this distinction and the grey area in between which tempers the trafficking debate. The internationally recognised definition of human trafficking already provides us with a sliding scale of severity of activity, all of which constitutes trafficking. Initially, we have the example of the victim abducted fully against their will. Further along the spectrum, we have the situation where consent is given, but some event occurs to render the consent irrelevant or invalidated. This could come about where one of the ‘means’ elements of the current definition of ‘trafficking in persons’ is employed; say,

⁸¹⁶ United Nations Economic and Social Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, ‘Integration of the Human Rights of Women and the Gender Perspective: Violence against Women’, Commission on Human Rights, Fifty-sixth session, Agenda item 12 (a) of the provisional agenda, (2000) E/CN.4/2000/68
<<http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb?Opendocument>> accessed 01 July 2011.

⁸¹⁷ Smuggling Protocol, n 5.

⁸¹⁸ J Bhabha, n 517.

⁸¹⁹ Ibid.

the nature of ‘work’⁸²⁰ or conditions agreed to are changed and therefore deception has occurred, rendering the victim trafficked (by definition) even though initial consent was given. These cases illustrate differences of degree, rather than nature.

Finally, at the far end of the spectrum, we have the person who has consented to every part of the process (or where objective proof of any coercion is lacking), even though they are to be performing exploitative work in perhaps dangerous conditions, which may threaten an individual’s human rights or basic rights. The presence of ostensible consent illustrates differences of both degree and the nature of the activity. This person has not been trafficked. Neither have they been smuggled, at least in a moral sense, as the activity goes beyond the ambit of the Smuggling Protocol. What we are left with is a body of persons who come within a larger spectrum of ‘facilitated exploitative migration’, or ‘facilitated migration for the purpose of exploitation’, which although exploitative and potentially illegal in nature, cannot currently be said to be human trafficking in a legal sense.

In the context of the definitional gap between trafficking and smuggling, these persons exist in a legal vacuum. They may have experienced the comparable levels of exploitation and abuse of rights as many persons who are deemed to have been trafficked. However, the State is unable to obtain prosecution against the migration facilitator as a ‘trafficker’, and the exploited migrants are not afforded the ‘victim’ status and, therefore, the protection offered to trafficked persons by the State. One might ask whether there are likely to be any persons at all who can really be said to have truly given their consent, and therefore consideration of this category of persons is unnecessary. Yet, in response, one would say that the drafters of the Trafficking

⁸²⁰ For the immediate purposes we will assume that ‘work’ includes that of a sexual nature. Sex work as a form of legitimate labour is discussed in Part IV, section B, below.

Protocol clearly envisaged the potential to consent in this context, and considered it to be relevant as to the determination of the existence of trafficking.

As outlined above, older traffick-specific instruments did not deem consent to be relevant or probative of human trafficking. Slavery related instruments make it clear that one cannot contract oneself into bondage in a slavery context. The Trafficking Protocol presents somewhat of an anomaly – the ability to contract oneself into an exploitative and potentially harmful situation. The nature and degree of the exploitation in question, and relevant factors such as coercion and deception, are clearly relevant to determining on which side of a blurred line – or at which point on a spectrum of coercion and consent - the activity in question will fall.

B. The ‘Spectrum’ of Consent/Coercion: The Reality of Consent in the Context of Human Trafficking

As the above discussion indicates, the ‘dichotomy’ of consent/coercion is rejected here. It is submitted instead that these inherently malleable concepts sit at opposite ends of a spectrum. Along this spectrum and between these concepts there are varying shades of grey as to what constitutes valid consent, or coercion sufficient to render consent ineffective or invalidated in any given situation.

Drew asserts that in the case of smuggling, the human being is the consumer, whereas in the case of trafficking, the human being is the commodity.⁸²¹ Yet, the division between trafficking and smuggling is not clear cut. One can give polarised examples such as the kidnapped victim juxtaposed against the willing migrant sex worker. These

⁸²¹ S Drew ‘Human Trafficking: A Modern Form of Slavery?’ (2002) *European Human Rights Law Review*, 4, 481 – 492, 484.

examples may represent how one perceives ‘pure’⁸²² cases of smuggling or trafficking, but in reality cases are rarely this simple.

The concepts of consent and coercion are particularly problematic when considered within a coercive environment, as indicated by research conducted into prison rape.⁸²³ Where there is the potential that individuals enjoy limited autonomy, such as in a potentially exploitative sex work environment, the appearance of valid consent can obscure the reality of coerced consent. The power imbalance which can occur in such relationships i.e. prison sex/rape and trafficking/smuggling for sexual exploitation further problematises determinations of valid consent. This hierarchical relationship of exploiter and exploited further means that a valid consent can become a coerced consent, yet to an objective observer, there has been little or no change to the relationship.

Consequently the potential for, and effects of, exploitation and abuse may be exacerbated. In such a coercive environment there may be little need for overtly and obviously coercive acts, and there is the further issue that the exploited individual may not view herself as coerced or trafficked. Human Rights Watch state that:

... in instances where the victim makes little apparent effort to escape the abuse, both prisoners and prison authorities often fall into the trap of viewing non-consensual [sic] sexual activity as consensual, ignoring the larger context in which the activity takes place.⁸²⁴

Similarly, the apparently willing smuggled prostitute may in fact be labouring under coercion – thereby rendering her formally ‘trafficked’ - but this may not be apparent.

⁸²² J Bhabha, n 527.

⁸²³ See Human Rights Watch, n 327.

⁸²⁴ Ibid, particularly the section entitled ‘Consent and coercion in prison’.

Valid consent requires the power to refuse – it may not be clear where this is lacking. Unwanted can still equate to unforced, but this does not amount to a valid consent.

In realistic terms, we might ask what degree of coercion or deception (and about what issues) is necessary in order to establish that a woman has been trafficked.⁸²⁵ Let us assume that one can consent to sex work, even in exploitative conditions where pimps or traffickers take their inflated cut of the earnings. In this situation, if the usually willing sex worker is persuaded to service one more client that she wants to on a particular day, does that mean she has been coerced significantly for her to have been trafficked? Even if it were concluded that she had been coerced, whether or not the coercion is sufficient to invalidate consent is a further issue. If, for example, on arrival in the agreed destination State the rate of remuneration is lower than that which was agreed but the victim cannot logistically withdraw consent and get herself back home, engaging in sex work may give the appearance of consent to the nature and degree of exploitation. The appearance of consent can obscure the coercive reality.

The consent/‘means’ aspect of the trafficking definition leaves the question unanswered as to how severe the interference with consent has to be – we have no specific pinpoint on the spectrum. This allows for States to interpret and implement the anti-trafficking regime differently. This will potentially allow for significant difference in terms of the identification and treatment of putative victims in destination States. If the terms are to be interpreted inclusively, the putative victim benefits, and the pool of recognised victims is wider. If the terms are to be interpreted exclusively and stringently, then the reach of the anti-trafficking regime is more limited.

Where an individual agrees to be smuggled for exploitation, there is *prima facie* a valid consent. Where the conditions of exploitation agreed to are changed, i.e. where

⁸²⁵ See the discussion in this Chapter of ‘informed consent’ in a trafficking context, Part I, section B, above.

there was deception as to some conditions of the ‘work’ such as hours or rate of pay, then this vitiates the initial consent. Yet, it is questionable as to whether destination States would view this individual as trafficked, since she had consented to the transport and to the exploitation, but in different terms to those which she eventually experienced. *Prima facie*, this is trafficking, yet the willingness of States to recognise trafficking in such a situation where the initial giving of consent has played such an important part in the process, is uncertain, if anything, it is doubtful that they would.⁸²⁶ The consent is damaged, but is the damage sufficient to fully negate the consent, therefore rendering the individual a trafficked victim who has the entitlement to rights and protections provided by the anti-trafficking regime?⁸²⁷

The difference here is less one of nature and more of quality or degree. The agreement as regards the latter, deceived, individual was always to undertake sex work, therefore the nature remains the same. The quality and degree of the exploitation, however, is changed – deception as to the rate of pay, for example, would alter the quality of the acts consented to. This should be sufficient to vitiate consent.⁸²⁸ The theory and application may vary depending upon the context, as States’ legitimate interests in border protection may colour the perception of consent with respect to some putative trafficking victims.

Clearly, then, the quality of the act consented to is relevant, as UK domestic cases such as *Tabassum*⁸²⁹ have indicated. Similarly, the nature and degree of the harm

⁸²⁶ On this point, see specifically See The Anti Trafficking Monitoring Group, n 306, 12, where the point is made that those who agreed to come to the UK to engage in work yet were subjected to abuse and/or deception have all too often been identified as ‘not trafficked’, even though the trafficking definition would intend for such persons to be formally identified as ‘trafficked’.

⁸²⁷ The bespoke rights and protections available to formally trafficked victims are discussed in Chapter 4, Part IV *et seq.*

⁸²⁸ See, for example, *R v Tabassum (Naveed)* [2000] 2 Cr App R 238.

⁸²⁹ *R v Tabassum (Naveed)* [2000] 2 Cr App R 238.

caused is relevant to consent – as domestic cases such as *Brown*⁸³⁰ have shown us. *Brown* is a clear illustration of the importance of public policy in the making of decisions regarding the potential for consent to operate as a defence. The transnational criminal regime⁸³¹ applicable to human trafficking does not allow exploitation where consent to it has been obtained by significant deception, coercion etc. It does, however, allow exploitation where there is no apparent or significant deception or coercion, and, therefore there is deemed to be a valid consent.

The nature and degree of harm caused in situations of consensual and non-consensual trafficking varies sufficiently for the situations to receive different treatment. It is unfortunate, however, that the treatment of consensually exploited persons is left to be addressed wholly by domestic law. In, for example, a medical law context, the consent of a patient renders lawful the touching etc. that takes place in medical procedures. Consent in a trafficking context does not negate the wrong, morally or legally – exploitation cannot be justified. In a legal sense, the migration facilitator is still in breach of legislation relating to the facilitation of the illicit border-crossing of humans,⁸³² and accepted domestic labour standards,⁸³³ although the position as regards the latter depends, in terms of sex work, upon how prostitution is dealt with by the legislative framework of the destination State.⁸³⁴

As a matter of public policy, the transnational criminal regime applicable to trafficking and smuggling should go further and provide for criminalisation of would-be traffickers who fall into the grey area between trafficking and smuggling, as the extent of the harm caused should be the concern of the criminal law. What this means

⁸³⁰ *R v Brown* [1993] 2 WLR 556, [1993] 2 ALL ER 75, *Laskey, Jaggard, and Brown v. The United Kingdom* [1997] Case No. 109/1995/615/703-705.

⁸³¹ As identified in Chapter 1, Part II, section A.

⁸³² I.e. smuggling offences, see, n 235.

⁸³³ As regards, say, the provision of a minimum wage, or other conditions of the ‘work’ undertaken.

⁸³⁴ See Part IV, section B, of this Chapter for discussion of sex work as a legitimate form of labour.

for the ‘victim’ who has been ‘less than trafficked but more than smuggled’ (at least in a moral sense) is another matter, and will be discussed later.⁸³⁵ As a protective measure or a matter of public policy, then, the law may be framed so as not to recognise the giving of consent in certain situations, at least to the extent that the justificatory scope of consent is limited. The capability of humans to give consent in the context of human trafficking will now be considered, in terms of opposing views which support either a ‘Paternalist’ or ‘Autonomy’ approach.

IV. Consent to Trafficking, Exploitation and Sexual Labour: Autonomy v Paternalism

Discourse regarding the trafficking of adults can lead to the making of a distinction between sex work and other forms of ‘exploitation’ under the trafficking definition. The discussion hinges largely on whether a person should be deemed capable of consenting to prostitution, or sexually exploitative work – i.e. should such a consent be legally recognised. It follows from this that – as will be discussed below - some see sex work as inherently exploitative, yet this is resisted here as a comprehensive proposition.⁸³⁶ Politically and socially, it is easier to accept that there has been consent to other forms of exploitative work which might otherwise be undertaken in acceptable conditions than it is to sex work, which has always carried with it implications of exploitation and immorality (and often illegality). Balos contends that one form markets strength, the other markets intimacy.⁸³⁷ Sixteen hour days spent working in a field or factory, and

⁸³⁵ See Part V, sections C and D, and Part VI, sections B and C of this Chapter, for discussion of what the consequences of consent are for the ‘consensually trafficked’ person, and also see Chapter 4, Part IX, section B for suggestions as to how this category of persons should be dealt with in the destination State.

⁸³⁶ See, Part IV, section D, below, for further discussion of this issue.

⁸³⁷ B Balos, n 14, 151 – 2.

sixteen hour days spent servicing man after man in a brothel, each for exploitatively low wages, may be perceived and reacted to in very different ways.

This is largely why the trafficking and smuggling related debate is frequently of a gendered nature – men are smuggled, women are trafficked. The common perception is that men consent to facilitated migration, or smuggling, in order to look for work on arrival in the host state. Trafficking, on the other hand, is perceived as largely affecting females and as being for the purposes of commercial sex work. It is, for some, difficult to accept that any woman would consent to being trafficked for these purposes. This gendered slant does not represent the full picture.

A. Autonomy v Paternalism

In terms of sex work, discourse has historically made a distinction between those who are pure and innocent, and those who are immoral i.e. prostitutes. Two polarised camps, the arguments of which are outlined in detail by various commentators,⁸³⁸ fuel the debate as to whether anyone should be considered capable of consenting to sex work, or whether consent to sex work should be recognised (legally). One position is the ‘Autonomy/Empowerment’ view, and the other is the ‘Paternalist/Protectionist’ view.⁸³⁹ These views are generally put forward by women, and should be seen in the context of the wider debate about the relationship between women and the law.⁸⁴⁰

⁸³⁸ See for example, K Abramson, n 14, and J Chaung ‘Redirecting the Debate over Trafficking in Women; Definitions, Paradigms and Contexts’ (1998) 11 Harvard Human Rights Journal 65.

⁸³⁹ See K Abramson, n 14, 473.

⁸⁴⁰ See, for example, C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard 1987), C MacKinnon, *Toward a Feminist Theory of the State* (Harvard 1991), C MacKinnon, *Sex Equality: Family Law* (Foundation Press 2001), C A MacKinnon, ‘Prostitution and Civil Rights’, (1993) 1 Michigan Journal of Gender and the Law, 13, K Mahoney, ‘Theoretical Perspectives on Women’s Rights and Strategies for their Implementation’, (1996) Brooklyn Journal of International Law 21(3): 799-856

The former is based in liberal theory, and maintains that individuals have the capacity and right to consent to prostitution-related activity. It allows for free will and expression of sexual self-determination,⁸⁴¹ and is an example of people, women in particular, seeing a market with the potential for economic gain, and making the most of that opportunity. Essentially, this view says that the choice to partake in commercial sex work is a rational economic choice made by a woman who is simply cashing in on her sexuality by taking advantage of a pre-existing market. After all, prostitution is referred to as the oldest profession, and this market will never be short of consumers. The world has its share of ‘happy hookers’, and the extreme view of a minority would go so far as to hold that ‘[o]utside of sex trafficking, it seems to me that it’s the women exploiting the men.’⁸⁴² Although the reality of such a view may be restricted to a small number of sex workers, anecdotal examples - such as Belle de Jour⁸⁴³ - do exist.

The Paternalist/Protectionist view on the other hand focuses largely on anti-prostitution debate, and argues that, since the sex trade is based on male dominance and the commodification of women, prostitution is inherently exploitative and any consent by women is irrelevant to its condemnation, including in trafficking law. If prostitution were such a rewarding job and the product of free choice, why, it is asked, is it most often the women with the fewest meaningful or desirable choices who are most often the ones found doing it,⁸⁴⁴ and why do traffickers have to ‘deceive, coerce and enslave women to get them into and keep them in the sex industry.’⁸⁴⁵

⁸⁴¹ J Chaung, n 838, 86.

⁸⁴² Godfrey Bloom, UKIP MEP, BBC News, ‘UK ‘should outlaw paying for sex’ (20 December 2007) <http://news.bbc.co.uk/1/hi/uk_politics/7153358.stm> accessed 20 Dec 2007.

⁸⁴³ A pseudonym used by a high profile call girl who has published several books about her experiences, including Belle de Jour, *The Intimate Adventures of a London Call Girl* (Weidenfeld & Nicolson, 2005).

⁸⁴⁴ C A MacKinnon, ‘Prostitution and Civil Rights’, (1993) 1 Michigan Journal of Gender and the Law, 13, 28.

⁸⁴⁵ D M Hughes, n 164, 632.

Opposing groups of feminist lobbying targeted the preparation of the UN Trafficking Protocol, each advocating either an Autonomy or Paternalist stance. This input came predominantly from the Human Rights Caucus (the Caucus),⁸⁴⁶ and the Coalition Against Trafficking in Women (CATW).⁸⁴⁷ The former were of the view that prostitution is a legitimate form of labour, in which women are capable of consenting to participate. CATW were strongly opposed to this view, advocating that prostitution is inherently exploitative and a violation of women's rights in all circumstances. CATW's position was effectively that consent be deemed irrelevant, and that trafficking should solely be comprised of 'action' and 'purpose' elements and cover all forms of 'recruitment, transportation...' etc. for prostitution. This echoes the all-encompassing sentiments of the 1926 Slavery Convention, which envisaged the subject being brought into the slave trade 'by any means',⁸⁴⁸ and goes hand-in-hand with the idea that one cannot contract oneself into bondage. The Caucus, in keeping with their view of prostitution as a form of labour, felt that prostitution should be placed in the same category as all forms of labour, and that it was therefore necessary to include an explicit 'means' element. The aim of the Trafficking Protocol was to be an anti-human trafficking document, not an anti-prostitution document aimed solely at women.

The Autonomy view represents a more modern take, and piggy-backs on arguments promoting equality, in turn implying and accepting that those involved are exercising choice. It is necessary to make a distinction between 'free' choice and 'necessary' choice. The former may be enjoyed by those individuals who are less

⁸⁴⁶ Human Rights Caucus 1999: Members of the Human Rights Caucus: International Human Rights Law Group, Foundation Against Trafficking in Women, Global Alliance Against Traffic in Women, Asian Women's Human Rights Council, La Strada, Ban-Ying, Fundacion Esperanza, Foundation for Women, KOK-NGO Network Against Trafficking in Women, Women's Consortium of Nigeria, Women, Law & Development in Africa (Nigeria).

⁸⁴⁷ Coalition Against Trafficking in Women 1999 (CATW)
<<http://www.catwinternational.org/index.php?srcdd=g206&gclid=CPLDivvD16ACFSU8IAodM0r9Fg>>
accessed 01 July 2011.

⁸⁴⁸ Article 1(2), 1926 Slavery Convention, n 404.

constrained by social and economic factors. Those with more constraints upon their ability to freely choose are more likely to make their decisions out of necessity, for example, those suffering severe economic impoverishment, or opting for sex work in order to fund drug addiction. Criticism of this view raises the frequently asked question; can there be such a thing as a ‘willing prostitute’? The fact is that there exist bodies of sex workers who argue that partaking in sex work is their free and un-coerced choice,⁸⁴⁹ and the views of such persons should not be disregarded.

It is argued by some that legalised prostitution blurs the line between what is coerced and what is voluntary, so that traffickers can claim that the woman had full prior knowledge of the nature and conditions of her ‘work’.⁸⁵⁰ In the most extreme sense, the Autonomy view focuses on consenting to sex work and, therefore, to potentially exploitative activity as a career move from economic motives. Further, the Autonomy view accepts it as given that the consumers - chiefly male – will always have the need for prostitutes. Acceptance of this stems from and perpetuates the gender imbalance that underpins the sex trade. This idea of capitalising on sexuality may represent part of a skewed ethos that women can gain control of this market. The liberal model of autonomy presumes the giving of consent in a ‘free and unfettered’ way.⁸⁵¹ Munro states that critics consider that the rhetoric of liberalism has played a role ‘in both disguising the complex realities of consent and obscuring the extent to which human agency is curtailed to comply with this artificial framework.’⁸⁵² What is required is ‘a more realistic account of the constructed operation of choice in specific human situations.’⁸⁵³

⁸⁴⁹ Such as the English Collective of Prostitutes - see <<http://www.prostitutescollective.net/>> accessed 01 July 2011.

⁸⁵⁰ D M Hughes, n 164, 633.

⁸⁵¹ V E Munro, n 510, 925.

⁸⁵² Ibid, 929.

⁸⁵³ Ibid.

On the other hand, the Paternalist/Protectionist view also invites criticism, as it victimises women and deems them to be weaker, sexually passive, and in need of paternalistic protection. Indeed, it can be argued that ‘paternalistic ethics impinge on individual self-determination (limiting the significance of consent)’.⁸⁵⁴ Commentators such as Mackinnon⁸⁵⁵ ‘draw... attention to the constraints and cultural pressures that operate on women’s ability to make sexual choices.’⁸⁵⁶ MacKinnon has produced some heavily paternalistic commentary.⁸⁵⁷ She insists that the notion of consent is inadequate, because it ignores the reality that all men and women are not on an equal footing when engaging in sexual encounters or negotiations.⁸⁵⁸ Furthermore, that ‘women exist as oppressed victims of male power, tokens of heterosexual interest, acquiescence, or even initiative, may be as much a mechanism for survival as an expression of legitimate choice.’⁸⁵⁹

Conversely, Munro observes that:

... while Mackinnon’s claims are perhaps to be commended ... her failure to discriminate between the different kinds of pressure and her refusal to engage with the role that (some) women play in perpetuating – or, indeed, resisting – these pressures is theoretically limiting and strategically damaging.⁸⁶⁰

⁸⁵⁴ D Beyleveld, and R Brownsword, n 321, 27.

⁸⁵⁵ See for example C MacKinnon, *Sex Equality: Family Law* (Foundation Press 2001), C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard 1987), C MacKinnon, *Toward A Feminist Theory of the State* (Harvard 1991); C A MacKinnon, ‘Prostitution and Civil Rights’, (1993) 1 Michigan Journal of Gender and the Law.

⁸⁵⁶ V E Munro, n 510, 939.

⁸⁵⁷ n 855, above.

⁸⁵⁸ C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard 1987) 100.

⁸⁵⁹ V E Munro, n 510, 938.

⁸⁶⁰ *Ibid*, 939.

The Paternalist stance removes the element of choice advocated by the Autonomy view; that women are simply taking advantage of an opportunity for economic gain. Yet, a quasi-paternalist stance in the context of consensual migration for the purpose of exploitation, particularly where the latter takes place in a coercive environment, may be preferable in that it can pave the way for a better standard of protection for those who may be coerced. Full autonomy is the luxury of the free and un-coerced agent who exercises choice in an ideal setting.

Consent to exploitation – particularly as a result of severe economic need – may be less a reflection of the exercise of genuine autonomy, and more of a necessary submission. This is based upon an abstract conception of free agency which does not fit comfortably in all situations. Conceding to sex work as a mechanism for survival does not necessarily equate to an acceptable standard of autonomous agency, at least morally. Yet, the desire here is not to belittle the choices of the autonomous migrant sex worker. Consent to sex work – even exploitative sex work⁸⁶¹ - is recognised as valid in an un-coerced setting, and should not be attributed to ‘false consciousness’ – as Stephen Schulhofer recognises, ‘[w]e cannot simply dismiss as ‘false consciousness’ the perceptions of women themselves.’⁸⁶²

Hernandez-Truyol and Larson state that ‘[l]abor measures the legitimacy of work not by the presence of contract or worker consent, but rather by substantive ethical and moral standards of what conditions of work accord with the dignity, health, and liberty of the worker.’⁸⁶³ Who are we to tell the voluntary sex worker that her choice of work means that she lacks dignity? The right to work includes the right to work in hard

⁸⁶¹ A definition of ‘exploitation’ in this context is offered at a later point in this Chapter – See Part VI, section B, below.

⁸⁶² S Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, (Harvard 1998) 56.

⁸⁶³ B E Hernandez-Truyol, and J E Larson, n 551, 395.

conditions. Nonetheless, it may be that a case can be made for the consideration ‘in context’ of the validity of certain choices and consents.

A central problem with both views (i.e. Autonomy v Paternalism) is that they do not see the sex trade as a whole; they appear to have been conceived solely with adult women in mind. A fully paternalistic approach is taken with regard to children, who are deemed incapable of making such a choice. Early trafficking instruments solely dealt with women being trafficked for the sex trade, and early slavery-specific instruments appear to have mainly envisaged a male subject.⁸⁶⁴ Now that trafficking definitions have extended to include other forms of exploitation, the subjects are both male and female. It is questionable as to whether either the Paternalist view or the Autonomy view would extend to male sex workers. Indeed, advocates of each view have thus far limited their application to women.

These views are polarised at opposite ends of a spectrum, which envisages informed consent in an ideal setting, or purely coerced sex work in an exploitative setting. Prostitution does not always occur in coercive conditions, neither is it always the product of choice.⁸⁶⁵ Either way, criminalising prostitution is not so much about protecting women or removing their ability to make choices; in reality, it has the effect of criminalising women who are sex workers, a proportion of whom will have become so due to a lack of other meaningful choices. Lim recognises that some sex workers:

... freely choose sex work as an expression of sexual liberation, or as an economically rational decision based on income potentials, costs involved and available alternatives. Others are pressured by poverty and dire

⁸⁶⁴ See, for example, League of Nations 6.B.4 Temporary Slavery Commission: Minutes of the first (and Second) Session(s), Geneva, 1924-5.

⁸⁶⁵ See L L Lim, ‘Whither the sex sector? Some policy considerations’ in L L Lim, *The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia*, (International Labour Office 1998), 212. The ILO concludes that although prostitution may frequently be coercive, it can also be freely chosen.

economic circumstances. Still others are subject to overt coercion from third parties, in the form of deception and/or physical violence or threats.⁸⁶⁶

Although one may accept that, in many cases, prostitution may either be a product of force, coercion, severe economic need or of the absence of other preferable choices, it must also be accepted that it is still a potentially viable economic choice. This is the case as long as there are sex workers who are proponents of this view. In the 2006 Report, the Special Rapporteur stated that ‘One of the many benefits of the (Trafficking) Protocol definition is that it provides a foundation upon which anti-trafficking discussion, research, and policy development may transcend the general debate about the rights and wrongs of prostitution to a significant extent.’⁸⁶⁷ Clearly, exploitation is wrong – this is something about which all may agree. Prostitution *per se* presents a more difficult exercise in terms of searching for a uniform approach.

B. Sex Work as a Legitimate Form of ‘Labour’

Reconciliation of the two polarised views (Autonomy v Paternalism) is nigh on impossible. Hernandez-Truyol and Larson⁸⁶⁸ propose that prostitution should be studied under a labour paradigm i.e. as an exercise of the right to work, even though it might contain elements of servitude. Abramson reaches a similar conclusion, stating that ‘emphasis on the right to consent to a generic livelihood divorced from a sexual context may carry the day in winning support for the autonomy camp.’⁸⁶⁹ Similarly, the

⁸⁶⁶ Ibid.

⁸⁶⁷ Report on the Special Rapporteur on trafficking in persons, especially women and children, Sigma Huda, Addendum, Mission to Bosnia and Herzegovina, ‘Integration of the Rights of Women and the Gender Perspective’ (30 November 2005) UN Doc E/CN.4/2006/62/Add.2.

⁸⁶⁸ B E Hernandez-Truyol, and J E Larson, n 551, 391.

⁸⁶⁹ K Abramson, n 14, 491.

UN Special Rapporteur on violence against women, in the 2000 Report⁸⁷⁰ offered a definition of trafficking which omitted inclusion of a separate reference to sex work – the terminology ‘forced labour or slavery like practices’ was intended to be inclusive of sex work.

Viewing prostitution through a labour lens allows us to overcome the stalemate reached by the ‘Autonomy v Paternalism’ debate, and to address trafficking for the purpose of exploitation as a whole. Issues of autonomy, morality, sinners and saints have long stood in the way of progress on this particular point. The same factors, such as economic hardship, can lead people to ‘choose’ any form of exploitative labour, sexual or otherwise. Treating sex work in this way (i.e. as a form of labour) may have the additional advantage of ridding consideration of it and the women who engage in it from a moralistic perspective, which can only obscure the genuineness of the consent to participate of some of them and the very real exploitation of others.

Prostitution and trafficking-related discourse can frequently – and mistakenly - equate prostitution with trafficking, which is an inherently misguided approach. Outshoorn asks ‘[i]s all “trafficking” forced or is it prostitution-related migration?’⁸⁷¹ thereby highlighting the consent/coercion spectrum of migration-related sex work. Early anti-trafficking Conventions⁸⁷² made the prohibited conduct trafficking for prostitution, and a link between the two has endured and has led to the two practices being all too often seen as indistinguishable. There can be a blurred line as to when prostitution-related migration becomes trafficking. Conflating those who are controlled

⁸⁷⁰ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, ‘Integration of the Human Rights of Women and the Gender Perspective: Violence against Women’ (28 February 2000) UN Doc E/CN.4/2000/68.

⁸⁷¹ J Outshoorn, n 43, 142.

⁸⁷² See Chapter 2, Part I in particular, although early trafficking-specific Conventions are discussed at various points throughout that Chapter.

and seriously exploited with those who have arguably exercised their right to work creates a barrier to making progress in terms of the fight against sexual exploitation. In keeping with this line of argument, Phoenix states the following:

Take, for instance, the recent identification of the links between global migration and prostitution. Recognition of the mass movement of people (usually women) from around the globe into the sex industry in more affluent Western societies has conditioned the *almost complete collapse of any discursive boundary between human trafficking and prostitution*. In responding to the international call to do something about human trafficking and the misery, exploitation and human tragedies which trafficking often involves, and in an endeavour to stop illegal migration, governments around the world have focused their attention on prostitution.⁸⁷³ (Emphasis added)

Although it cannot be disputed that the two are sometimes linked, ‘Prostitution’ should not be used as a euphemism for ‘human trafficking.’ Prostitution *per se* and trafficking for the purpose of prostitution are fundamentally different things - prostitution can be a ‘purpose’ element of human trafficking, it can also be a result of prostitution-related migration,⁸⁷⁴ or a wholly separate issue in its own right i.e. concerning domestic sex workers – coerced or fully consensual.

This leads us more specifically on to consideration of whether sex work is to be viewed as a legitimate form of labour. It is undisputed that ‘[t]he legal status of prostitution is an unsettled issue in nations throughout the world, particularly those of

⁸⁷³ Jo Phoenix, ‘Frameworks of understanding’, in Jo Phoenix (Ed) *Regulating Sex for Sale: Prostitution policy reform in the UK*, (The Policy Press 2009) 7.

⁸⁷⁴ J Outshoorn, n 43, 142.

the west.’⁸⁷⁵ For example, prostitution in Sweden is viewed as a form of violence against women in all situations, and this is reflected in the legislative framework, which criminalises the purchaser of sexual services in all situations.⁸⁷⁶ Clearly, there is a lack of uniformity as to how sex work is viewed in different countries. Sex work is not ‘legitimate’ in the UK in the sense that it is not legalised and regulated, in contrast to the system adopted in the Netherlands, which has a fully regulated and legitimised sex sector and has clearly identified sex work as ‘labour’, like any other form of work. In the UK context then - and those of other countries where a system operates other than one of a regulated sex trade, there remains the philosophical and political question of whether sex work is ‘legitimate’ labour.

What, then, is ‘labour’, and can sex work be viewed through this paradigm? In the most basic sense, labour – specifically wage labour – is the exchange of services for remuneration. One’s ordinary understanding of the meaning of the word ‘prostitution’ might be ‘the exchange of sex or sexual services for money or other material benefits’.⁸⁷⁷ According to Section 51(2) of the Sexual Offences Act 2003, a ‘prostitute’ is:

... a person (A) who, on at least one occasion and whether or not compelled to do so, offers or provides sexual services to another person in return for payment or a promise of payment to A or a third person; and “prostitution” is to be interpreted accordingly.⁸⁷⁸

⁸⁷⁵ B E Hernandez-Truyol, and J E Larson, n 551, 396.

⁸⁷⁶ Law (1998:408) Prohibition of the Purchase of Sexual Services; *Lag ou förbund mot köp av sexuella tjänster* (1998): Dem som mot ersättning skaffar sig en tillfällig sexuell förbindelse, doms – om inte gärningen är belagd med straff enligt Brottsbalken – för köp av sexuella tjänster till böter eller fängelse i högst sex månader. För försök döms till ansvar enligt 23 kap. Brottsbalken.

⁸⁷⁷ J Outshoorn, n 43, 141.

⁸⁷⁸ SOA 2003, s 51(2).

This definition indicates that it is possible to prostitute one's self and also to be prostituted by another, illustrating the potentially coercive and exploitative nature of prostitution in some circumstances. However, prostitution is neither always the result of either free will, or coercion or force. These are two opposite points on a spectrum, along which all prostitution-related activities may be placed, including prostitution as a 'purpose' element of human trafficking. 'Sexual labour' may also extend beyond prostitution – for example, '[s]ome sex trafficking victims are forced into the following situations: forced prostitution, pornography, stripping/exotic dancing, mail order brides, and massage parlors.'⁸⁷⁹ These forms of 'labour' may also – and indeed in some situations are – undertaken or engaged in, in a fully voluntary and unforced manner.

In contrast to forced or coerced prostitution, prostitution itself is, as stated by Bakirci 'when a woman sells her body as a commodity and pockets the income. Prostitutes are not slaves and are not controlled by the traffickers.'⁸⁸⁰ Clearly this represents the ideal scenario of fully consensual and un-coerced prostitution. The presence of exploitation – actual or intended – does little to render prostitution less of an activity capable of being viewed as a legitimate form of labour. The quintessential smuggled or trafficked potato picker, for example, may work consensually and in acceptable labour conditions; consensually in exploitative conditions; or involuntarily as a result of coercion etc – as, indeed, may the sex worker. It is, however, potentially necessary (and not entirely unprincipled) to consider that the sex worker may be a more vulnerable person than the potato picker. Sex workers are predominantly female, and anti-trafficking instruments are increasingly making reference to gender as a consideration to be taken in account when considering any/all aspects of the fight

⁸⁷⁹ K Bakirci, 'Human trafficking and forced labour: a criticism of the International Labour Organisation' (2009) *Journal of Financial Crime* 160 – 165, 164.

⁸⁸⁰ *Ibid.*

against trafficking.⁸⁸¹ This added vulnerability of the sex worker is not solely based upon gender, however – the nature of the ‘work’ may raise other issues.⁸⁸²

Eckberg states that ‘prostitution has been normalized by neoliberals as a form of sexual entertainment, with equal players exchanging services for money. “Working” as a “sex worker” is seen as a legitimate career path for women’.⁸⁸³ Although such a realisation may not sit well with all who comment on sex work, the reality is that alluded to in the previous section of this thesis, i.e. that ultimately for some individuals, prostitution is a viable choice in terms of ‘economic survivalism’:⁸⁸⁴ a job, a profession, a way of making money – preferable to some other forms of ‘legitimate’ employment.⁸⁸⁵ Outshoorn recognises that:

It should be noted that not all those adhering to the sex work position set prostitution within the same feminist framework. Some are radical liberals who celebrate sexual variety and free choice ... whereas others, while analyzing prostitution as (sexual) service work, maintain a feminist critique by contextualizing prostitution within unequal relations of sexual economic exchange...⁸⁸⁶

⁸⁸¹ Notably the Trafficking Protocol refers in its title to ‘especially women and children’ and the EU 2011 Directive refers in the preamble to the ‘gender-specific phenomenon of trafficking’ at para 3. This is not to disregard the potential vulnerability of male sex workers or sex traffick victims – it is accepted here that these men may be similarly vulnerable when compared to their female counterparts. Yet, the references to gender in the 2011 Directive indicate that female victims may be seen as particularly vulnerable.

⁸⁸² See Part IV, section C, below, where it is recognised that different typed of ‘work’ may be subject to different types of regulation and safety standards, for example.

⁸⁸³ G Ekberg, ‘The Swedish Law that Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings’, *Violence against Women* (October 2004) Vol. 10 No. 10, 1187 – 1218, 1187 – 8.

⁸⁸⁴ Jo Phoenix, n 873, 3.

⁸⁸⁵ This is certainly not to suggest that the majority of prostitutes feel this way, but that a proportion does. Anecdotal examples of willing prostitutes, such as Belle de Jour and Xaviera Hollander, do exist and should not be disregarded.

⁸⁸⁶ J Outshoorn, n 43, 146.

Hernandez-Truyol and Larson refer to the ‘current human rights debate that dichotomises prostitution as either a modern form of slavery or as the exercise of the right to work.’⁸⁸⁷ This encapsulates perfectly the problem with prostitution related discourse – it is not simply a case of one or the other. The authors engage in a labour analysis of prostitution, in order to deconstruct the practice and its component parts.⁸⁸⁸ It is nonsensical to see prostitution as EITHER bondage OR work. The authors refer to prostitution as ‘sexual labour’ and recognise that like all forms of labour, it can be exploited.⁸⁸⁹ This is key to the argument made in this thesis, as it demonstrates recognition of the delineation between prostitution, exploitative prostitution (which may be un-coerced), and coerced/forced prostitution (which will always be exploitative).

Over the past decade, the ILO's Committee of Experts on the Application of Conventions and Recommendations has made various comments regarding human trafficking (of persons of all ages and genders) for the purposes of labour exploitation, such as that performed in factories, construction, or the sex and entertainment industry.⁸⁹⁰ ‘Forced *labour* as a result of organised criminal trafficking can be found in the *sex industry* all over the world.’⁸⁹¹ (Emphasis added). It follows from this that work or services provided within in the sex industry, or ‘sexual labour’ services, are therefore capable of being viewed as a form of forced labour.

Bakirci states that:

According to the ILO (2005) supervisory bodies: A woman forced into prostitution is in a forced labour situation because of the involuntary nature

⁸⁸⁷ B E Hernandez-Truyol, and J E Larson, n 551, 391.

⁸⁸⁸ Ibid.

⁸⁸⁹ B E Hernandez-Truyol, and J E Larson, n 551, 393.

⁸⁹⁰ B Andrees, n 563, 17.

⁸⁹¹ Ibid, 16.

of the work and the menace under which she is working, irrespective of the legality or illegality of that particular activity.⁸⁹²

It follows from this that sexual labour can be forced, it can also be unforced, in the same way that any form of labour can. That sex work might be seen as legitimate ‘work’ or ‘labour’ is clearly not a novel idea, albeit a contentious one that not all may agree with.

The ECJ ruled in a fairly recent case that ‘sex work’ such as prostitution is a protected economic activity.⁸⁹³ The finding of the Court was that ‘[t]he activity of prostitution pursued in a self employed capacity can be regarded as a service provided for remuneration.’⁸⁹⁴ The Court went on to state that the economic activity must be ‘outside any relationship of subordination ... under (the sex worker’s) own responsibility; and in return for remuneration paid to that person directly and in full.’⁸⁹⁵ It was concluded that in each case it is for the national court to determine whether those conditions were satisfied, in the light of the evidence before it.⁸⁹⁶ Granted, this case concerned the Netherlands sex sector which is State legitimised and regulated, yet it is significant in terms of the potential for the ‘sex work as labour’ debate.

Hernandez-Truyol and Larson propose that:

... even where prostitution is chosen by an adult woman as a form of work, it may be an intolerably exploitative form of labour analogous to

⁸⁹² K Bakirci, n 879, 163.

⁸⁹³ *Aldona Malgorzata Jany v Staatssecretaris van Justitie* (Case C-268/99) [2001] ECR I-8615 (regarding the refusal of the Netherlands Secretary of State for Justice to grant residence permits for Polish and Czech nationals to engage in self-employed sex work)

⁸⁹⁴ *Ibid*, para 4.

⁸⁹⁵ *Ibid*, para 5.

⁸⁹⁶ *Ibid*.

sweatshop, child, or bonded labour, and subject to the same legal and political pressures for extinction or transformation.⁸⁹⁷

Elimination - of prostitution *per se* - is unlikely; it has always been around and always will be. Extinction of exploitative prostitution, i.e. where the conditions or rate of pay are exploitative, even in the face of consent, is without doubt desirable. The creation of the harms should be tackled,⁸⁹⁸ as opposed to the simple sale and purchase of sexual services.

C. Consequences of Sex Work as Labour – Access to Labour Rights and Standards

If prostitution is fully legitimised in the UK in the formal sense, sex workers may have access to the economic and social rights which affect all legitimate workers, as well as the civil and political rights from which they already benefit as human beings (where countries are party to the relevant instruments). The fact that they currently do not may have some implications for part of the discussion in Chapter 4 as regards concessions for the ‘consensually’ trafficked.⁸⁹⁹

However, there is the potential for ‘the presence of the wage labour contract, which manifest’s the workers consent, (to) obscure any reality of exploitation or bondage.’⁹⁰⁰ The presence of some form of contract may obscure the coercive or bonded reality. At present, since the sex sector is not regulated in UK, there is nothing to ensure that treatment of sex workers is maintained within a fair labour framework.

Consent does not necessarily equate to legitimacy:

⁸⁹⁷ See B E Hernandez-Truyol, and J E Larson, n 551, 393.

⁸⁹⁸ See, for example, J Elliott, n 275, where the argument is made that the creation of the harms surrounding sex work need to be tackled, as opposed to the sale and purchase of sexual services *per se*.

⁸⁹⁹ See Chapter 4, Part IX, section B

⁹⁰⁰ B E Hernandez-Truyol, and J E Larson, n 551, 394.

A sex worker's consent does not legitimate conditions of work that are otherwise incompatible with her human dignity. We may accept that a labourer is making the best choice she can and still acknowledge that she lacks the bargaining power to insist upon standards of decent work.⁹⁰¹

To take this one step further, we may accept that 'sexual labourers' may make the best choice they can yet still insist upon and experience decent conditions of work for them. This may realistically only be a true reflection of a very small proportion of the sex sector, but vehement responses from groups such as the International Prostitutes Collective⁹⁰² indicate that a body of sex workers themselves argue for and recognise free consent and that not all sex work takes place in forced or exploitative settings.

If sex work is not viewed as a legitimate and regulated form of labour within a State, then it will fall without of the scope of labour inspection systems.⁹⁰³ Indeed:

NGOs and other civil society organisations are essential in economic sectors that are not covered by trade unions and that are difficult to reach for labour inspectors or the police. Examples are domestic service, sex and entertainment or other types of work that are out of scope for labour inspectors.⁹⁰⁴

It is the lack of legal legitimacy of sex work as 'labour' in the UK renders this activity beyond the reach of any enforceable labour standards, and instead places significant

⁹⁰¹ Ibid, 395.

⁹⁰² See International Prostitutes Collective website <<http://www.prostitutescollective.net/>> accessed 05 June 2011.

⁹⁰³ B Andrees, n 563, 21.

⁹⁰⁴ Ibid 36.

aspects of it within the remit of the criminal law, leaving sex workers particularly vulnerable when compared with other forms of labourers. Sex work as labour should be subject to international and national labour standard regulations,⁹⁰⁵ thereby creating a clearer legal and political separation between the exploited and unexploited sex workers.⁹⁰⁶ Further empirical research into the conditions of domestic prostitution is perhaps needed, in order to establish the standards, varied as they may be.

Labour rights and human rights are clearly intertwined, particularly so where consensual economic migration, consensual exploitative facilitated migration, and human trafficking (non-consensual by definition) are concerned. In a labour context, civil and political rights are not wholly separate or independent from economic and social rights, as the worker, the exploited worker, and the forced labourer draw their rights from these instruments.⁹⁰⁷ Together, these rights comprise ‘the fundamental guarantees of essential rights inherent in human existence.’⁹⁰⁸ The preamble to the ICCPR⁹⁰⁹ and the International Covenant on Economic and Social Rights (ICESCR)⁹¹⁰ both state that ‘freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights’, thereby underpinning this point. The UDHR recognises the right to work, and the right to ‘just and favourable conditions of

⁹⁰⁵ See L L Lim, n 865.

⁹⁰⁶ Hernandez-Truyol and Larson state that ‘we believe that the case can be made now for partial decriminalisation as a mandate of international law in order to protect the fundamental labor and human rights of sex workers to organize and freely associate.’ The authors are under no illusion, however, that full legalisation would solve all problems associated with sex work, as there is no ‘magic bullet’; see B E Hernandez-Truyol, and J E Larson, n 551, 440.

⁹⁰⁷ *Ibid*, *passim*.

⁹⁰⁸ *Ibid*, 407.

⁹⁰⁹ ICCPR, n 279.

⁹¹⁰ International Covenant on Economic and Social Rights (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27) (hereafter ‘ICESCR’) of 16 December 1966

work.’⁹¹¹ ICESCR enshrines the same basic substantive rights, and refers to ‘just and favourable conditions’⁹¹² and ‘safe and healthy working conditions’.⁹¹³

Analogies with other forms of wage labour may aid the discussion here. Spector states that:

What is really needed ... is a sustained comparison between prostitution and other forms of wage labor, to try to identify what might be troubling about prostitution, or rather, about the way that it is practiced. Schwarzenback likens the prostitute as physical labourer to a dancer, while Nussbaum compares prostitution to a number of jobs ... including domestic servant and masseuse ... Accordingly, since we treat other such jobs as legitimate choices, we should similarly treat prostitution. For feminist liberalism, it is the worst form of paternalism to preclude the choices of women whose options are already limited.⁹¹⁴

The intention in this thesis is not to embrace this ‘worst form of paternalism’, but instead to recognise the right of sex workers to choose sex work as a legitimate labour choice. Furthermore, to emphasise that there is a spectrum of situations, ranging from voluntary sexual labour, through exploitative (yet still potentially voluntary and consensual) sexual labour, to coerced/forced sexual labour.

Spector also recognises that:

⁹¹¹ Articles 30 and 23(1), UDHR, n 663.

⁹¹² Article 7, ICESCR, n 910.

⁹¹³ Article 7(b), ICESCR, n 910.

⁹¹⁴ J Spector, n 530, 426.

... the radical feminist critique of prostitution is both an argument about the harms caused by prostitution and an argument about the fact (or sometimes, about the possibility) of consent to such harms, while the feminist liberal defense of the legitimacy of prostitution is an argument that the harms are not of a different kind than the harms caused by other jobs and, as such, can be subject to meaningful consent.⁹¹⁵

The author of this thesis holds more closely with the latter view, but recognises that other forms of wage labour may involve different levels of potential harm – prostitution and sexual labour *per se* can be high risk, and therefore ‘safety measures’ would need to be taken if it is legitimised – the ‘hardhat’⁹¹⁶ of the sex industry, so to speak.

Askola⁹¹⁷ suggests that trafficking for the purpose of sexual exploitation raises complex issues connected to freedom, sexuality, choice and gender equality, in contrast to trafficking for the purpose of other forms of more traditionally recognised labour.⁹¹⁸ It seems that although sex work may indeed be viewed as a legitimate form of labour in that it comprises an exchange of services for remuneration, it is a complex issue which cannot easily be assimilated with a generic idea of labour – different types of labour raise different issues, and accordingly may require different responses.

⁹¹⁵ Ibid, 427.

⁹¹⁶ To draw an analogy with the construction industry and the potential for ‘harm’ to occur through work in that industry – there is clearly no need for a hardhat when working in the office, therefore different levels of harm, risk etc may be identified within currently recognised and regulated form of ‘legitimate’ labour.

⁹¹⁷ See H Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, (Oxford: Hart Publishing, 2007).

⁹¹⁸ See, A Gilbert and C Moore, ‘Human Trafficking in the United Kingdom: the journey so far and the road ahead’, (2010) *Criminal Lawyer*, 2 – 4, 2.

D. What Constitutes ‘Exploitative’ Labour, and is Sex Work Inherently Exploitative?

It is said that:

Mostly female prostitutes sell access to their intimate body, sexual service, time, and intellectual and emotional labour for mostly male profit and consumption. This commodification of female characteristics in accord with sexualised gender roles stigmatises women as objects and reaffirms women’s subordinate status.⁹¹⁹

Yet, must this necessarily lead us to conclude that the sale of sex is inherently exploitative? There is sex work in the ideal setting – safe, consensual, un-coerced, un-exploitative (in terms of accepted labour standards). Then, there is exploitative sex work – say, where the would-be economic migrant agrees to work in the UK sex sector for less than UK minimum wage, or for arduously long hours. Finally, there is fully coerced, forced sex work. These are all different things – sexual labour, exploitative sexual labour, and forced/coerced sexual labour – and there is not necessarily the same graduation of awfulness of the conditions of the work, though there sometimes will be.

It appears from the discussion in the previous section⁹²⁰ that sex work (i.e. the first category) can therefore – in a philosophical and/or political if not necessarily legal sense - be deemed a legitimate form of labour. There is compromised legitimacy in the face of exploitation, and furthermore there is nothing legitimate about force or

⁹¹⁹ B E Hernandez-Truyol, and J E Larson, n 551, 441.

⁹²⁰ Section C, above.

coercion. These latter categories are not sexual labour or prostitution – they are exploitation of, or force as to, sexual labour or prostitution.

What exactly constitutes ‘exploitative’ labour remains largely undefined in international law, although the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour ⁹²¹ provides some specific insight as regards exploitative child labour.⁹²² Hernandez-Truyol and Larson conveniently summarise from that Convention four factors which characterise exploitative child labour. These are:

- (1) work that meets existing standards of slavery or forced labour, (2) culturally stigmatized or degrading work, (3) the illegality of the work itself, and (4) harmful or dangerous conditions that interfere with human development and capacity.⁹²³

For the purposes of the argument made in the thesis, a definition of ‘exploitation’ in a labour context is proposed which explicitly refers to lack of conformity with accepted labour standards in the country where the work is taking place.⁹²⁴ There exists no international legal instrument which formally defines what is ‘exploitative’ in an adult labour context.

That sex work is inherently exploitative does not have to be accepted as given. The Trafficking Protocol does not state that prostitution itself is exploitative; instead, it refers to ‘the exploitation of ... prostitution’.⁹²⁵ It is essential at this point to emphasise

⁹²¹ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, ILO No. 182.

⁹²² *Ibid*, Articles 3(a) – (d).

⁹²³ B E Hernandez-Truyol, and J E Larson, n 551, 434.

⁹²⁴ See Part VI, section B, below.

⁹²⁵ Article 3, UN Trafficking Protocol, n 8.

the separation between consent to the ‘purpose’, e.g. commercial sex work, outside of a trafficking context, and consent to trafficking for that ‘purpose’. In terms of domestic prostitution, there are many convincing arguments for recognising a capacity to consent in that context,⁹²⁶ including the recognition of prostitution as a legitimate form of labour, and participation in it as an expression of autonomy, as previously discussed.

Autonomy advocates may rely upon an abstract conception of consent to reinforce a freedom which may really be illusory. It is argued that ‘the autonomous individual agent is itself a product of social construction’.⁹²⁷ The disparate power relations inherent in an exploitative relationship have to be taken into account when considering the validity of any consent. In a trafficking context, it should also be acknowledged that there are conditions present which do not affect the domestic prostitute.⁹²⁸ These include the fact that the trafficked prostitutes are away from their family and friends and therefore their community support network, as well as perhaps being hundreds or thousands of miles from home. They may be illegally present on the soil of the destination state, and therefore unable to approach law enforcement agencies for protection, fearing ill-treatment or deportation. On top of this, their native language may well be different from that of the destination State.

All of these conditions render the putative victim potentially more vulnerable than the domestic sex worker, and therefore arguably more in need of protection; ‘sexual exploitation becomes trafficking when the abuse involves forcefully moving women from one location to another.’⁹²⁹ Similarly, the victim trafficked for forms of labour other than sex work is more vulnerable than domestic labourers for the same reasons. Even those who have consented to the trafficking process may be more vulnerable than

⁹²⁶ See, for example, J Doezema, n 14.

⁹²⁷ E Frazer and N Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate*, (Harvester Wheatsheaf, Hemel Hempstead, 1983) 57.

⁹²⁸ Home Office and Scottish Executive, n 254, 47.

⁹²⁹ F Gold, n 420, 101.

the domestic worker for the reasons outlined above. In terms of the realities of determining a valid consent in an exploitative facilitated migration/human trafficking context, an argument can be made for a context-sensitive understanding of, and corresponding standard of, consent.⁹³⁰

Nonetheless, although empirical evidence clearly demonstrates that sex work can be exploitative,⁹³¹ it also demonstrates that other forms of work or labour can, too. This does not lead here to a conclusion that all work, or indeed all sex work, is exploitative. In fact, it is submitted here that provided that satisfactory labour conditions are present (i.e. those in conformity with the accepted labour standards in the destination State) sex work or sexual labour can be undertaken in a wholly un-exploitative way.

E. Consent to Harm and/or Exploitation

As regards all forms of exploitation, including sex work (where it is exploitative), it must be considered whether consent to exploitative, abusive and dangerous situations should be recognised as valid or as having legal effect. After all, '[people] may agree to exploitative working conditions, but ... agreement is not tantamount to consent.'⁹³²

What is considered to be consent may in reality more closely resemble 'giving in'.

⁹³⁰ On this point in a sexual autonomy context, see V E Munro, n 510.

⁹³¹ See, J Raymond, '10 Reasons for Not Legalising Prostitution', (2003) *Journal of Trauma Practice* 2, 315; C H Hauge, n 407; Home Office, 'Tackling the Demand for Prostitution: A Review' (November 2008); Home Office 'Paying the Price: a consultation paper on prostitution' (July 2004) <http://www.homeoffice.gov.uk/documents/paying_the_price.pdf?view=Binary> accessed 01 July 2011; Eaves, 'Men who buy sex: who they buy and what they know' (2009) <http://www.eaves4women.co.uk/Documents/Recent_Reports/Men%20Who%20Buy%20Sex.pdf> accessed 01 July 2011; L Brussa, n 108; M Coy, M Horvath and L Kelly, Child and Women Abuse Studies Unit 'It's just like going to the supermarket': Men buying sex in East London, (2007) <http://www.cwasu.org/filedown.asp?file=17242_LMU_Demand_Report_Text_screen-1.pdf> accessed 01 July 2011.

⁹³² See, K Abramson, n 14, regarding the view taken by Ateneo Human Rights Centre, The Philippine-Belgian Pilot Project Against Trafficking in Women.

In the context of offences against the person, Ormerod asks ‘[i]n what circumstances should the acts of the accused which cause injury to the victim be punished when that victim has expressly consented to, or at least knowingly taken the risk of, the injury occurring?’⁹³³ English law does not take a single position on whether or not the ‘victim’s’ consent to otherwise unlawful conduct will be a bar to the criminal liability of the perpetrator. In some circumstances, the law does recognise that this is the effect of consent. In *Wilson*,⁹³⁴ a husband branded his wife with a hot iron – with her full consent - as an apparent token of his love for her. He was acquitted. Jehovah’s Witnesses can refuse to consent to blood transfusions, a decision which may result in their death,⁹³⁵ thereby attributing a high level of autonomy to the consenting agent in a situation which can result in harm or death.

In various Reports and Consultation Papers, the Law Commission have considered the effect of consent on criminal liability in the context of offence against the person.⁹³⁶ In Consultation Paper No 134,⁹³⁷ the Commission consider the general rule that ‘no offence is committed if harm of a minor and limited kind is inflicted with the consent of the victim’,⁹³⁸ which meant that, beyond special categories,⁹³⁹ ‘a person cannot effectively consent to the intended or actual infliction on him of ‘actual bodily harm’.⁹⁴⁰ This rule was developed through the common law in UK domestic cases such

⁹³³ D Ormerod, ‘Reports: Consent and Offences Against the Person: Law Commission Consultation Paper no. 134’, (1994) *Modern Law Review* 928, 928.

⁹³⁴ *R v Wilson (Alan Thomas)* [1997] QB 47.

⁹³⁵ See, for example, *R v Blaue* [1975] 3 All ER 446, and more recently Emma Gough, a Jehovah’s Witness, died following severe blood loss after giving birth to twins, Times Online, November 5, 2007, <<http://www.timesonline.co.uk/tol/news/uk/article2809423.ece>> accessed 07 Nov 2007.

⁹³⁶ See, Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles* (Law Com No 218, November 1993), and Law Commission, *Consent and Offences Against the Person* (Law Com Consultation Paper No 134, 1994).

⁹³⁷ Law Commission ‘Consent and Offences Against the Person’ (Law Commission Consultation Paper No 134, 1994).

⁹³⁸ *Ibid*, at 4.1.

⁹³⁹ Such as sports, and medical procedures.

⁹⁴⁰ Law Commission, n 937, at 4.2.

as *Coney*,⁹⁴¹ *Donovan*,⁹⁴² *Attorney General's Reference (No 6 of 1980)*⁹⁴³ and most recently, *Brown*.⁹⁴⁴

What these cases illustrate is a quasi-paternal approach; the State puts a limit on the acceptable level of harm to which consent can operate as a defence. A distinction remains, however, between situations such as that which occurred in *Brown* and those of the consenting trafficked victim. Those in *Brown* concerned individuals who were on a more comparably equal footing with each other. In the case of 'consensual' trafficking, one party has a clear advantage over the other. Such is the nature of exploitation, which is why 'consensual' trafficking may appropriately be labelled 'consensual facilitated exploitative migration'. It is important to recognise that the autonomy of those engaging in sex work is valid and real. That is to say, consent to sex work is accepted here as *prima facie* valid. Consent to exploitative sex work is also recognised here as *prima facie* valid. But, due to the nature of the latter – particularly in the context of migration and trafficking - perhaps a quasi-paternalist stance is acceptable in the face of serious exploitation.

These different effects of consent raise the question of whether or not it is possible to recognise the validity of consent to trafficking/exploitative facilitated migration but still retain the criminality of the 'trafficker', and more pertinently for this thesis, whether any concession may be made for the victim who has ostensibly consented/is ostensibly un-coerced. The latter will be considered later.⁹⁴⁵

The negative ramifications of recognising consent in a trafficking context will now be considered in Part V. Part VI will then consider potential alternatives to the current

⁹⁴¹ [1882] 8 QBD 534.

⁹⁴² [1934] 2 KB 498.

⁹⁴³ [1981] QB 715.

⁹⁴⁴ *R v Brown* [1993] 2 WLR 556, [1993] 2 ALL ER 75, *Laskey, Jaggard, and Brown v. The United Kingdom*. [1997] Case No. 109/1995/615/703-705.

⁹⁴⁵ See, Chapter 4, Part IX, section B, for discussion of concessions for the 'consensually trafficked'.

situation created by the deficit arguably created between the definitions of trafficking and smuggling, which will in turn be developed through Chapter 4.

V. The Effects of Recognising Consent

In order for the trafficker to be convicted, the prosecution must show that women have been transported for exploitation as a result of coercion or otherwise have not consented to being brought to the destination State. This test poses several difficulties.

The first is the evidential burden produced by the need to show lack of consent/presence of coercion. It cannot be assumed that the criteria, indicators and training provided to the authorities charged with identifying victims of trafficking will always be adequate in this respect.⁹⁴⁶ The second problem is the potential for the existence of consent to act as a defence for the would-be trafficker. The third is the most pertinent for the discussion in this thesis and concerns the denial of victim status as regards the trafficked person who is deemed to have consented. This feeds into the fourth problem: that of the potential criminality of the victim as a result of their consensual role in the breaching of borders and domestic labour laws.

A. The Evidential Problem

Primarily, there is the evidential problem. One might ask whether, ‘where consent is equivocal or uncertain, (should) we take a precautionary approach or do we treat the consent as given?’⁹⁴⁷ Coercion of some form must be shown in order to vitiate consent, but what of those cases where this simply is not clear? The problems associated with

⁹⁴⁶ See, Chapter 4, Part VI, section C, for discussion of training of officials and ‘indicators’ used in the victim identification process.

⁹⁴⁷ D Beyleveld, and R Brownsword, n 321, 22.

determining the presence of, or lack of, consent in rape cases provides an example of the difficulties presented here.⁹⁴⁸ Bhaba makes the following observation as regards consent or coercion in situations of human trafficking:

The distinction between coercion and consent remains useful in some circumstances. There are clear-cut cases that fall at one or the other end of the spectrum, and they should be treated accordingly. Where the distinction is not clear, however, significant investment of administrative resources will be necessary to ensure that basic human-rights protections are not violated by thoughtless categorizations designed to serve exclusionary agendas and improve deportation statistics.

Wherever the lines are drawn, they must involve the discretion of experienced and skilled professionals. Determining who is coerced and who has consented – whether at the border or in the workplace – requires detailed case histories and considerable background knowledge about states

⁹⁴⁸ At present, 6% of reported rapes result in prosecution in the UK. See *R v A* [2001] UKHL 25, where tensions between section 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) (which prohibits the giving of evidence and cross examination about any sexual behaviour of the complainant except with leave of the court, in certain circumstances outlined throughout the subsections of the provision) and Article 6 ECHR were apparent. The relevant provision was s. 41(3)(c) which states that 'This subsection applies if the evidence or question relates to a relevant issue in the case and either ... it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.' It was held in that case that the YJCEA 1999 s.41(3)(c) should, where necessary, be construed according to the interpretative obligation under the Human Rights Act 1998 s.3, and furthermore by considering the need to aim to protect complainants from humiliating questions, or indignity. It was found that evidence of a complainant's previous sexual history was admissible where that evidence, and any questioning which concerned it, was so relevant to the issue of consent that to not include it would raise Article 6 concerns. Also, see Home Office 'The Stern Review', Government Equalities Office (2010) <http://www.equalities.gov.uk/pdf/Stern_Review_of_Rape_Reporting_1FINAL.pdf> accessed 01 May 2011.

of origin, states of transit, and employment arrangements within particular industries. Once this process has been undertaken – and grass-roots border-patrol agents, immigration officials, NGOs, community associations, newspaper reporters, trade unions, and other labour-rights groups should be involved as consultants – then sensible determinations can be made.⁹⁴⁹

As the above statement illustrates, proving coercion is likely in many cases to be an arduous and difficult task. As a result, the coercion/consent debate provides an opportunity for legal representatives which could provide a real barrier to the successful prosecution of those facilitating migration and subsequently exploiting the putative ‘victim’.

B. Consent as a Defence for the Trafficker

As regards the second problem identified above, whether or not consent should act as a defence in a trafficking context, the matter is debatable. It is necessary to make the point that ‘consent’ here is not, as it usually is in the criminal context to do with the *mens rea* of the defendant or giving him a defence but with establishing an element of the *actus reus*, such as coercion or deception. In the most basic sense, one would generally accept that the presence of consent indicates a lack of any crime. The reality is not quite this simple.

Harmful activities were consented to in the cases of *Wilson*,⁹⁵⁰ mentioned above, and also in the case of *Brown*⁹⁵¹, which concerned consensual sado-masochistic

⁹⁴⁹ J Bhabha, n 527.

⁹⁵⁰ *R v Wilson (Alan Thomas)* [1997] QB 47.

⁹⁵¹ *R v Brown* [1993] 2 WLR 556, [1993] 2 ALL ER 75, *Laskey, Jaggard, and Brown v. The United Kingdom*. [1997] Case *Laskey, Jaggard, and Brown*, n No. 109/1995/615/703-705.

activities between adults. In the former, consent was accepted as a defence to the harm caused. In the latter, the domestic courts found that consent was not a defence to the crime. The ECtHR allowed that the identification of criminal harm which could not be lawfully consented to was largely for each State to decide.⁹⁵²

It can be contended that:

When individuals consent to undergo medical operations, to engage in sexual intercourse, to open their homes to police searches, or to testify against themselves in court, they convert what would otherwise be an invasion of their person or their rights into a harmless or justified activity.⁹⁵³

This view is overly simplistic. Some activities require justification in order for them to be rendered harmless, and as to what these activities are there is some disagreement in academic discussion.⁹⁵⁴ It is questionable as to whether exploitation can ever be justified. Consent can be transformative; it can, as suggested by Hurd, work its ‘moral magic’ and transform rape into lovemaking, and trespass into a dinner party.⁹⁵⁵ Yet, not every situation is capable of being disposed of with such a simplistic formula.

If consent is simply seen as justification for the doing of ‘something’, then this does not go far enough. This justification does not take into account whether the doing of this ‘something’ is right or wrong, at least in a moral if not legal sense. Exploitation of human beings unquestionably has a moral dimension. Does consent in a trafficking

⁹⁵² *Laskey, Jaggard, and Brown v. The United Kingdom*. [1997] Case No. 109/1995/615/703-705.

⁹⁵³ G P Fletcher, n 320, 109.

⁹⁵⁴ See, for example, M M Dempsey, and J Herring, ‘Why Sexual Penetration Requires Justification’ (2007) *Oxford Journal of Legal Studies*, Vol. 27, No. 3, 467 – 491.

⁹⁵⁵ H Hurd, ‘Was the Frog Prince Sexually Molested?: A review of Peter Westen’s *The Logic of Consent*’ (2005) *Michigan Law Review* Vol. 103, 1329, at 1329.

context render the exploitative activity harmless or justified? Few would answer ‘yes’; ‘consent functions as a ‘procedural’ rather than as a ‘substantive’ (or, ‘on the merits’) form of justification.’⁹⁵⁶ Should consent in a trafficking context provide a legal ‘flak-jacket’⁹⁵⁷ to protect the would-be trafficker? If the answer were ‘yes’, then this surely would not be a wholly satisfactory situation. An attitude of ‘it’s my body and I’ll do what I want with it’⁹⁵⁸ should be deemed insufficient to excuse certain acts; paternalism in this context does have its place. It is for this reason that, even in the face of an ostensible consent, the thesis asks for consideration of concessions for the ‘consensually trafficked’.⁹⁵⁹

There is argument to be drawn upon from a public interest perspective; the ‘wider social harm’ must be considered - consent should be no defence if it is ‘injurious to the public, as well as the person injured.’⁹⁶⁰ Consent should not preclude an otherwise trafficked person from asserting that they have been wronged – a line must be drawn, beyond which consent is no defence. Where the trafficker stands trial, the burden of proof is on the prosecution to show coercion in order to prove lack of consent. Uncertainty as to the limits of what constitutes ‘coercion’ in this context, coupled with the fact that initial consent is often given, renders the issue more difficult to prove.

⁹⁵⁶ D Beyleveld, and R Brownsword, n 321, 61.

⁹⁵⁷ Lord Donaldson in *Re W (A Minor) (Medical Treatment)* [1992] 4 ALL ER 627, at 635.

⁹⁵⁸ D Ormerod, n 933, 938 – 9.

⁹⁵⁹ See, Chapter 4, Part IX, section B.

⁹⁶⁰ Stephen J in *Coney* [1882] 8 QBD 534, at 549.

C. Denial of Victim Status

As regards denial of victim status under the trafficking instruments, the three main instruments considered in this thesis all make provision for some form or another of consideration of support (or requirement of support and protection) for victims, whereas the Smuggling Protocol extends no such status to the smuggled person. Chapter 1 outlines the basic provisions contained within the main instruments considered in this thesis,⁹⁶¹ and Chapter 4 will go on to consider these victim-specific provisions in depth.

The consenting trafficked person who falls in the grey area between the trafficking and smuggling definitions is left in limbo. This allows for the potential for destination States, in the situation where coercion cannot be shown, to deny the consenting trafficked person protection and support. In terms of maintaining border integrity, controlling immigration, and meeting quotas, this may well be in the State's interests.

Under the continuing existence of a definition which recognises consent, it is possible to argue that the consenting trafficked person both does, and does not, deserve to be accorded victim status. Arguments 'for' include the fact that consent does not necessarily cancel out the existence of serious abuse through exploitation. The consenting trafficked person is still potentially a victim of unacceptable circumstances flowing from the exploitative conditions of their 'labour'. Arguments 'against' include the perspective that the consenting trafficked person has not been coerced in the manner of the non-consenting trafficked person. In fact, they have willingly and knowingly agreed to breach borders and domestic immigration laws. This brings us to the third

⁹⁶¹ See Chapter 1, Part II, section B.

issue; that of the potential criminality of the trafficked person, who, through the giving of consent, could be seen as an accomplice.

D. Criminality of the ‘Consensually Trafficked’ Due to Breach of Immigration Laws

The focus of anti-trafficking legislation must be borne in mind – it should offer a combination of the criminalisation of the activities of the trafficker, coupled with protective human rights-based measures as regards the trafficked person. None of the Smuggling or Trafficking Protocols, CoE Trafficking Convention or EU 2011 Directive envisage criminality for the migrant in terms of their illicit entry into the destination State, even though smuggling seems to be of a largely consensual nature on the part of the migrant. The question of criminality is left for States to determine where smuggled migrants are concerned.

It can be argued that, on the face of it, it is difficult to justify criminalisation of the consenting trafficked person, as this undermines the purpose of anti-trafficking legislation, one of the aims of which is to combat exploitation. However, tensions will arise in this respect concerning breaches of immigration law, and border integrity. Conversely, if there is existence of true consent, then the ‘consensually’ trafficked person will often have committed an immigration offence. It is difficult here to maintain an argument for non-criminalisation, it might be suggested that as a matter of prosecutorial discretion - whether prosecution is in the public interest – should be used, where women have been exploited and remain vulnerable.⁹⁶²

Essentially, the issue seems to be not whether consent in a trafficking context should be deemed meaningless, more whether or not it should be deemed irrelevant.

⁹⁶² This argument will be built upon in Chapter 4, Part VII, section B, where existing Crown Prosecution Service Protocols, which provide for prosecutorial discretion as regards formally trafficked victims who committed an offence as a result of having been trafficked, will be drawn upon.

Alternatives to the current situation created by the trafficking and smuggling definitions, which encompass the abovementioned problems, will now be considered.

VI. Where Next? Alternatives to the Current Situation

The consent debate could potentially leave trafficked persons in a state of limbo, on the wrong side of the law, and denied any victim status. They may be subject to legal sanctions and/or peremptory removal, with the destination State struggling to obtain prosecution against their trafficker. This aspect of human trafficking legislation is a contentious issue, but ultimately the inclusion of this issue in legal definition takes major steps in clarifying what trafficking actually is in a legal sense.

Inclusion of the consent element in the trafficking definition creates a hierarchy of severity of exploitative migration. This means that those who have ostensibly consented to migrate and be subjected to exploitative conditions are indeed exploited in a way that undermines human dignity, but they have not, in a current legal sense, been trafficked. The trafficking and smuggling definition, therefore, have created a loophole. The definition of smuggling includes solely an ‘action’ element.⁹⁶³ The definition of trafficking includes ‘action, ‘means’ and ‘purpose’. Where there is consent, we are left with ‘action’ and ‘purpose’.

The abovementioned situation is not simply smuggling, as it goes beyond the ambit of the Smuggling Protocol. It also may not be trafficking, as it falls short of the requirement for ostensible coercion or some other ‘means’. It is, therefore, unclear what exactly this type of exploitative migration is. That which may tentatively (yet perhaps realistically) be deemed a ‘lesser’ form of exploitative migration than trafficking, i.e.

⁹⁶³ See, Article 3, Smuggling Protocol, n 5.

that where consent has been given, can and must be addressed by international legislation. Consent lends legitimacy to traffick-related activity. Even in the face of consent, such activity still merits suppression and punishment, beyond simply addressing the breach of immigration laws which it may involve.

Hernandez-Truyol and Larson consider ‘relations within which an individual consents to conditions of labour that cannot be reconciled with human dignity.’⁹⁶⁴ In a smuggling context, the focus is on the smuggler, his illegal activity and the damage that it does. Consent in the context of the trafficking definition shifts the focus from the damage done, and keeps the focus on the victim and the existence or otherwise of ostensible consent/lack thereof.

Consent exists largely to protect the stereotypical trafficked victim, the woman who is abducted and forced into sex work against her will. This victim does not comprise the entire victim pool. The following proposals suggest alternatives to the current situation created by the definition provided within the UN Trafficking Protocol and reproduced within the other main instruments considered in this thesis.⁹⁶⁵ These alternatives will potentially mean that the those who - on application of the criteria used to identify victims of human trafficking⁹⁶⁶ - do not display ostensible ‘indicators’ or signs of coercion and so are deemed to have consented, are not left in a legal vacuum.

Progress can realistically follow one of two routes. Either consent must be deemed irrelevant in a trafficking context, or specific measures must be taken or legislation enacted to address situations of ‘consensual facilitated migration for the purposes of labour exploitation’, as a category separate to both smuggling and trafficking.

⁹⁶⁴ B E Hernandez-Truyol, and J E Larson, n 551, 394.

⁹⁶⁵ I.e. the CoE Trafficking Convention and the EU 2011 Directive

⁹⁶⁶ See, Chapter 4, Part VI, section C.

A. Rendering Consent Irrelevant in the Context of Human Trafficking

Abramson states that the Protocol ‘offers the opportunity to urge state party compliance in a way that protects trafficked people without making a formal pronouncement on their ability or inability to consent.’⁹⁶⁷ Yet, deeming consent to be irrelevant in a trafficking context is not about denial of the capacity to make choices about one’s life. Rather, it is about effectively combating a phenomenon which constitutes criminal activity coupled with serious exploitation. Feinberg considers reconciliation of the prohibition against contracting one’s self into slavery with maintaining respect for freedom of contract. He suggests that when faced with fallible tests of voluntariness, then a presumption of non-voluntariness is more preferable than the alternative.⁹⁶⁸

If this route were to be taken, and consent were deemed to be irrelevant in the context of trafficking, it would be necessary to draft an instrument providing a definition of ‘trafficking in humans’ which recognised trafficking as an activity involving an element of transport, and an element of exploitation of labour, including sex work, ‘regardless of consent’, or ‘by any means’. An instrument which supersedes both the trafficking and smuggling definitions is a possible option, but smuggling is not characterised by exploitation in the same way that trafficking is and so this may not be the most comprehensive way to proceed. However, a definition which covers a wider group of people retains what should be the essential focus of anti-trafficking legislation; the criminalisation of perpetrators and the protection of trafficked and exploited persons. Even if valid consent only exists in a very limited number of situations, the current existence of this element excludes some – perhaps many - from the protection

⁹⁶⁷ K Abramson, n 14, 497.

⁹⁶⁸ J Feinberg, ‘Legal Paternalism’ in *Rights, Justice, and the Bounds of Liberty* (Princeton, Princeton University Press, 1980).

offered by the legal instruments forming the anti-trafficking regime, and makes it harder for others who did not consent to get the protection that they need and deserve under said instruments.

A definition tailored to fit this proposal might read along the following lines:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by any means, 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...

B. The Creation/Recognition of a New Category: Concessions for the ‘Consensually Trafficked’

Consent operates as a ‘transformative channel between the harmful and the harmless, and also thereby between the permissible, the condemnable, and the criminal.’⁹⁶⁹ Consequently, addressing formal trafficking and ‘consensual’ trafficking for the purpose of sexual exploitation both in the same way, with the same instruments, may not provide a satisfactory answer. Although the two do not sit at opposite ends of a spectrum of what is harmful and what is harmless, they do indicate different degrees of harm and therefore in a ‘fair labelling’ sense need to be addressed separately, as unsatisfactory as this may be in some cases.

⁹⁶⁹ V E Munro, n 510, 924.

As opposed to rendering consent irrelevant in the context of human trafficking, the other potential route to be taken involves recognition of a third category as wholly separate from trafficking and smuggling: that of ‘consensual facilitated migration for the purpose of exploitation’, or ‘smuggling for the purpose of exploitation’, or similar. This approach is less paternalistic than the one outlined above, as it accepts that there may be valid consent, even to exploitative work in the sex trade but it does not allow it to fully negate the wrongness of exploitation. If it must be maintained that legally, human trafficking cannot involve any consensual transportation for the purpose of exploitation, then this new category allows for criminalisation of serious exploitative activity which undermines human dignity, even in the face of consent. Furthermore, this new category allows the potential for concessions⁹⁷⁰ to be made for victims in borderline cases of trafficking, or where, for example, ostensible evidence of coercion etc cannot be shown. Smugglers, in the most basic sense, commit a wrong against the country whose borders have been breached. Those who ‘traffick’ even consenting persons commit a wrong which far exceeds the breach of borders and involves harm to human beings and undermines the dignity of the human.

To determine a precise point on a spectrum of consent and submission, or free consent and coerced consent, is a ‘philosophical conundrum’.⁹⁷¹ In the context of the creation of a new category of consenting trafficked persons in the broad spectrum of facilitated migration, it is perhaps possible to achieve some concession as to allow support and assistance (for ‘victims’) without fully going into the realms of paternalism (i.e. not opting for ignoring the autonomous choice of a consenting agent to consent to migrate to work in the sex trade). It is undoubtedly possible to achieve criminalisation.

⁹⁷⁰ This will be discussed in Chapter 4, Part IX, section B

⁹⁷¹ R Stone, *Offences Against the Person*, (Cavendish Publishing, 1999) 147.

In terms of policy, more people may benefit if it is not accepted that consent may be given by a trafficked person to transport into exploitative conditions.⁹⁷² However, some may find it difficult to fully concede that consent should be rendered irrelevant. If we take the following completely polarised examples: at one end of the spectrum, we have the person who is abducted and forced into some form of exploitative labour. At the opposite end of the spectrum is the person who is earning low wages at home – although enough to survive – who consents to be ‘trafficked’ to, say, Cornwall to pick turnips for sixteen hours a day for low/exploitative pay but at a higher rate of pay than they were receiving while working at home. The second person has given full consent, but is still being exploited by working long hours for very low pay. Since these polarised scenarios differ in both degree and nature, it is difficult to concede that they can be deemed identical and, therefore, properly addressed in the same way, by the same instrument. Coerced trafficking can include elements of violence and control which go beyond the scope of ‘trafficking’ against a backdrop of consent. Someone who trafficks an inanimate object, such as firearms,⁹⁷³ should not be seen in the same light as one who trafficks human beings who are capable of choice.

A potential definition tailored to fit this proposal might read as follows:

“Facilitated migration for the purpose of labour exploitation” shall mean the recruitment, transportation, transfer, harboring, or receipt of persons, with the consent of that person, for the purpose of exploitation.

⁹⁷² K Abramson, n 14, 493.

⁹⁷³ See, for example, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (adopted June 2001 by United Nations General Assembly Resolution A/RES/55/255), which defines illicit trafficking as: ‘the import, export, acquisition, sale delivery, movement or transfer of firearms....’ thus demonstrating only an ‘action’ element.

In order for this proposal to be implemented, the meaning of ‘exploitation’ or ‘labour exploitation’ - both to include commercial sex work – would have to be considered in some depth. This issue would either have to be determined as ‘a question of degree depending on circumstances’⁹⁷⁴, or alternatively a minimum level would have to be established. Although the meaning of ‘exploitative labour’ has been alluded to at an earlier point in this Chapter,⁹⁷⁵ further exploration of this issue goes beyond the ambit of this Chapter, yet it is suggested here that a suitable definition of ‘exploitation’ could be offset against a standard compliant with domestic labour legislation. This definition would also cover the exploitation of prostitution, on the basis that sex work is ‘sexual labour’ and should be viewed as a form of labour. Abramson offered a definition of traffick in persons which, although intended to address trafficking regardless of consent, proposed the following as regards ‘exploitation of labour’:

... for the purpose of the exploitation of their labor, as defined through illegal work or legally recognized work that is carried out in a pattern of serious non-conformity with existing labor laws.⁹⁷⁶

Similarly, labour exploitation as a ‘purpose’ element of human trafficking was considered in a European Union Commission proposal for a Framework Decision on combating human trafficking.⁹⁷⁷ Article 1 defined it as:

⁹⁷⁴ Stephen J in *Coney* [1882] 8 QBD 534.

⁹⁷⁵ See, Part IV, section D, above.

⁹⁷⁶ K Abramson, n 14, 499.

⁹⁷⁷ European Union (2001b) Communication from the Commission to the European Council and the European Parliament: Combating Trafficking in Human Beings and Combating Sexual Exploitation of Children and Child Pornography, Proposals for a Council Framework Decision on Combating Trafficking in Human Beings and on Combating Sexual Exploitation of Children and Child Pornography COM (2001) 854.

... the purpose of exploiting him or her in the production of goods or provision of services in infringement of labour standards governing working conditions, salaries and health and safety.

Exploitation, then, depends not on the nature of the work, but on the degree i.e. voluntary prostitution juxtaposed against exploitative prostitution, with the latter falling below the accepted labour standards of the State in question. Both of the abovementioned examples provide a sound basis from which to proceed in developing a definition of 'exploitation' in the context of sex work as an accepted form of labour.

C. The Effect of the Implementation of these Proposals

Either of the above proposals recognises the potential for validity of consent in a trafficking context, but they differ in how the presence of consent is to be legally addressed. The implementation of either of these proposals allows for some resolution of the four problem areas identified above.⁹⁷⁸ If the first proposal is followed (i.e. that consent be deemed irrelevant), then the evidential problem is eradicated as it is not necessary to prove lack of consent. Yet in terms of the second proposal, the evidential problem still exists, as it is still necessary to determine lack of consent in order to determine which category the individual case falls into i.e. that of 'trafficking' (non-consensual) or 'consensual facilitated migration for the purpose of exploitative labour', i.e. where one has been 'consensually trafficked'.

Either proposal cancels out the potential for consent to serve as a full defence for the perpetrator, as there is criminality of his activity in either instance – and not simply

⁹⁷⁸ See, Part V, above.

that resulting from breaches of immigration law. Some may struggle to accept criminalisation in the face of consent, on the basis that if one voluntarily accepts exploitative labour conditions, there is no wrong to be remedied. Yet, on the basis of cases such as *Brown*,⁹⁷⁹ it can be contended that as a defence should only go so far – without being overly paternalistic, there can realistically be limits on what is considered ‘harmless’ in the face of consent. In *Donovan*,⁹⁸⁰ it was argued that:

If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent... As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.⁹⁸¹

If we transpose the above into a trafficking/exploitative migration context, the movement of persons and the exploitation of these persons, regardless of consent, potentially infringes domestic immigration and labour laws. Facilitating an illicit border crossing and exploiting the labour of another, are unacceptable irrespective of the giving of consent. Arguably, ‘Where human dignity is independently compromised,

⁹⁷⁹ *R v Brown* [1993] 2 ALL ER 75, *Laskey, Jaggard, and Brown v. The United Kingdom*. [1997] Case No. 109/1995/615/703-705.

⁹⁸⁰ [1934] 2 KB 498.

⁹⁸¹ [1934] 2 KB 498, at 507.

irrespective of whether the act in question is freely performed, consent is not material.⁹⁸²

Due to the difficulties of determining a valid consent or the presence of coercion, and the obvious gap between those who are trafficked and those who are smuggled, international law should provide for criminalisation of the would-be trafficker despite the presence of ostensible consent, and perhaps treat the lack of evidence of coercion as a ‘mitigating factor’ or similar. The effect of this would be that the would-be trafficker is not simply treated as a smuggler – they must pay for their part in the exploitation of the ‘victim’. Consent does not negate the wrong which undermines human dignity and the basic values of society and, therefore it should not absolve the trafficker of any responsibility for his actions.

As regards the denial of victim status, the former proposal eradicates this issue, as ‘victims’ will be victims regardless of consent, although their treatment may vary according to which instruments are ratified by each State and what those instruments provide for. It would be difficult to maintain an argument for exactly the same access to the same rights for those who ostensibly consented, unless the instrument was drafted so that no line was drawn between ‘types’ of victim. If consent is deemed irrelevant, the ‘victim’ is more likely to be portrayed as a victim, and therefore the state will be more likely to accord victim status.⁹⁸³

The latter proposal is more problematic in terms of the denial of victim status (and therefore the bespoke rights created for victims of trafficking) as not all would agree that the exploited migrant who falls into this category deserves comparable victim status. Those who have given an ostensible consent (which may possibly be merely

⁹⁸² D Beyleveld, and R Brownsword, n 321, 17.

⁹⁸³ J Chuang, n 838, 85.

‘assumed’ due to lack of adverse indicators) might be left less deserving of full victim status and the protection that it provides.

On the one hand, it can be argued that consent does not destroy the duty on the state to protect the otherwise-trafficked person. On the other hand, as Bhabha states, ‘Having *chosen* to migrate illegally, smuggled illegals are considered less deserving of protection.’⁹⁸⁴ Thus, the voluntary nature of consensual trafficking forms a potential barrier to victim status. Yet, consensually trafficked people have been more than smuggled – they have also been exploited, thus placing them in a grey area, somewhere between victim and complicit actor. The exploitation taking place against a backdrop of consent arguably benefits both parties – the ‘consensually trafficked’ person earns more than they did back at home, and the migration facilitator/trafficker profits from the exploitation of that person, although both parties cannot be said to be on an equal footing.

Denial of victim status will, however, adversely affect those who did not consent but were unable to show lack of consent. Balos states that ‘The evolution of language in human rights documents has increasingly made the choice or consent of the trafficked woman the linchpin to determine if a human rights violation has occurred.’⁹⁸⁵ It may be desirable to allow consent to determine the presence of human trafficking, but not necessarily that which may arguably be deemed a lesser ‘wrong’ – exploitative consensual migration. The fact remains that the consenting ‘victim’ has been the object of serious ill treatment at the hands of their exploiter(s). There may be, at the least, a case to be made for a sympathetic ‘victim of exploitation’ based approach to be considered on a case-by-case basis. Depending on various factors such as the nature and degree of exploitation experienced, different ‘victims’ will have different needs.

⁹⁸⁴ J Bhabha, n 527.

⁹⁸⁵ B Balos, n 14, 173.

Issues such as the potential for reprisals from the would-be-traffickers or similar would justify consideration of protection in the same way as it would where legally recognised non-consenting trafficked victims are concerned. The treatment and protection of victims of human trafficking, and those who might be deemed ‘consensually trafficked’, is discussed in Chapter 4.⁹⁸⁶

As regards the potential criminality of the trafficked person, once again the former proposal fully eradicates this issue. Consideration of this issue under the latter proposal necessitates return to the justification laid down previously; that the focus of anti-trafficking legislation and anti-smuggling legislation is to criminalise the agent, not the ‘object’ of the trafficking or smuggling. This is particularly true as regards the Organised Crime Convention and the Smuggling and Trafficking Protocols thereto, as these instruments are intended to combat organised crime and the activities flowing from it. Therefore, the organised crime groups are the intended targets for criminalisation. Further, the existence of exploitative labour undermines human dignity and constitutes intolerable treatment of individuals, and so these are the central issues which need to be tackled – not the potential criminality of the migrant. Of course, that is not the end of the story – States have a legitimate concern in maintaining border integrity and therefore require the potential to criminalise and prosecute those who willingly flout immigration laws. This issue will be specifically examined in terms of trafficked and ‘consensually’ trafficked persons in Chapter 4.⁹⁸⁷

⁹⁸⁶ See, Chapter 4, Part IX, section B.

⁹⁸⁷ See, Chapter 4, Part VII.

Conclusion

Consent provides a ‘procedural justification’ for an action or omission.⁹⁸⁸ Whereas consent may lend legitimacy to trafficking-related activity, the use of coercion, force or other relevant factors will damage that consent and render it ineffective. The introduction of a lack of consent element as determinative as to the existence of human trafficking, places emphasis firmly on the coerced or un-coerced nature of the activity. In a given ‘trafficking’ situation, where none of the coercive ‘means’ are proved to have been used, and therefore lack of consent cannot be shown, the individual is deemed to have consented. The transformative nature of consent therefore means that that which would otherwise be termed ‘trafficking’ now becomes a form of consensual facilitated migration for sex work or labour in exploitative conditions. The resulting legal status of the ‘consenting’ individual is that they are viewed as merely another illicit migrant or smuggled sex worker.

The consent/coercion ‘dichotomy’ created by the trafficking definition has been the subject of much debate in recent years. The most basic approach would simply say ‘[t]hat which in the absence of consent would be wrong is rendered permissible by the giving of consent.’⁹⁸⁹ This approach has been shown to be too simplistic in the context of trafficking and facilitated migration for the purpose of sexual exploitation. The trafficking definition shifts the focus so that consent or the absence thereof is the central issue, as opposed to the subsequent exploitation of the trafficked person. It assumes ‘pure’ cases of coerced and un-coerced trafficking, whereas in reality, cases are rarely this clear cut.

⁹⁸⁸ See D Beyleveld, and R Brownsword, n 321, 125.

⁹⁸⁹ See, D Archard, ‘Book Reviews’ (2007) *Journal of Applied Philosophy*, Vol. 24, No. 2, 209.

The current situation with the legal anti-trafficking regime recognises the traffickers who are the criminals, the trafficked persons who are the victims, and the trafficked persons who consent, and therefore by definition have not been trafficked and therefore are not ‘victims’ in this context. The last comprises a category of persons who have uncertain status.⁹⁹⁰ As a result, anti-trafficking legislation has the potential to act as a barrier to obtaining prosecutions and protecting victims of exploitation and human rights abuse. An ability to give valid consent in this context should be recognised, but the real point at issue is whether consent should ever be deemed irrelevant. From a ‘fair labeling perspective’, consent must be deemed relevant. Yet, consent must be valid - care is needed, as full and informed consent may be rare and the appearance of consent may obscure the coercive reality.

This Chapter has argued that sex work can be viewed as a legitimate form of labour. Trúong argues that the elements of the body that are purely sexual may be used not only for pleasure but also for survival and sustenance.⁹⁹¹ This may not sit well with traditional social norms i.e. sex as intimacy, to be reserved for a proper relationship, but it is nonetheless a modern reflection of the potential for sex work to be viewed as a legitimate form of labour, albeit not in a legal sense in every State.

Any form of labour is capable of being exploited or exploitative. Hernandez-Truyol and Larson state that ‘the premise of labor rights is that consent or voluntariness alone cannot guarantee freedom from bondage.’⁹⁹² They go on to recognise that ‘[w]hat the wage labourer sells is control over the body, energy, will and time.’⁹⁹³ They consider ‘relations within which an individual consents to conditions of labour that

⁹⁹⁰ K Abramson, n 14, 500.

⁹⁹¹ See, T Trúong, *Sex, Money and Morality: The Political Economy of Prostitution and Tourism in South East Asia* (1990) 67 – 92.

⁹⁹² B E Hernandez-Truyol, and J E Larson, n 551, 418.

⁹⁹³ *Ibid*, 420.

cannot be reconciled with human dignity.’⁹⁹⁴ It is the conditions of the sale, the agreement, which make the difference between slavery, consensual exploitation, and consensual labour resulting from an agreement/sale. Arguably, the law should provide additional protections to those who are potentially more vulnerable – clearly this category includes children, it may also include women, or sex workers in general.

During the drafting of the Trafficking Protocol, organisations such as the Global Alliance Against Trafficking in Women⁹⁹⁵ did not want the instrument to be overprotective or too paternalistic. But, even in the face of consent, exploitative activity should be criminalised and addressed. Consent may well be deemed probative as to the existence of human trafficking, but it should not be deemed probative as to the existence of serious exploitation. Consensual or forced, exploitative labour undermines human dignity.

The exercise of self-determination and free (or ‘free’) choice does not preclude the existence of exploitation which has been consented to. Simply because a woman agrees, in absence of a preferable choice, to service 16 men a day for an exploitatively low wage does not mean that she does not suffer ‘harm’, or at least that she does not have needs – for example - for assistance and support once discovered. This is particularly the case as it is evident that correct identification of victims of human trafficking is not always straightforward or correct.

If it is to be accepted that exploitation is the focus and that consent is irrelevant, then there is the potential to draft an instrument which supersedes the definition provided within the Trafficking Protocol and other relevant instruments,⁹⁹⁶ and which addresses trafficking regardless of consent. This approach, however, is rejected here -

⁹⁹⁴ Ibid, 394.

⁹⁹⁵ See, Global Alliance Against Trafficking in Women <<http://www.gaatw.net/>> accessed 29 March 2009.

⁹⁹⁶ I.e the CoE Trafficking Convention and the EU 2011 Directive.

one who trafficks a human being who is deemed capable of choice cannot be treated in the same fashion as one who trafficks an inanimate object. On this basis, a distinction must be made between the agent who kidnaps their victim, and the agent who aids the ‘victim’ in their migration into exploitative circumstances. This illustrates the fact that where human beings are concerned, responsibility must be apportioned accordingly: if it is accepted in a given situation that full, informed consent has been provided, then the ‘agent’ who would otherwise be labelled a trafficker is perhaps little more than a facilitator in the exploitative migration process. Yet, they must be held to account for their part in the facilitated migration and subsequent exploitation of the person in question.

If it is to be accepted that one can give full, informed consent in a trafficking context, then ‘consensual facilitated migration for the purpose of exploitation’, or ‘smuggling of humans for the purpose of exploitation’, is a new category existing as a result of the loophole created by the grey area between the Trafficking and Smuggling Protocols (and therefore the other main instruments discussed in this thesis which form the anti-trafficking regime). As the discussion in this Chapter has highlighted, the lines between these categories are often blurred anyway, without there being need for a black spot category created by the consent debate. Yet, this black spot category clearly exists – either because consent is clearly given, consent is ostensible, or the presence of any coercion etc is not clearly, objectively present according, for example, to the ‘indicators’ used by those charged with identifying trafficked persons.⁹⁹⁷ This is inherently problematic, and exactly what this means for the consenting ‘victim’ will be discussed in Chapter 4.⁹⁹⁸

⁹⁹⁷ See, Chapter 4, Part VI, section C.

⁹⁹⁸ See, Chapter 4, Part IX, section B.

However we are to proceed on this issue, the focus on the harm done⁹⁹⁹ must be retained, and the aim of anti-trafficking legislation must be kept well in mind. 'There is ... abundant authority for saying that no consent can render that innocent which is in fact dangerous.'¹⁰⁰⁰ The public interest surely lies more in combating exploitative trafficking and migration-related activity than in becoming tangled in the issue of consent.

The following Chapter will consider – in more depth than previously done in the thesis - the International legal regime applicable to victims of trafficking. This will include discussion and analysis of the bespoke regime applicable to formally trafficked victims, the international legal protection regime which is applicable to all human beings in States who are party to these regimes, and finally discussion as to what concessions may be offered to the 'consensually trafficked'.

⁹⁹⁹ See, B Balos, n 14, 149.

¹⁰⁰⁰ Mathew J., in *Coney* [1882] 8 QBD 534, 547.

Chapter 4

The Treatment of Victims

Introduction

There are in the UK an undetermined but considerable number of irregular migrants. It must be borne in mind from the outset that States have a very broad right to set the policy and adopt the law to control the entry to and to regulate the residence in and removal from their territory of non-nationals.¹⁰⁰¹ Some of these people will, however, be entitled to some protection against removal, despite their irregular entry. These entitlements may be general - all persons in the UK are, for example, entitled not to be removed to a destination where there is a real risk of serious ill treatment. The entitlements may apply only to members of a specific class, such as refugees, who enjoy a more nuanced protection against removal. To this list of groups to which these considerations apply, we can now add victims of human trafficking.

Previous Chapters have established the tripartite nature of the trafficking process according to the internationally recognised definition of ‘trafficking in persons’. Accordingly, when all three criteria are satisfied, a person can be said to have been trafficked and is a victim of human trafficking, who is entitled to certain standards of treatment. Those who have consented to the process may fall outside of the definition of human trafficking, and are, on the face of it, not subject to any bespoke assistance, support or protection which would otherwise be offered as a result of their being

¹⁰⁰¹ *Moustaquim v Belgium* (12313/86) [1991] ECHR.

conferred 'victim' status. Such persons are not considered to be 'victims' in a trafficking context.

The instruments considered throughout this thesis which form the anti-trafficking regime include Articles outlining the purpose of the instrument, which include protecting and assisting victims - and respecting their human rights. The growing recognition of this criminal activity and the human rights abuses that it involves have resulted in legislation and action on an international, European, and domestic level. Policy objectives, however, have until recently been predominantly geared towards the criminalisation and prosecution of traffickers. Efforts to provide for victim support, and show adequate consideration for the many trafficked victims, who may be unable or unwilling to cooperate with state authorities in criminal proceedings, and give evidence against their traffickers, have been insufficient. A human rights based, victim-centred approach should take account of the effect that trafficking and any subsequent sexual exploitation has on the victims, and provide for their support and rehabilitation.

The drafting and enactment of any legislation to deal with trafficking must cover the prohibition, prosecution, and punishment of traffickers, as well as the protection of victims. Legislation which deals with only some of these aspects must be complimented by legislation to address the other(s). Piotrowicz correctly observes that these two aspects of trafficking – namely the prosecution of traffickers and the protection of victims – are not separable, and therefore should not be dealt with separately.¹⁰⁰² All too often, trafficking victims are treated not as victims but as criminals, either because of their involvement in prostitution, or their status as an illegal immigrant.

In some cases, trafficked victims may be deported because of their immigration status, with insufficient regard for the gravity of their situation – this may be

¹⁰⁰² R Piotrowicz, 'European Initiatives in The Protection Of Victims Of Trafficking Who Give Evidence Against Their Traffickers' (2002) *International Journal of Refugee Law*, vol 14, 263 – 278, 263.

particularly so where the ‘indicators’¹⁰⁰³ used by those charged with identifying victims are lacking, or fail to bring to the surface the presence of ‘coercion’ etc, giving the trafficked victim the appearance of being yet another ‘smuggled’ (and willing) prostitute.

Further to this, there may be borderline cases of trafficking, or cases where the conditions experienced by the exploited individual have been so harsh that, although she may have/appear to have ostensibly consented and therefore not be formally trafficked, she is still in need of some support and assistance. We do not know the proportions of consenting women to smuggled women to trafficked women, but we do know that the number of trafficking convictions is small,¹⁰⁰⁴ and yet there is evidence of the presence of large numbers of foreign sex workers in the UK.¹⁰⁰⁵ It seems unlikely that all of these will be consensual prostitutes. There is, thus, a real problem - which a strict application of the trafficking law would appear to make worse – of what to do about ‘victims’ of exploitation, who, for one reason or another, are not able to bring themselves within the formal trafficked category.

This Chapter aims to analyse the international, European and UK stance taken with respect to providing for victims of trafficking for the purpose of sexual exploitation to date. Although this Chapter necessarily enquires into the range of benefits that the victim might be entitled to, it also raises and considers the centrally important matter of

¹⁰⁰³ See, Part VI, section C of this Chapter.

¹⁰⁰⁴ In the period 2009 - 2010, 106 prosecutions were secured for human trafficking offences. See Mr Hanson, Written Answers to Questions, Hansard HC, Column 935W (30 March 2010). Also see, for example, UK Human Trafficking Centre, ‘United Kingdom Pentameter 2, Statistics of Victims recovered and Suspects arrested during the operational phase’, which cites 15 convictions for trafficking offences secured as a result of the operation, full document available at <http://www.soca.gov.uk/about-soca/library/doc_download/122-uk-pentameter-2-statistics.pdf> accessed 01 July 2011, and See also Nick Davies, n 111.

¹⁰⁰⁵ Barbara Follet MP stated in November 2007 that ‘10 years ago 85 per cent. of women in brothels were UK citizens now 85 per cent. are from outside the UK.’ See Barbara Follet MP, Hansard HC vol 467 Column 537W (19 November 2007). Also, see Project Acumen, n 92, and see, UK Human Trafficking Centre, ‘United Kingdom Pentameter 2, Statistics of Victims recovered and Suspects arrested during the operational phase.’

how we decide effectively who is a victim and how we deal with those who are. Ultimately, conclusions will be drawn to the effect that the danger is that the implementation of the State obligations as regards victim support measures in the UK still does not go far enough in achieving adequate victim protection. It will be shown that there are gains to be made from adopting measures which are yet more sympathetic to the victim than those in place at present. Further, a case will be sketched out for consideration of offering concessions in the form of support and assistance to the ‘consensually trafficked’, for reasons which will be elucidated throughout the Chapter.

Primarily, Part I will consider the previous poor performance of the UK Government as regards implementation or consideration of victim support measures. Part II will detail the progressive approach to assisting trafficked victims which has been adopted in Italy. Part III will address why there is a need for a victim-centred approach, and is followed by consideration of the effects (upon State Parties and trafficked victims) of ratification of the Council of Europe Convention on Action against Trafficking in Human Beings, in Part IV. Part V addresses recent EU activity – specifically the 2011 Directive, and the victim assistance measures provided for within. Part VI deals with the all-important issue of victim identification and outlines the procedure currently in place, as well as its shortcomings. Part VII addresses the issue of non-criminalisation of trafficked persons who have committed offences as a result of having been trafficked, and Part VIII considers international protection for the trafficked person available beyond the bespoke regime implemented as a result of the main anti-trafficking instruments. Finally, Part IX makes recommendations for dealing with trafficked persons and the ‘consensually trafficked’, thereby considering potential improvements to the current system and explicitly calling for a more inclusive regime which makes concessions for the ostensibly consenting trafficked person.

I. Victim Protection – the UK’s Previous Poor Performance

It has been suggested that the UK is one of the main destination countries for victims of human trafficking.¹⁰⁰⁶ The presence of any trafficked victims in a country signifies that an approach that accommodates the needs of victims is required. However, consistent poor performance in respect of these victims’ rights in the UK has meant that even an adequate minimum standard has not previously been achieved. Limited initiatives have been in existence, such as The Poppy Project,¹⁰⁰⁷ yet even this project has had limited reach in terms of actually assisting and supporting victims of trafficking.¹⁰⁰⁸ This consistent poor performance in respect of victims’ rights in UK will now be considered, with reference to the relevant legislation and policy.

¹⁰⁰⁶ See, Europol, n 37, 5, where this claim is made, and see also Nick Davies, n 111, 2009, which suggests that the results of Operation Pentameter 2 potentially show that trafficking into the UK has been somewhat overestimated.

¹⁰⁰⁷ The Poppy Project is funded by the Office for Criminal Justice Reform and offers accommodation and support to female victims of trafficking. This project has played a valuable role in identifying and supporting victims of human trafficking. See the Poppy Project, <http://www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php> accessed 16 June 2007.

¹⁰⁰⁸ The criteria for receiving help and support from this organisation have previously been quite restrictive and therefore lacked applicability in respect of many trafficking victims (see, for example, UK Action Plan on Tackling Human Trafficking, n 224, 51). Criteria included having worked as a prostitute within the last 30 days, and having shown the will to co-operate with the authorities. A four-week period of support is provided while the victim makes this decision. Beyond the Poppy project, various independently funded organisations have set up victim support schemes (see UK Action Plan on Tackling Human Trafficking, n 224, 52). Victims have had the option, regardless of whether they choose to cooperate with the authorities, to apply for asylum or humanitarian protection (see UK Borders Agency ‘Humanitarian Protection’ <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/humanitarianprotection.pdf?view=Binary>> accessed 21 Feb 2010. Also within recent years, parliamentary debate within the UK has at times focused upon victim incentive schemes and evidence for residence bargaining in a human trafficking context (see for example, Lord Filkin, Lords Hansard, Written Answers, Hansard HL vol 645 Column WA143 (10 March 2003)) although not all were in favour of this approach. Indeed, it was felt by some that support for victims should in no way be dependent upon their cooperation in the criminal process (see, for example, The Earl of Sandwich, Hansard HL vol 652 Column 555 (10 July 2003)).

A. European Union activity: Council Directive 2004/81/EC

Activity within the EU resulted in a Council Directive in 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (2004 Council Directive).¹⁰⁰⁹ Article 6(1) requires the establishment by Member States of a reflection period, during which the victim may consider whether or not that to cooperate with the relevant authorities. Yet, it states that ‘[t]he duration and starting point of the period referred to in the first subparagraph shall be determined according to national law...’, thereby allowing for much variation in the actual recovery and reflection periods adopted by different Member States. This Directive has been subject to criticism from various corners for the lack of incentive for victims to cooperate,¹⁰¹⁰ and also because, as the title implies, it offers protection to victims only in exchange for cooperation with state authorities.¹⁰¹¹ This illustrates the fact that trafficking is a matter of both criminal law and human rights law, and this Directive appears to exist predominantly to satisfy the former.

This type of ‘evidence for residence’ bargaining at best envisages a quasi-sympathetic approach to the victim in return for their cooperation with state authorities in the criminal proceedings, and provides no scope at all for victim support measures outside of those necessary to effectively induce the victim into such cooperation.

¹⁰⁰⁹ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261/19.

¹⁰¹⁰ R Piotrowicz, n 243, 263.

¹⁰¹¹ See, for example, Human Rights Watch Briefing Paper, ‘Commentary on the European Commission Proposal for a Council Directive “on the short-term residence permits issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities”’ (1 July 2002).

Further to this, the offer of victim support is qualified in that even a willingness to cooperate is inadequate for the granting of a residence permit if the victim is not considered to be sufficiently 'useful' to the criminal proceedings.¹⁰¹² Furthermore, the duration of the residence permit, if granted, is 'linked to the length of the relevant national proceedings'.¹⁰¹³ The 2004 Council Directive was an attempt to tackle growth in illegal immigration and the increasing development of human trafficking and smuggling networks, and the Commission Proposal for the Council Directive openly admitted that it is not concerned with victim protection.¹⁰¹⁴

This approach is less victim-centred and more functional in terms of securing border integrity. Although the issuance of residence permits, temporary or otherwise, is a contentious issue in that there is the potential for abuse by those claiming to be victims of human trafficking, the previous proposals and legislation have failed to sufficiently take account of the vulnerable position of the trafficked victim who may be put seriously at risk from deportation, resulting from her status as an illegal immigrant. Many international human rights instruments envisage enforcement measures against illegal migrants, but a human rights based, victim centred approach should take better account of victim vulnerability, rather than simply regarding them as a nuisance who is on the wrong side of the law.

¹⁰¹² Article 10 of the Commission Proposal for a Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

¹⁰¹³ Article 1, 2004 Council Directive, n 1009.

¹⁰¹⁴ Commission Proposal for a Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, Explanatory Memorandum, 2.3, COM (2002) 71 Final states that 'This proposal for a Directive is concerned with a residence permit and defines the conditions for its issue. In this sense, and to the extent that certain provisions on the conditions of residence constitute protective measures (starting with the residence permit itself, which offers *de facto* "protection" against deportation), *the proposal may appear to serve to protect victims. This is not, however, the case: the proposed Directive introduces a residence permit and is not concerned with protection of either witnesses or victims. This is neither its aim nor its legal basis.*' (Emphasis added)

The Directive offers a form of bargain which is inappropriate with respect to the gravity of harm potentially suffered by victims of trafficking activity. Not only is it unsatisfactory on this basis, but also on the basis that the incentives offered to those who choose to give evidence are limited and inadequate; this is ultimately a one-sided bargain. Lack of victim cooperation is a definite barrier to effectively combating trafficking, but lack of incentive does not invite cooperation. Trafficked victims are frequently suspicious or even frightened of the authorities, which similarly does not encourage cooperation. The fear or suspicion can occur either as a result of their anxiety about deportation, or from a darker fear that the authorities may at best be tolerant, and at worst be complicit in, the illegal activities.¹⁰¹⁵

Although many EU Member States are subject to this Directive, the UK unfortunately chose to ‘opt out’, and therefore is not subject to its content and is consequently not required to observe the ‘reflection period’ provided for by the Directive. Tough stance on immigration has at times meant that victims of serious abuse, such as trafficked persons, have been swept aside in favour of the interests of UK border integrity.¹⁰¹⁶

B. The UN Trafficking Protocol

The Trafficking Protocol is one of the more recent comprehensive international instruments to address the trafficking phenomenon. Guidelines on International Protection state that the Trafficking Protocol ‘represents a crucial step forward in efforts to combat trafficking and ensure full respect for the rights of the individuals

¹⁰¹⁵ See, Chapter 1, Part I, section C, subsection iii, on the corruption of State Officials.

¹⁰¹⁶ See, for example, *R (Limbuella, Tesema, Adam) v Secretary of State for the Home Department* [2005] UKHL 66 (2006) 1 A.C. 396.

affected by trafficking.’¹⁰¹⁷ The Trafficking Protocol evidently envisages some form of victim support, assistance and protection, as it states in Article 2 that one of the aims is ‘[t]o protect and assist the victims of such trafficking, with full respect for their human rights’, yet the Trafficking Protocol did little to yield a more favourable approach as regards victims of trafficking. The main focus of the Protocol was crime control;¹⁰¹⁸ the same can be said of the Council Directive discussed in the preceding section.

The relevant provisions on the treatment of victims are Articles 6, 7, and 8, located in Part II of the Protocol. Article 6(3) states that:

Each State Party shall *consider* implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of ... (housing, counselling – see full text of the article for exhaustive list) (Emphasis added)

The tentative language used does not provide a solid obligation for States to actually take any action, and this minimum standard envisaged by the Protocol may be interpreted as little more than an afterthought by some state parties: only a limited few willingly implemented noteworthy victim-friendly schemes of their own volition.¹⁰¹⁹

The issuance of temporary or permanent residence may once again be ‘considered’ by States, by virtue of Article 7(1), with Article 7(2) requesting that this be done with

¹⁰¹⁷ ‘Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked’ (2007) *International Journal of Refugee Law*, vol 19 (372) para 2.

¹⁰¹⁸ *Ibid*, para 7.

¹⁰¹⁹ Examples include Germany and Italy – the latter is discussed in Part II, below.

‘appropriate consideration (given) to humanitarian and compassionate factors.’ Article 8 addresses repatriation of victims.¹⁰²⁰

The UK implemented no bespoke victim assistance measures to speak of.¹⁰²¹ In order to achieve signatures and ratifications, concessions must at times be made.¹⁰²² Yet overall, in terms of support, assistance and protection for victims of trafficking, the Trafficking Protocol has a lack of bite and therefore may be termed somewhat of a toothless instrument in this particular respect. The tentative language of the Protocol requires and therefore achieves little in the way of victim protection and support.

II. More Favourable Conditions from Abroad: The Example of Italy

The Explanatory Memorandum to the Commission Proposal¹⁰²³ for an EU Council Directive (discussed above)¹⁰²⁴ observes that States have the freedom to enact more favourable conditions for trafficked victims. This, coupled with the tentative language of the Trafficking Protocol, effectively transfers responsibility on to Member States to deal with these victims in the way they deem to be most suitable, and leaves the door

¹⁰²⁰ In summary, Article 8 of the UN Trafficking Protocol and its relevant subsections provides for origin States to ‘facilitate and accept ... the return of that person without undue or unreasonable delay’; that repatriation ‘shall preferably be voluntary’; that origin States ‘verify whether a (trafficked victim) is its national or had the right of permanent residence’; that where proper documentation is lacking, the origin State of whom the victim was a national or resident will issue (on request) the necessary documents for travel etc; that ‘[t]his article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party’; and also ‘without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.’ This must all be done consistently with ‘due regard for the safety of that person’.

¹⁰²¹ Beyond the Poppy Project, which was set up post signature but pre-ratification of the Trafficking Protocol.

¹⁰²² Take, for example, the Convention on the Elimination of All Forms of Discrimination against Women, (adopted in 1979 by the United Nations General Assembly, entered into force 3 September 1981) - one of the most highly ratified yet also most highly reserved Conventions in existence today.

¹⁰²³ Commission Proposal for a Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, Explanatory Memorandum, 2.3, COM (2002).

¹⁰²⁴ See, Part I, section A, above.

open for a range of reactions. At one end of the spectrum the United Kingdom has demonstrated tough policies, with trafficked victims at times being subject to rapid (and at times wholly unprincipled) deportation.¹⁰²⁵ This is in stark contrast to the approach taken in Italy, where significant provisions relating to the provision of residence permits for trafficked victims were adopted in 1998.¹⁰²⁶

Article 18 of Legislative Decree 286/1998 provides for issuance of a special residence permit ‘enabling the foreign citizen to escape from a situation of abuse and conditioning perpetrated by a criminal organisation and to participate in a social assistance and integration programme.’¹⁰²⁷ The legislation goes on to specify how such a situation could be established.¹⁰²⁸

The permit can be issued whether or not the victim chooses to cooperate with law enforcement authorities.¹⁰²⁹ It promotes opportunities for victims to reintegrate into ‘normal’ society, and pursue education or employment. This period of reflection is not a ‘victim inducement scheme’¹⁰³⁰ such as that provided for in the 2004 Council Directive, but ‘a means of extracting the individual from an intolerable situation without imposing legislative cooperation’.¹⁰³¹ Such an approach takes a victim-centred approach to dealing with victims of human trafficking, whereas offering support and protection, albeit limited, solely in return for cooperation with state authorities in the

¹⁰²⁵ See, for example, Alan Travis, ‘Sex trafficking victim wins substantial damages from Home Office’, *Guardian*, (April 2011) <<http://www.guardian.co.uk/uk/2011/apr/11/sex-trafficking-home-office-damages?INTCMP=SRCH>> accessed May 01 2011.

¹⁰²⁶ See Article 18 of Legislative Decree 286/1998.

¹⁰²⁷ STOP Programme, ‘Article 18: Protection of Victims of Trafficking and Fight Against Crime (Italy and the European Scenarios) Research Report’, 41.

¹⁰²⁸ Such a situation could be established through, for example, ‘...the existence of situations of violence or serious exploitation and of concrete danger for the personal safety of the foreigner, because of his/her attempts to escape from the criminal organisation, or because of statements made in the course of criminal proceedings. These prerequisites must be ascertained in the course of police operations, investigation, proceedings undertaken concerning specific offences (Offences indicated in Art 380, Code of Criminal Procedure of Italy, enacted in 1930) or in the context of assistance provided by social services.’

¹⁰²⁹ Article 18 of Legislative Decree 286/1998, sections 7.2 and 7.3.

¹⁰³⁰ R Piotrowicz, n 1002, 263.

¹⁰³¹ Hansard, Baroness Elles, Hansard HL vol 651 Column 549 (10 July 2003).

criminal proceedings merely treats the victim as a pawn who is discarded once their 'usefulness' has come to an end. The unspecified reflection period provided for by the 2004 Council Directive essentially serves as a period in which the women may decide whether or not to assist in the prosecution, as opposed to a period of actual recovery. During this period, the victim's residence in the destination State is merely 'tolerated, until such time as the competent authority can rule on their future status'.¹⁰³² Such an attitude of temporary 'tolerance' appears to view the presence of a victim as a mere expedient, and once they have been deemed useful or otherwise, their presence may be terminated forthwith.

Although the victim may have access to assistance and care during this period, its limited time span – determined by the Member State - means that the benefit will also be limited, especially given the imminent threat of deportation which hangs over the victims who decide not to cooperate. The Italian system really allows for the victim to begin the recovery process and reintegration in to society. Although the 2004 Council Directive allows for access into the labour market, education, and vocational training whilst victims hold a valid temporary residence permit,¹⁰³³ this offer rings rather hollow when it is realised that once the 'usefulness' of the victim has expired, so too will the residence permit and the employment and education opportunities along with it.

This is a saving grace of the Italian system, as permits can be renewed for a further period of a year after an initial grant of six months on the basis that either the victim is assisting in the prosecution proceedings or that she is employed or enrolled in an education programme at the time of expiration of the initial six month permit.¹⁰³⁴ The

¹⁰³² Article 8 of the Proposal for a Council Framework Decision on combating the sexual exploitation of children and child pornography, COM (2000) 854 final/2.

¹⁰³³ Article 11, 2004 Council Directive, n 1009.

¹⁰³⁴ Anti-Slavery International, 'Human Traffic, human rights: redefining victim protection' <<http://www.antislavery.org/homepage/resources/humantraffichumanrights.htm>> accessed 7 August 2009

Joint Committee on Human Rights (JCHR) has praised the Italian legislation by stating that ‘...we were highly impressed by the way in which the proactive victim-centred approach adopted in the country has allowed such high numbers of trafficking victims to be supported and ultimately integrated into Italian society.’¹⁰³⁵

The unspecified period of reflection offered by the 2004 Council Directive, and similarly the 30 day period provided through the UK Poppy Project can be compared with the slightly more accommodating 45 days provided for in Belgium under the 1994 Circular,¹⁰³⁶ and contrasted with the three month reflection period provided for under the B9 regulation¹⁰³⁷ in the Netherlands. Both Belgium and the Netherlands recently ratified the Council of Europe Convention.¹⁰³⁸ The reflection period is essential not only to the wellbeing of the victim but also in enabling the victim to make a properly thought out decision regarding whether or not to cooperate with state authorities in the criminal proceedings. However, the requirements of adequate victim protection go well beyond the provision of a minimum period of recovery and decision making.

Of course, the Italian system requires correct identification of trafficked persons so that Article 18 might be invoked. Therefore, it is essential that those who come into contact with trafficked persons are effectively trained in order that they recognise potential victims. Further, the victim, once identified, must be informed of her right to invoke the Article. It has been documented that in certain parts of Italy – notably

¹⁰³⁵ Joint Committee on Human Rights Twenty-Sixth Report, n 31.

¹⁰³⁶ Circular regarding the issuance of residence documents and work permits to migrant victims of trafficking in human beings (7 July 1994, Belgium).

¹⁰³⁷ Circular for immigrants: regulation B9 (2000) (formerly B17 (1988), The Netherlands).

¹⁰³⁸ List of signatures and ratifications available at <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=197&CM=0&DF=&CL=ENG> accessed 01 June 2011.

Rimini – proactive police have promoted the use of this Article to the benefit of victims on many occasions.¹⁰³⁹

III. The Need for a Victim-Centred Approach

The JCHR observes that with respect to anti-trafficking legislation, '[t]he focus should be shifted from immigration control to the prevention of exploitation of migrants and workers, and care of victims.'¹⁰⁴⁰ The legislative framework within the UK has lacked this focus, and immigration legislation and policy has presented an obstacle to the protection of victims' rights. Notably, the reference by the JCHR to the exploitation of migrants and workers makes no mention of consent. Since the UK was not subject to the Council Directive or (until recently) subject to any obligations arising from the CoE Trafficking Convention, and the requirements of the UN Trafficking Protocol in respect of victim protection were minimal, no comprehensive victim protection framework existed and victims drew their rights from the Refugee Convention and the ECHR. This, coupled with restricted access to public funds and healthcare, highlights the needs for an approach which caters for victims.

The UK Action Plan on Tackling Human Trafficking recognises that:

... the impact of the crime itself is often exasperated [sic] by other factors that can affect non-UK national victims such as: isolation; language

¹⁰³⁹ See M Ventrella, 'Protecting Victims of Trafficking in Human Beings in the UK. The Italian 'Rimini Method' that could influence the British Approach' *Journal of Migration and Refugee Issues*, Vol 3 No2, 64 – 86

¹⁰⁴⁰ Joint Committee on Human Rights Twenty-Sixth Report, n 31, para 118.

barriers; cultural differences; unfamiliar surroundings; and possible irregular immigration status.¹⁰⁴¹

The UK Borders Agency (UKBA) has issued general guidance on handling victims of human trafficking to staff in asylum screen units and regional asylum teams,¹⁰⁴² in which it highlights various issues such as the potential distressed or traumatised state of the victim, and resulting trauma-induced mental or physical illness. For these reasons, amongst others, trafficked victims constitute a particularly vulnerable body of persons and therefore need to be treated accordingly.

In 2002, the Commissioner for Justice and Home Affairs observed that the Commission Proposal for the 2004 Council Directive (considered above) was:

... only one element of a comprehensive strategy which must strike a clear balance between the repressive aspect of fighting crime and respect for human rights and aid for victims.¹⁰⁴³

There has been a distinct lack of comprehensive strategy to aid the victim who cannot or will not cooperate with State authorities in the criminal proceedings against their traffickers, and where the potential for such aid does exist, it appears to have been largely ignored by the UK. The development of (and adherence to) a minimum international standard as to assistance, protection and support for victims is necessary to

¹⁰⁴¹ Home Office and Scottish Executive, n 254, 47.

¹⁰⁴² UK Borders Agency, 'Victims of Trafficking' <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/victimsoftrafficking.pdf?view=Binary>> accessed 15 April 2010.

¹⁰⁴³ Europa Press Releases, Combating illegal immigration and trafficking in human beings: Commission's proposal for a residence permit for victims who cooperate with the authorities reminds the Member States that the phenomenon cannot be tackled at national level alone, (Brussels, 12 February 2002).

ensure that these victims do not continue to suffer once they have become emancipated from their traffickers or current ‘owners’.

Ventrella calls for the provision of permanent residence permits to victims of trafficking as opposed to consideration of the needs of each victim on a case-by-case basis.¹⁰⁴⁴ It cannot ultimately be said that destination States have an absolute duty to provide for rehabilitation or residence as regards victims of trafficking but they have some duties towards these people which cannot be satisfied if they are peremptorily removed under ordinary immigration law. What is needed is a human-rights based, victim-centred approach which has procedures adequate enough to determine who is a victim and to identify what their rights are, so that they might be effectively accessed. Such a regime undoubtedly requires positive action by destination State authorities to seek out potential victims and to assist them in gaining access to the facilities which the State provides.

Recently, international recognition of the rights of victims of crime and human rights abuses is increasingly evident,¹⁰⁴⁵ and a UK response is evident through various Government measures such as the introduction of a Statutory Code of Practice for Victims of Crime¹⁰⁴⁶ and signature and ratification of the CoE Trafficking Convention. At first blush, the CoE Trafficking Convention contains much stronger provisions with respect to victim protection than the UN Trafficking Protocol. The obligations placed upon state parties by the provisions of the CoE Convention appear to be much more onerous, and of considerable benefit to the victim. The success or otherwise of

¹⁰⁴⁴ M Ventrella, n 1039, 64.

¹⁰⁴⁵ See M Cherif Bassiouni, ‘International Recognition of Victim’s Rights’ (2006) *Human Rights Law Review* 6, 203 – 279.

¹⁰⁴⁶ Home Office ‘Statutory Code of Practice for Victims of Crime’ <<http://www.homeoffice.gov.uk/documents/victims-code-of-practice>> accessed 12 May 2011.

implementation in the UK of this Convention with respect to improved victim support will be evaluated later.¹⁰⁴⁷

Human trafficking carries with it opportunities for human rights abuse. Although comprehensive victim-centred, human-rights led anti-trafficking legislation has not previously existed in any specific form in the UK, an applicable human rights framework has existed - albeit divorced from a specific trafficking nexus.¹⁰⁴⁸ The UK has, at present, obligations under the ECHR, and the Refugee Convention, which are analysed in further depth below.¹⁰⁴⁹

At present, those who do not qualify for refugee status can be considered for Humanitarian Protection¹⁰⁵⁰ or Discretionary Leave¹⁰⁵¹ if they need to remain in the UK because of the reasons outlined above. A trail of cases¹⁰⁵² indicates the application of ECHR rights to the plight of asylum seekers, which can similarly be invoked in situations of human trafficking. These issues will be discussed at a later point in this Chapter.¹⁰⁵³

¹⁰⁴⁷ Discussed from Part IV *et seq.*, below.

¹⁰⁴⁸ See, S Egan 'Protecting the victims of trafficking: problems and prospects' (2008) *European Human Rights Law Review*, 106 – 119.

¹⁰⁴⁹ See, Part VIII, sections A – C for analysis of the Refugee Convention and Article 3 ECHR in terms of their applicability to trafficked victims.

¹⁰⁵⁰ UK Borders Agency 'Humanitarian Protection'

<<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/humanitarianprotection.pdf?view=Binary>> accessed 21 Feb 2010.

¹⁰⁵¹ UK Borders Agency 'Discretionary Leave'

<<http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/discretionaryleave.pdf?view=Binary>> accessed 21 Feb 2010.

¹⁰⁵² See, for example, *Soering v United Kingdom* [1989] 11 EHRR 439, See R Lillich 'The Soering Case' (1991) 85 *American Journal of International Law*, 128, and Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, DJ Harris, M O'Boyle, E P Bates, C M Buckley (eds) (Oxford 2009) 79 – 90 for discussion on this point.

¹⁰⁵³ See, Part VIII, below.

IV. Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings

The UK signed the Council of Europe Convention on Action against Trafficking in Human Beings¹⁰⁵⁴ on 23 March 2007, thereby meeting the first point of action proposed in the UK Action Plan on Tackling Human Trafficking.¹⁰⁵⁵ Ratification took place on December 18, 2008, and the Convention entered into force on 1st April 2009. Implementation is monitored by a Group of experts on action against trafficking in human beings (GRETA),¹⁰⁵⁶ and the Committee of the Parties,¹⁰⁵⁷ Effective implementation is essential in order for the requirements of the Trafficking Convention to have any force in national courts.¹⁰⁵⁸

UK Government spokespersons responded positively as regards this milestone event.¹⁰⁵⁹ Ratification of the Convention constitutes part of a UK agenda geared toward victim protection and punishment of their exploiters,¹⁰⁶⁰ and the decision to sign and ratify came after measuring the risks against the wider benefits to be gained. The main concern was in respect of border integrity and immigration control as trafficking policy and ratification of the Convention inevitably impacts upon government targets, such as

¹⁰⁵⁴ CoE Trafficking Convention, n 9.

¹⁰⁵⁵ Home Office and Scottish Executive, n 254, 76.

¹⁰⁵⁶ Established by Article 36 of the CoE Trafficking Convention.

¹⁰⁵⁷ Established by Article 37 of the CoE Trafficking Convention.

¹⁰⁵⁸ A Harvey 'Human Trafficking – the road to ratification of the Council of Europe Convention Against Trafficking in Human Beings in the UK' (2008) *Journal of Immigration Asylum and Nationality Law*, 218 – 235, 219.

¹⁰⁵⁹ Jacqui Smith, then Home Secretary, stated with respect to this important event: 'We have reached a major milestone today in the fight against trafficking by implementing measures that help us build on our existing efforts to turn the tables on traffickers and provide victims with protection, support and a voice in the criminal justice system. It is vital that European member states work together to stop this awful crime and I am determined that the UK will continue to play its part by supporting victims and bringing the perpetrators to justice.' See UK Borders Agency, 'New measures to boost United Kingdom fight against human trafficking' (1 April 2009)

<<http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/boosttougainsthumantrafficking>>

accessed 3 July 2009, link no longer live.

¹⁰⁶⁰ Home Office and Scottish Executive, n 254, 76.

the aim to ‘ensure fair, controlled migration that protects the public and contributes to economic growth.’¹⁰⁶¹

The UK government showed initial reluctance to sign and ratify the Trafficking Convention, notably because although the aims of the Convention were broadly supported, there were concerns that ‘some of the provisions, such as the automatic granting of reflection periods and residence permits for trafficking victims, might act as ‘pull’ factors to the UK.’¹⁰⁶² The JCHR rejected this argument in its Twenty-Sixth Report, stating that such concerns may be largely or entirely ‘unfounded’.¹⁰⁶³

A. The CoE Trafficking Convention: a Victim-Centred Approach

It is stated in the UK Action Plan on Tackling Human Trafficking that support for victims ‘should go beyond providing safe and secure accommodation to include help in their recovery, and prevent re-trafficking or re-victimisation’.¹⁰⁶⁴ The Council of Europe Convention requires the implementation of minimum standards in respect of victim protection and support, involvement of victims in the criminal justice system, increased prosecution of traffickers, and increased prevention of trafficking activity.¹⁰⁶⁵ This indicates a move toward a holistic approach to combating human trafficking, as

¹⁰⁶¹ Home Office ‘Impact Assessment of Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings’ (6 October 2008) 3 <<http://www.ialibrary.berr.gov.uk/ImpactAssessment/?IAID=da0f3cecd6214381bef9e9514cb46afd>> accessed 23 Jan 2009, link no longer live.

¹⁰⁶² Home Office/Scottish Executive ‘Tackling Human Trafficking – Consultation on Proposals for a UK Action Plan’ (2006) 6 <<http://www.homeoffice.gov.uk/documents/cons-2006-tack-human-trafficking/cons-2006-tackling-trafficking?view=Binary>> accessed 12 Sept 2007.

¹⁰⁶³ The JCHR Stated that ‘The bulk of the evidence submitted by NGOs in this inquiry suggests ... that such concerns are largely, if not entirely, unfounded. Nor did we find any evidence of a pull factor resulting in fraudulent claims to have been trafficked arising from Italy’s Article 18 procedure. Safeguards exist within the Convention itself, so that reflection periods do not have to be provided if fraudulent claims are made. We therefore do not accept that there is any realistic likelihood that the Convention’s provisions relating to reflection periods and residence permits would act as a pull factor for migration into the UK.’ See Joint Committee on Human Rights Twenty-Sixth Report, n 31, para 200.

¹⁰⁶⁴ Home Office and Scottish Executive, n 254, 47.

¹⁰⁶⁵ Home Office, n 1061, 1.

protecting and providing for victims as well as creating a hostile environment for traffickers complements the aim for reducing the harm caused by illegal immigration.

There is a difference, however, between an obligation to provide a systematic response and the obligation to protect individual rights. Systems, however efficient, may not prevent some exploitation. Where an individual complains that the system has not protected her, ideally, there would be an accessible and effective remedy to test whether she were right nor not. The Human Rights Act 1998 and the ECHR might do this, so long as potential deportees were given access to informed lawyers and there were a process by which adverse decisions could be challenged.

As regards assistance to and protection of victims of trafficking, implementation of the Convention required policy changes in various areas, which will now be considered.

i. Recovery and Reflection Period

Where there are 'reasonable grounds' to believe that an individual is a victim of trafficking, the CoE Trafficking Convention calls for the provision of a recovery and reflection period of at least 30 days.¹⁰⁶⁶ Initial response in the UK was to provide a recovery and reflection period of 45 days, which could be extended in certain circumstances.¹⁰⁶⁷ Amnesty International, amongst others, call for a more substantial period of 90 days,¹⁰⁶⁸ particularly due to the alarming figures which relate to the various types of trauma suffered by trafficked persons.¹⁰⁶⁹

¹⁰⁶⁶ CoE Trafficking Convention, Article 13

¹⁰⁶⁷ Home Office, n 1061, 5. It is not specified what these 'certain circumstances' may be.

¹⁰⁶⁸ Amnesty International, 'UK: Startling new report on trafficked women's health published, urgent call for protection of trafficked women' (June 2006)

<http://www.amnesty.org.uk/news_details.asp?NewsID=17013> accessed 12 Aug 2007

¹⁰⁶⁹ Ibid.

It is envisaged that the decision as to whether ‘reasonable grounds’ exist in respect of each individual will be made in an average of 5 days following initial contact between a potential victim and a ‘first responder’.¹⁰⁷⁰ The latter is envisaged as being the police, the UK Borders Agency, or another party entirely.¹⁰⁷¹ Therefore, a process is established for correct identification of an individual as a potential victim of trafficking, an essential pre-requisite to being granted a recovery and reflection period. While this decision is being made, temporary accommodation will be provided to those possible victims who are destitute. Evidently, correct identification has implications for the possible victim. This will be discussed further below.¹⁰⁷²

ii. Temporary Residence Permits and Other Victim Assistance and Support Measures

On the face of it, the policy changes in the UK following implementation of the requirements of the Convention demonstrate a notable improvement when compared to the pre-Convention position, particularly in respect of the accommodating terms relating to the provision of residence periods. When the abovementioned reflection period has passed and it has been concluded that an individual is a victim of human trafficking, a residence permit should be granted where a victim is cooperating in criminal proceedings or an investigation, and/or, notably, where provision of a residence permit is deemed necessary owing to the victim’s ‘personal situation’.¹⁰⁷³

The meanings of these terms are expanded upon in the Explanatory Report to the Convention, where it is stated that ‘[t]he personal situation requirement takes in a range

¹⁰⁷⁰ Home Office, n 1061, 5.

¹⁰⁷¹ Home Office ‘Council of Europe Convention on Human Trafficking’ <<http://www.crimereduction.homeoffice.gov.uk/humantrafficking005overview.pdf>> accessed 12 Feb 2010.

¹⁰⁷² See, Part VI and sections therein, below, which discusses the requisite system for victim identification and its implementation in the UK, as well as its shortcomings.

¹⁰⁷³ Article 14.

of situations, depending on whether it is the victim's safety, state of health, family situation or some other factor which has to be taken into account.'¹⁰⁷⁴ The Home Office/Border and Immigration Agency judge that, in respect of the second category relating to the 'personal situation' of the victim, 'a combination of our existing obligations on asylum and human rights and our Discretionary Leave policy already cover situations where an individual's personal circumstances ... make it necessary for them to remain in the UK.'¹⁰⁷⁵ They further state that 'we intend to extend discretionary leave to explicitly cover the first category as well.'¹⁰⁷⁶

Following full implementation of Convention in the UK, where an individual qualifies for a residence permit, it will be granted for a minimum of one year.¹⁰⁷⁷ This exceeds the provisions of the UN Trafficking Protocol. Although victim involvement in investigation and criminal proceedings is an integral part of the fight against human trafficking,¹⁰⁷⁸ securing prosecution against the trafficker must not be the only focus of anti-trafficking legislation and policy. Participation in criminal proceedings or investigation may also be dependent upon the mental or physical well being of the victim, which provides yet another reason for securing adequate treatment and support of victims.

For some, however, the scope of the Council of Europe Convention is not sufficient. The Convention for the Elimination of all Forms of Discrimination against Women (CEDAW) Committee Report 'invites the State party to give consideration to granting victims of trafficking indefinite leave to remain.'¹⁰⁷⁹ Ventrella calls for the

¹⁰⁷⁴ Explanatory Report to the CoE Trafficking Convention, n 248, 184.

¹⁰⁷⁵ Home Office, n 1061, 6.

¹⁰⁷⁶ Ibid.

¹⁰⁷⁷ Ibid.

¹⁰⁷⁸ By late 2008, only one recorded prosecution had been secured in the UK without the involvement of the victim, see Home Office, n 1061, 8.

¹⁰⁷⁹ OHCHR 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland', (Committee on the Elimination of

imposition of permanent residence permits for trafficking victims.¹⁰⁸⁰ The practical implications of this mean that it is really not a viable option; the Council of Europe Convention attempts to offer a more practical and realistic approach i.e. residence permits where needed, and repatriation where a more lengthy or permanent measure is not needed. The UN Trafficking Protocol refers to the repatriation of victims ‘...without undue or unreasonable delay’,¹⁰⁸¹ but that return should preferably be voluntary.¹⁰⁸² CoE Trafficking Convention also states that repatriation shall preferably be voluntary, and be done ‘with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim’.¹⁰⁸³ Not all trafficking victims necessarily wish to remain in the destination country.¹⁰⁸⁴ The CoE Trafficking Convention position is that involuntary removal or repatriation is a last resort, and will only take place where it is safe to do so.¹⁰⁸⁵

Under the CoE Trafficking Convention, States are required to protect the identity and private life of victims.¹⁰⁸⁶ Furthermore, States are required to ‘such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery’,¹⁰⁸⁷ which include giving assistance in terms of providing accommodation and medical treatment, and access to counselling and interpreters etc. Obligations are also imposed as regards providing access to legal assistance and free legal aid, as well as to compensation from the perpetrators.¹⁰⁸⁸

Discrimination Against Women, Forty-first session, 30 June – 18 July 2008) at 36, <<http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.GBR.CO.6.pdf>> accessed 01 July 2009.

¹⁰⁸⁰ M Ventrella, n 1039, 69 -70.

¹⁰⁸¹ Article 8(1).

¹⁰⁸² Article 8(2).

¹⁰⁸³ Article 16(2).

¹⁰⁸⁴ Home Office and Scottish Executive, n 254, 59.

¹⁰⁸⁵ Ibid.

¹⁰⁸⁶ Article 11.

¹⁰⁸⁷ Article 12.

¹⁰⁸⁸ Article 15.

V. Recent European Union activity – The Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims

Very recent EU action has culminated in the Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims (EU 2011 Directive).¹⁰⁸⁹ The UK Government initially proposed not to opt in to this directive.¹⁰⁹⁰ The possibility that the Government might review its position was, however, not ruled out.¹⁰⁹¹ As well as the claim that the UK was already compliant, it was stated that opting in would have the effect of making provisions mandatory which are currently discretionary.¹⁰⁹² The Government were therefore keen to avoid being bound by provisions which would apparently be ‘against our interests.’¹⁰⁹³ This continues the pattern of the Government showing a certain reluctance to concede to provisions which are increasingly accommodating the interests of victims of human trafficking.¹⁰⁹⁴

The response from CARE¹⁰⁹⁵ was highly critical of this position, on the basis that the UK ‘was not compliant in a number of key areas and that without the Directive (or some other identical provision) British provisions for the victims of trafficking would

¹⁰⁸⁹ EU 2011 Directive, n 10.

¹⁰⁹⁰ The Prime Minister on 15 September 2010 justified the choice not to opt in on the basis that that the Directive would add nothing of value to British anti-trafficking law, stating that ‘[w]e have put everything that is in the Directive in place.’ See Hansard HC, column 873 (15 September 2010).

¹⁰⁹¹ Home Office, ‘Home Office Defends Position on Human Trafficking’ 31 August 2010 <<http://www.homeoffice.gov.uk/media-centre/news/trafficking-directive>> accessed 01 Dec 2011.

¹⁰⁹² It was stated that ‘[o]pting in now would also require us to make mandatory the provisions which are currently discretionary in UK law. These steps would reduce the scope for professional discretion and flexibility and might divert already limited resources.’ See Home Office, *Ibid.*

¹⁰⁹³ Home Office, n 1091.

¹⁰⁹⁴ See, Chapter 4, Part I for discussion of the UK’s past poor performance as regards catering for the needs of trafficked victims.

¹⁰⁹⁵ A registered UK Charity – see, CARE, n 219.

become weaker than those of other Member States.’¹⁰⁹⁶ Various areas other were also singled out for criticism.¹⁰⁹⁷

In March 2011, the Government announced that it had reviewed its position and that it had the broad intention to apply to opt in to the Directive now that there was a finalised text, stating that ‘The new text still does not contain any measures that would significantly change the way the UK fights trafficking.’¹⁰⁹⁸

A. ‘Vulnerability’ and Aggravating Factors

The Preamble to the Directive States that ‘When the offence is committed in certain circumstances, for example against a particularly vulnerable victim, the penalty should be more severe.’¹⁰⁹⁹ The Directive goes on to state that certain factors relating to vulnerability in this context include, for example, gender,¹¹⁰⁰ thereby building or expanding upon previous instruments,¹¹⁰¹ and the Preamble refers directly to situations where the offence is ‘particularly grave’ being ‘reflected in a more severe penalty.’¹¹⁰²

¹⁰⁹⁶ Ibid.

¹⁰⁹⁷ Such as the point that through not opting in, the extended scope of the trafficking definition provided within the Directive would not apply in the UK. Furthermore, as regards the establishment under Article 19 of a ‘National Rapporteur or equivalent mechanism’, CARE were critical of the ‘equivalent mechanism’ in the UK, which is the Inter-Departmental Ministerial Group on Trafficking, on the basis that ‘This group ... is, by definition, part of the Government and so cannot constitute the conventional meaning of a rapporteur which is supposed to be independent.’ Criticism was also levelled at the lack of UK power to prosecute where the activity takes place beyond UK borders, and at the potential for victim protection and assistance measures to be weaker than in other Member States as a result of opting out. See CARE, n 219.

¹⁰⁹⁸ Home Office, (Minister of State of Immigration, Damian Green) ‘EU Directive on Human Trafficking – Written Ministerial Statement’ (22 March 2011)

<<http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/eu-direct-human-trafficking-wms/>> accessed 12 April 2011.

¹⁰⁹⁹ EU 2011 Directive, n 10, preamble, para 12.

¹¹⁰⁰ EU 2011 Directive, n 10, preamble, para 12.

¹¹⁰¹ The UN Trafficking Protocol notably refers to ‘Women and Children’ in its title.

¹¹⁰² The preamble states that ‘[w]hen the offence is particularly grave, for example when the life of the victim has been endangered or the offence has involved serious violence such as torture, forced drug/medication usage, rape or other serious forms of psychological, physical or sexual violence, or has otherwise caused particularly serious harm to the victim, this should also be reflected in a more severe penalty.’ EU 2011 Directive, n 10, preamble, para 12.

The CoE Trafficking Convention has a similar provision,¹¹⁰³ yet does not use the terminology of ‘vulnerability’.

Thus it appears that a form of ‘aggravated’ trafficking is envisaged, therefore drawing delineations between the severity of experiences of different trafficking victims. As will be argued later, such an approach, taken by the 2011 Directive, which focuses upon vulnerability and spectrum of severity of treatment and exploitation of victims, may leave open the possibility that situations of exploitation which fall much further down the spectrum – perhaps falling short of even the formal trafficking threshold - may still need to be scrutinised, and at least some of the ‘victims’ thereof need some form of ‘favourable’ treatment beyond that of the purely, non-exploited, smuggled prostitute.

B. The ‘Gender’ Perspective

The Directive has some interesting additions to the current anti-trafficking framework. Article 1 refers directly to ‘taking into account the gender perspective.’ The preamble expands upon this in stating that:

This Directive recognises the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes. For this reason, assistance and support measures should also be gender specific where appropriate. The ‘push’ and ‘pull’ factors may be different depending

¹¹⁰³ Article 18 states that ‘Each Party shall ensure that the following circumstances are regarded as aggravating circumstances in the determination of the penalty for offences established in accordance with Article 18 of this Convention: a) the offence deliberately or by gross negligence endangered the life of the victim; b) the offence was committed against a child; c) the offence was committed by a public official in the performance of her/his duties; d) the offence was committed within the framework of a criminal organisation.’

on the sectors concerned, such as trafficking in human beings into the sex industry or for labour exploitation in, for example, construction work, the agricultural sector or domestic servitude.¹¹⁰⁴

Specific reference in this Directive to gender and the potential for gender-specific assistance and support measures, coupled with the fact that ‘women and children’ are explicitly mentioned in the very title of the Trafficking Protocol further raises the issue of the potential for recognition of the particular vulnerability of certain parties.¹¹⁰⁵ Not only does such an approach bring the particular vulnerabilities of women to the forefront of sex trafficking debate, but it may also have ramifications for the ‘consensually trafficked’ woman too, who may have specific needs.¹¹⁰⁶

C. Victim Assistance, Support and Protection

As regards victim assistance and protection, mechanisms for early identification¹¹⁰⁷ of and assistance to victims are required by Article 11 which envisages safe accommodation and medical treatment, and access to counselling, information and interpretation services where needed. Provisions relating to non-prosecution of victims ‘for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to (trafficking)’¹¹⁰⁸ are also included, and are a welcome development, as cases such as *R v O*¹¹⁰⁹ have shown us.

¹¹⁰⁴ EU 2011 Directive, n10, preamble, para 3.

¹¹⁰⁵ This thesis does not aim to specifically address child trafficking, therefore an in depth consideration of this issue would go beyond the ambit of the thesis.

¹¹⁰⁶ See, Part IX, section B, below.

¹¹⁰⁷ See, Part VI, below, regarding the identification of victims.

¹¹⁰⁸ 2011 Directive, Article 8.

¹¹⁰⁹ [2008] EWCA Crim 2835. The case is discussed below in Part VI, and the specific issue of prosecutorial discretion as regards criminal offences committed by trafficked victims, as a result of having been trafficked, is discussed with reference to this case in Part VII, below.

i. Recovery and Reflection Period

There is no new, bespoke recovery and reflection period for trafficked persons contained within the 2011 Directive – the period remains that set down in Council Directive in 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities,¹¹¹⁰ the exact length of which was to be left to individual Governments to determine.

ii. Temporary Residence Permits

As to residence permits, the 2011 Directive does not impose similarly onerous obligations on States as the CoE Trafficking Convention, and asks for little beyond the beyond the recovery and reflection period.¹¹¹¹ Article 11(2) states that:

Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to (trafficking offences).¹¹¹²

¹¹¹⁰ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261/19.

¹¹¹¹ In para 18 of the Preamble to the EU 2011 Directive, it is stated that ‘In cases where the victim does not reside lawfully in the Member State concerned, assistance and support should be provided unconditionally at least during the reflection period. If, after completion of the identification process or expiry of the reflection period, the victim is not considered eligible for a residence permit or does not otherwise have lawful residence in that Member State, or if the victim has left the territory of that Member State, the Member State concerned is not obliged to continue providing assistance and support to that person on the basis of this Directive.’

¹¹¹² Article 11(2), EU 2011 Directive, n 10.

The Directive does also state that '[w]here necessary, assistance and support should continue for an appropriate period after the criminal proceedings have ended'.¹¹¹³ It is surprising that the measures relating to temporary residence permits appear to be less accommodating than those provided for within the CoE Trafficking Convention, given the statement that victim assistance and support is one of the primary objectives of the Directive, coupled with the specific mention of the 'gender perspective'.

The current residence permit obligations go no further than those provided within the 2004 Council Directive discussed above.¹¹¹⁴ Nonetheless, Article 11(3) of the 2011 Directive does state that:

Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial, without prejudice to Directive 2004/81/EC or similar national rules.

Thereby paving the way for measures which are somewhat more accommodating, and which will have in any case been adopted by those who ratified the CoE Trafficking Convention and are therefore bound by its more sympathetic victim assistance and support provisions.

As previously mentioned, effective protection is dependent upon correct and timely identification of victims. This issue will now be considered.

¹¹¹³ Para 18 of the Preamble to the EU 2011 Directive goes on to provide examples: 'for example if medical treatment is ongoing due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to the victim's statements in those criminal proceedings.'

¹¹¹⁴ See, Part I, section A, above.

VI. Victim Identification

All people who enter the UK illegally are entitled to a fair trial before conviction for any immigration offence. Those entitled to this protection will be identified by the decision to prosecute them. Trafficked victims might have special characteristics which require special treatment in the fair trial context, and prosecutors and defence lawyers should be aware of these possibilities. It is, therefore, imperative that those putatively entitled to these protections be accurately and rapidly identified and provided with competent legal advice where necessary. It cannot be assumed that those officials charged with policing the immigration regime have the interests of these kinds of people at the head of their priorities. Matters of border security and economic protection are also significant concerns.

In these circumstances, the provision of effective processes to bring to the attention of people their rights and to decide on contested claims of eligibility are of crucial importance. Correct identification of trafficking victims is paramount to securing their effective protection, and effective protection of their rights. Ill-effects flowing from misidentification include lack of protection and opportunity to recover, as well as detention, expulsion,¹¹¹⁵ or criminalisation as a result of being in breach of immigration law, as demonstrated by cases such as *R v O*, decided pre-ratification of the CoE Trafficking Convention,¹¹¹⁶ considered below.

¹¹¹⁵ See A Pacurar ‘Smuggling, Detention and Expulsion of Irregular Migrants: A Study on International Legal Norms, Standards and Practices’ (2003) *European Journal of Migration and Law* 5, 259 – 283.

¹¹¹⁶ *R v O* [2008] EWCA Crim 2835.

A. (Mis)Identification of Victims of Human Trafficking: the Case of R v O

That national law might not have been as effective as subsequently required by the UK's international obligations, has been demonstrated by the recent decision in *R v O*,¹¹¹⁷ which was decided prior to ratification of the CoE Trafficking Convention by the UK.

The appellant was apprehended on her way out of the UK and was found to be carrying false identity documents. Between speaking to passport control officers and subsequently her legal representatives, it soon became clear that there were questions to be ascertained as to her age.¹¹¹⁸ She stated that she had come to England with her boyfriend in order to escape her father, who would have killed her if she had not proceeded with an arranged marriage in Nigeria. She also stated that once in England, she was 'given to be a prostitute' and consequently ran away.

Several days prior to her trial date, the appellant's legal representatives received information from the Poppy Project to the effect that O was potentially a victim of human trafficking for the purpose of prostitution, yet failed to act upon this information. O was initially convicted at the Crown Court on 17 March 2008, resulting

¹¹¹⁷ *R v O* [2008] EWCA Crim 2835. Also see, J Elliott '(Mis)Identification of Victims of Human Trafficking: The Case of *R v O*', *Int J Refugee Law* (2009) 21 (4): 727-741 for full consideration of this case.

¹¹¹⁸ At interview the day following her apprehension at French passport control in the UK, she admitted that the identity card in which she was in possession of was not her own, and she proceeded to give her actual name and asserted that her nationality was Nigerian. She had initially stated that she was 31, but later had given her year of birth as 1985. Notably, she was described by two officers as 'very young', and in one instance, 'possibly juvenile'. Several days prior to her trial date of 17 March 2008 at the Crown Court, she informed her legal representatives that she was 17. From various meetings between the appellant and her legal representatives which took place prior to the trial, the latter obtained information to the effect that her actual date of birth was 10 December 1991, which would have made her only 16 rather than 17 as she had claimed. The Crown Court was not informed of this.

in imposition¹¹¹⁹ of a sentence of eight months imprisonment, less 16 days spent on remand. Leave to appeal was granted by Cox J on 26 June 2008.

The grounds of appeal related to O's age;¹¹²⁰ the potential for her to rely on the defence of duress;¹¹²¹ and the lack of appreciation by the appellant's lawyers of her position as a victim of trafficking.¹¹²² Consideration of this issue by her legal representatives was largely non-existent,¹¹²³ as was any awareness by legal representatives on both sides, of two CPS Protocols which provided guidelines on 'Prosecution of Defendants Charged With Offences Who Might Be Trafficked Victims' and 'Prosecution of Young Defendants Charged With Offences Who Might Be Trafficked Victims'.¹¹²⁴ The appeal was allowed.¹¹²⁵

Since the UK had not at that time ratified the CoE Trafficking Convention, it was not bound by its provisions and could not have been held legally accountable for

¹¹¹⁹ By Judge Adele Williams.

¹¹²⁰ Article 10(3) provides that the victim will be presumed to be a child if his/her age is uncertain and there are reasons to believe that he or she is a child. Further to this, since the age of the defendant was in doubt, then if she were indeed 16 she should have been tried in the Youth Court rather than the Crown Court. It is also clear that her legal representatives had ample opportunities and reasons to question the age of the defendant. The UK also has obligations under the Convention on the rights of the Child 1989 (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990, in accordance with article 49), State Parties are committed to protecting children from sexual exploitation, etc – see Article 34

¹¹²¹ As regards any criminal charge for her potential complicity in breaching immigration laws.

¹¹²² Several days prior to her trial date, the appellant's legal representatives received information from the Poppy Project to the effect that O was potentially a victim of human trafficking for the purpose of prostitution. The appellant's legal representatives did not act upon this information.

¹¹²³ The seventh and final ground of appeal was actually an application to admit fresh evidence in the following categories: a report by the Poppy project prepared after the trial date of 17 March; the file of the trial solicitors; correspondence between the appellant's present solicitors and her trial lawyer. The second category was admitted under section 23 of the Criminal Appeal Act 1968. As regards the first category, The Poppy Project report is dated 23rd June 2008. It provides that after the trial date of 17 March, the appellant was assessed by a senior outreach worker and was deemed to be a victim of trafficking. A detailed history included showed that she was held in debt bondage, raped, and forced to work as a prostitute until she escaped a month later. This report was admitted as fresh evidence to the appeal.

¹¹²⁴ Crown Prosecution Service, 'Prosecution of Defendants Charged With Offences Who Might Be Trafficked Victims' and 'Prosecution of Young Defendants Charged With Offences Who Might Be Trafficked Victims' <[http://www.cps.gov.uk/legal/h to k/human trafficking and smuggling/](http://www.cps.gov.uk/legal/h%20to%20k/human%20trafficking%20and%20smuggling/)> accessed 25 February 2009.

¹¹²⁵ The complete lack of consideration given to the possibilities of the appellant being a victim of trafficking or being a child/young person, coupled with the lack of awareness on the part of the Prosecutors of the above-mentioned protocols meant that the appeal had to be allowed.

any failure to act according to the standards of the CoE Convention,¹¹²⁶ yet the facts of the case do show that the then existing provision of protection for such people as the applicant in *O* was deficient. It was recognised in *O* that the UK has taken measures expressly in support of the purpose of the Trafficking Convention,¹¹²⁷ yet these were clearly insufficient to protect *O* at first instance. Instead, Laws LJ found a way to get the most desirable outcome through drawing upon the sources which were available to be used at that point in time: the two CPS Protocols, the common law,¹¹²⁸ and Article 6 of the ECHR.¹¹²⁹ He recognised that both the common law and Article 6 of the ECHR required standards of procedural protection that were much higher than those that had been accorded to the defendant in the present case. *O* had not had a fair trial.

The issue of adequate legal assistance, something clearly lacking in this case, has been raised by the JCHR in their Twenty-Sixth Report.¹¹³⁰ Article 6(3)(c) of the ECHR includes the right to legal assistance, and legal assistance and legal aid is provided for in Article 15 of the CoE Trafficking Convention.¹¹³¹

¹¹²⁶ Beyond Article 18 of the Vienna Convention which States that signatory States must ‘refrain from acts which would defeat the object and purpose of [the] treaty.’ Such an obligation – pre-ratification – cannot possibly exist, because, as Aust observes, ‘the act of ratification would then have little or no purpose, the obligation to perform the treaty being then not dependent on ratification and entry into force.’ See Aust, n 584. 117.

¹¹²⁷ Notably through the criminalisation of trafficking by sections 57 and 58 of the Sexual Offences Act 2003, and by introducing the two abovementioned CPS Protocols, yet as the facts indicate, these were of little help to *O* at first instance. It may be noted at this point that some of these measures taken ‘expressly in support’ of the Trafficking Convention were taken 4 years prior to signing of the Convention by the UK.

¹¹²⁸ *R v O* [2008] EWCA Crim 2835, para 26.

¹¹²⁹ *R v O* [2008] EWCA Crim 2835, para 26.

¹¹³⁰ It is stated in the Report that ‘There was ... some concern expressed regarding the quality of the initial legal assistance that was being provided to victims of trafficking, the following being a situation described as typical by one witness: ‘They were given access to legal representation but the information that we got from the POPPY Project who interviewed those women was that the duty solicitor was not really in a position to give them much advice or guidance. There was not any assessment of whether an appropriate adult might be needed for women who were clearly quite vulnerable and intimidated...’ Joint Committee on Human Rights Twenty-Sixth Report, n 31, para. 159.

¹¹³¹ As Drew recognises, ‘Article 15 of the (CoE Trafficking) convention requires the state to provide access to compensation and legal redress, including the right to legal assistance and to free legal aid for victims. This means competent legal assistance. The judiciary is starting to increase its awareness of the issue through training and familiarity with the indicators, as shown by judgements such as *R v O*.’ See S Drew, S Drew, ‘Comment: You’re missing the points’ (2008) Law Society Gazette, Issue 46, December Articles, 4 December 2008.

Clearly, a formalised procedure which is tailored to the identification or and catering for the needs of trafficking victims, such as the CoE Trafficking Convention requires, is much more suitable than relying on a patchwork of existing measures which were not created with victims of trafficking in mind. Although the UK could not be held to account for deficiencies as regards the CoE Convention which it had yet to ratify, *O* still provides a shocking insight into the lack of training, acknowledgement, and formal procedure for victim identification pre-ratification.

B. Identification of Victims of Trafficking – Barriers to Identification, and the Need for Effective Procedures

It is stated in the UK Action Plan on Tackling Human Trafficking that support for victims ‘should go beyond providing safe and secure accommodation to include help in their recovery, and prevent re-trafficking or re-victimisation’.¹¹³² The CoE Trafficking Convention requires the implementation of minimum standards in respect of victim protection and support, involvement of victims in the criminal justice system, increased prosecution of traffickers, and increased prevention of trafficking activity.¹¹³³ Although the UK was apparently largely compliant with the Convention at the point of signature,¹¹³⁴ implementation required some legislative changes,¹¹³⁵ and policy changes in various areas, notably the development of a formal process for referring and

¹¹³² Home Office and Scottish Executive, n 254, 47.

¹¹³³ Home Office, n 1061, 1.

¹¹³⁴ *Ibid*, 3.

¹¹³⁵ Implementation required legislative amendments to the Criminal Justice and Immigration Act 2008 to ensure that automatic deportation of victims of trafficking under the UK Borders Act 2007 cannot take place where this would breach obligations under the Trafficking Convention; and to the Asylum & Immigration (Treatment of Claimants, etc.) Act 2004 to correct a cross-reference to human tissue legislation has been made through the Human Tissue (Scotland) Act 2006 (Consequential Amendment) Order 2008 (S.S.I. 2008/259). Also, Secondary legislation by way of the National Health Service (Charges to Overseas Visitors) Regulations 2008 which amend regulation 4(1) of the National Health Service (Charges to Overseas Visitors) Regulations 1989 (S.I. 1989/306) and ensure the UK meets obligations in relation to medical treatment under the Convention.

identifying victims of trafficking.¹¹³⁶ There is, however, a lack of clear implementing legislation following ratification of the CoE Trafficking Convention. This could be taken as an indication of the UK's continuing reluctance to concede too much for even those formally identified as trafficked, let alone those borderline cases where there is lack of ostensible coercion, etc, according to UK Border Agency (UKBA) 'indicators'.¹¹³⁷

Evidently, trafficking is the kind of crime which places some responsibility on third parties with respect to victim identification. These parties range from police, border authorities and organisations such as the Poppy Project to sexual health services, prostitute users and beyond. Clearly, various barriers exist with respect to victim identification. Some of these arise from the predicament of the victim;¹¹³⁸ others arise from the responsibilities of the relevant persons charged with identification of victims. Drew observes that '[w]aiting for a client to self-identify will not suffice. Many clients will be unwilling or unable to raise the issue first, because of fear, ignorance or linguistic barriers.'¹¹³⁹

Primarily, the circumstances in which human trafficking occurs mean that, despite an increasingly victim-centred approach, there is a low level of self-reporting on the part of victims.¹¹⁴⁰ Victims may be less likely to identify themselves to male

¹¹³⁶ Home Office, n 1061, 1.

¹¹³⁷ See Part VI, section C, below, for an outline of these 'indicators'.

¹¹³⁸ The Anti Trafficking Monitoring Group state that 'Myths about trafficking still exist and often impede identification. For example, to understand the real nature of forced labour, we need to understand the link between coercive exploitation and the abusive treatment that workers might be subjected to as a result of "rational" choice (Speech by the Roger Plant, the head of the Special Action Programme on Forced labour of the ILO, at a conference "Work - Migration - Rights; Strategies against Trafficking in Women", Vienna, October 2008.) Traffickers have become more sophisticated and the coercion they apply more complex and "invisible". Instead of kidnapping, physical violence, and keeping victims under lock, traffickers tend to use methods that create a complex web of control, through debt bondage, psychological violence and threats, use of modern information technologies and intimidation to put their victims into a situation of total dependence, where victims are scared or too intimidated to escape or reveal what happened to them.' See The Anti Trafficking Monitoring Group, n 306, 17.

¹¹³⁹ S Drew, n 1131.

¹¹⁴⁰ Home Office/Scottish Government 'Update to the UK Action Plan on Human Trafficking' (October 2009) 25.

personnel. Therefore, increased representation of women involved in, for example, border management could be a factor in successfully identifying more female sex trafficking victims.¹¹⁴¹ The clandestine nature of human trafficking means that outreach to victims is not easily achieved. The UK Action Plan on Tackling Human Trafficking goes so far as to recognise that some trafficked persons may not perceive themselves as such, which is a clear barrier to identification.¹¹⁴² Secondly, the relevant persons coming into contact with victims of trafficking may not correctly identify them, as was the case in *O*.

C. The Current Identification System – the ‘National Referral Mechanism’

Article 10 of the CoE Trafficking Convention has some particular stipulations which go toward providing a victim identification mechanism, to be executed by competent authorities and trained staff to identify putative victims with whom they come into contact.¹¹⁴³ The EU 2011 Directive has a similar stipulation in Article 11(4),¹¹⁴⁴ yet the

¹¹⁴¹ OSCE ‘Border Management and Gender’, Geneva Centre for the Democratic Control of Armed Forces (2008) <http://www.osce.org/publications/odihr/2008/02/29669_1035_en.pdf> accessed 21 Jan 2009, link no longer live.

¹¹⁴² The UK Action Plan on Tackling Human Trafficking, Home Office, n 254, states that ‘[s]ome victims do not self-identify because they may not recognise that the situation in which they are in actually constitutes a recognised crime against their person, or they may have been in an exploitative situation for such a long period of time that they have built up a psychological dependency on their exploiters. Some victims may be unwilling to identify themselves to the authorities due to a fear of reprisal from their traffickers, whilst others may fear that they will be penalised for their immigration status. There are also a number of victims who have a distrust of the authorities due to past negative experiences or possible levels of corruption in their home countries.’

¹¹⁴³ Article 10 states that: ‘1) Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention; 2) Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in

Trafficking Protocol has no such corresponding provision. Such systems can only be effective if properly implemented and adhered to.¹¹⁴⁵

Implementing measures as regards Article 10 of the CoE Trafficking Convention required the creation of a process which is often referred to internationally as a ‘National Referral Mechanism’¹¹⁴⁶ (NRM), whereby:

Front-line professionals will use indicators to consider whether an individual could be a victim of trafficking before referring their details to a designated Competent Authority to make a decision on whether there are reasonable grounds to believe that the individual has been trafficked.¹¹⁴⁷

Examples of ‘competent authorities’ are given in the Explanatory Report to the Convention as ‘public authorities which may have contact with trafficking victims,

Article 12, paragraphs 1 and 2; 3) When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age; 4) As soon as an unaccompanied child is identified as a victim, each Party shall: a) provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child; b) take the necessary steps to establish his/her identity and nationality; c) make every effort to locate his/her family when this is in the best interests of the child.

¹¹⁴⁴ Article 11(4) states that ‘Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations.’ Paragraph 4 of the Preamble to the Directive also refers to ‘the development of general common indicators of the Union for the identification of victims of trafficking, through the exchange of best practices between all the relevant actors, particularly public and private social services.’

¹¹⁴⁵ Article 10 also provides for protection against preemptory removal until the identification process is complete, and makes some specific provision for the treatment of children.

¹¹⁴⁶ Defined as ‘a procedure in which trained/qualified staff within ‘competent authorities’ can identify victims of all forms of trafficking and ensure their access to appropriate levels of support’ - see ‘Explanatory Memorandum on the Council of Europe Convention on Action against Trafficking in Human Beings’, Report CM 7465 at <<http://www.fco.gov.uk/en/about-the-fco/publications/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2008/humantrafficking>> accessed 7 April 2009, link no longer live. Information on the NRM is now available through <<http://www.crimereduction.homeoffice.gov.uk/humantrafficking005overview.pdf>> accessed 7 April 2009.

¹¹⁴⁷ Home Office, n 1061, 5.

such as the police, the labour inspectorate, customs, the immigration authorities and embassies or consulates.’¹¹⁴⁸

The NRM has been in place in the UK since 1 April 2009, and the relevant designated competent authorities are the UK Borders Agency and the UK Human Trafficking Centre.¹¹⁴⁹ Once a possible victim is identified, specialist staff will be assigned to assess the individual case.¹¹⁵⁰ Training and guidance are imperative as regards victim identification - the *O* case (above) demonstrates that the ramifications of misidentification can be severe for the victim. CPS guidelines state that ‘Guidance has been issued to police and immigration officers on identification of victims and what might constitute a credible trafficked victim.’¹¹⁵¹ The NRM, however, lacks a formal route of appeal, which may give rise to Article 6 challenges and Judicial Review claims concerning those who are not found to be a credible trafficked victim.

The UK Borders Agency has also produced information as regards ‘indicators’ which those who come into contact with potential traffick victims should look out for.¹¹⁵² These include: signs of physical or psychological harm or debt bondage; signs of fear or anxiety; and whether the testimony of the potential victim includes elements of coercion, deception or threat. The list provided is far from exhaustive. Further guidance is provided by the UK Human Trafficking Centre, and by Anti-Slavery International,¹¹⁵³ who include extensive lists of identification criteria under headings

¹¹⁴⁸ Explanatory Report, n 248, para. 129.

¹¹⁴⁹ See UK Human Trafficking Centre website, < http://www.ukhtc.org/council_of_europe.htm > accessed 7 April 2009.

¹¹⁵⁰ See Home Office ‘Overview of the implementation of the National Referral Mechanism’ <<http://www.crimereduction.homeoffice.gov.uk/humantrafficking005overview.pdf>> accessed 01 July 2011.

¹¹⁵¹ The Crown Prosecution Service, n 318.

¹¹⁵² See Home Office/UK Borders Agency, ‘Enforcement Instructions and Guidance, Chapter 9 – Identifying Victims of Trafficking’. <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectiona/chapter9?view=Binary>> accessed 01 July 2011.

¹¹⁵³ This includes extensive lists of identification criteria under headings such as ‘Personal documents and belongings’, ‘Violence or threat of violence’, and ‘Working conditions’. See Anti-Slavery

such as ‘Personal documents and belongings’, ‘Violence or threat of violence’, and ‘Working conditions’.

As outlined previously,¹¹⁵⁴ where there are ‘reasonable grounds’ to believe that an individual is a victim of trafficking, a recovery and reflection period of at least 30 days is called for by the CoE Trafficking Convention.¹¹⁵⁵ The abovementioned criteria go toward the establishment of ‘reasonable grounds’ as regards any putative victim. Secondly, there is a notable improvement as regards the rather accommodating terms relating to the provision of residence periods.¹¹⁵⁶

However, the granting of a residence permit is wholly dependent upon correct determination of the first stage; i.e. there being ‘reasonable grounds’ to believe that an individual is a victim of trafficking. Because the identification of an individual as a possible victim of trafficking is a pre-requisite even to being granted a recovery and reflection period, an essential period of time and space for the potentially severely traumatised victim of trafficking, it is necessary that those who are likely to come in to contact with victims of trafficking are alert to the indications which are signs of this possibility. The circumstances in the abovementioned *O* case were such that – even after ratification and after full implementation of the Convention – *O* may not have been in a position to enjoy the benefits conferred by the Convention because there was no recognition of her trafficked-victim status at a sufficiently early stage.

The UK is currently in the early stages of considering the Human Trafficking (Border Control) Bill 2010 – 11, which will, in summary, be ‘[a] Bill to require border control officers to stop and interview potential victims of trafficking notwithstanding

International, ‘Protocol for Identification and Assistance to Trafficked Persons’, (2005) <<http://www.antislavery.org/homepage/resources/PDF/Protocoltraffickedpersonskit2005.pdf>> accessed 15 March 2009, link no longer live.

¹¹⁵⁴ See Part IV, section A, subsection i, above.

¹¹⁵⁵ Article 13.

¹¹⁵⁶ See Part IV, section A, subsection ii, above.

entitlements under European Union law to free movement of persons; and for connected purposes.’¹¹⁵⁷ Such a legislative measure could clearly enhance the possibility of early detection and identification of trafficked victims, and therefore the fight against trafficking.

i. Problems with the Current System

Clearly the UK cannot be criticised for failing to meet international obligations to which they were not at the time subject, yet now they are required to meet these international obligations imposed by the CoE Trafficking Convention, the current system is not without its own flaws. That awareness and training among officials as regards identification of trafficked victims may still be somewhat deficient is exemplified by the recent case of *OOO et al v Commissioner of Metropolitan Police*,¹¹⁵⁸ in which there were a number of occasions where police officers were asked to investigate the situation of the women involved, yet failed to do so. Had they done so, it would potentially have been discovered that the women had been subjected to slavery-like practices. In summary, it was held that police duties to investigate alleged breaches of an individual's Article 3 and 4 ECHR rights was not solely limited to where an alleged victim had made a complaint. The duty was triggered as soon as a credible allegation was received that such an infringement had occurred, however that information was brought to their attention. Furthermore, the investigation would have to be undertaken promptly. For the effective protection of victims, it is clearly imperative that the relevant authorities charged with identifying the victims have

¹¹⁵⁷ At present the Bill has not proceeded beyond First Reading in the Commons - see ‘Human Trafficking (Border Control) Bill 2010 – 11 <<http://services.parliament.uk/bills/2010-11/humantraffickingbordercontrol.html>> accessed 01 June 2011.

¹¹⁵⁸ [2011] EWHC 1246 QB.

heightened awareness of and sensitivity to the clandestine nature of trafficking, forced labour etc. Intense scrutiny as regards any potential instance of trafficking is essential.

Although already theoretically compliant with the victim protection and assistance provisions of the anti-trafficking regime, the Anti-Trafficking Monitoring Group¹¹⁵⁹ has in a Report noted various problems occurring under the current system,¹¹⁶⁰ particularly with the identification system used in the UK – the NRM. The Report states that:

The system appears to be relying excessively on the discretion of officials who receive minimal training to staff a mechanism supported by flawed legal guidance relating to who should be identified as victims of trafficking, and without a formal appeals process. This fails to consistently identify and assist people who have been trafficked. Furthermore, the system appears to be putting more emphasis on the immigration status of the presumed trafficked persons, rather than the alleged crime committed against them.¹¹⁶¹

If this is indeed the case, then the current system can indeed be said to be deficient – lack of consistent identification and a lack of formal route of appeal leaves the NRM and the assistance and protection measures for those not correctly identified as trafficked persons, with a lack of bite.

¹¹⁵⁹ The Anti Trafficking Monitoring Group, ‘Call for Evidence’, <http://www.antislavery.org/english/what_we_do/programme_and_advocacy_work/anti_trafficking_monitoring_group.aspx> accessed 01 June 2011.

¹¹⁶⁰ See The Anti Trafficking Monitoring Group, n 306.

¹¹⁶¹ Ibid, 9.

As considered in Chapter 2,¹¹⁶² the specifics of the ‘means’ element of trafficking are not always clearly separable, yet nonetheless go toward establishing the definition of human trafficking as a non-consensual process, or at least a process where any consent given may be rendered irrelevant by use of any of the ‘means’. This in turn relies upon objective proof of ‘coercion’ etc being shown by the State’ in order to prosecute a trafficker. The victim stands in her own metaphorical trial in terms of establishing the same, as she is assessed by ‘indicators’ (outlined above) which are given to those charged with identifying her. These ‘indicators’ are used to decide whether she coerced, for example, and is therefore a victim, or if there are a lack of ‘indicators’ of such treatment she may simply be rendered merely another ‘smuggled prostitute.’ In the words of Raymond, ‘[n]o woman should be punished for her own sexual exploitation’¹¹⁶³ but this is what incorrect or misidentification of trafficked victims has the effect of doing.

The Anti Trafficking Monitoring Group Report also finds that:

The UK citizens referred were speedily identified as having been trafficked with a rate of 76 per cent of cases positively identified as trafficking, in contrast with the rate of cases positively identified as trafficked as a whole of 19 per cent. The rate of nationals from other EU states identified as trafficked was 29.2 per cent, while that of nationals from countries outside the EU was only 11.9 per cent.¹¹⁶⁴

¹¹⁶² See Chapter 2, Part III.

¹¹⁶³ J Raymond, ‘10 Reasons for Not Legalising Prostitution’, (2003) *Journal of Trauma Practice*. 2, 315.

¹¹⁶⁴ The Anti Trafficking Monitoring Group, n 306, 9.

Although this cannot be interpreted conclusively as evidence of discrimination against third country nationals, the difference is startling.¹¹⁶⁵ The Report goes on to state that ‘these figures merit further investigation by the Home Office, to check that individuals from outside the EU are not being subject to discrimination in the decision-making process.’¹¹⁶⁶ On the evidence, however, it would appear that the UK may not be doing enough to meet its obligations under the CoE Convention as regards these putative victims, particularly in terms of their identification which would lead to access to bespoke rights and assistance.

VII. Non-Criminalisation of Victims of Human Trafficking

The prosecution of trafficked victims who have committed offences as a direct consequence of having been trafficked is a controversial issue. All too often, trafficked victims are treated not as victims but as criminals, as demonstrated by *O*, above. The JCHR have voiced concerns, notably that:

Section 2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 makes it an offence to enter into the UK without valid passports and visas. This, it was claimed, is detrimental to trafficked victims as many of them use false documentation to enter.¹¹⁶⁷

The CoE Trafficking Convention addresses the issue of non-criminalisation of victims of trafficking, by explicitly stating that ‘Each Party shall, in accordance with the basic principles of its legal system, *provide for the possibility* of not imposing

¹¹⁶⁵ Ibid.

¹¹⁶⁶ Ibid.

¹¹⁶⁷ Joint Committee on Human Rights Twenty-Sixth Report, n 31, para 116.

penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.’(Emphasis added)¹¹⁶⁸ Notably, the language employed here is weak:¹¹⁶⁹ non-prosecution is not a concrete requirement of the Convention. Nonetheless, this remains a very important provision. The 2011 EU Directive has a similar provision.¹¹⁷⁰

As noted by Laws LJ in *O*,¹¹⁷¹ there are the CPS Protocols¹¹⁷² which cover the commission of immigration offences, such as possession of a false passport or forged identity document, by trafficking victims who have been coerced by someone else. According to these Protocols, if the suspect is a ‘credible trafficked victim’ i.e. ‘the investigation officers have reason to believe that the person has been trafficked’,¹¹⁷³ then the prosecutor must consider whether pursuing a prosecution for the immigration offence best serves public interest.¹¹⁷⁴ As regards the latter Protocol which deals with ‘Prosecution of Young Defendants Charged With Offences Who Might Be Trafficked Victims’,¹¹⁷⁵ evidence of duress will lead to the case being discontinued, and where the evidence is less clear, ‘further details should be sought from the police and youth offender teams, so that the public interest in continuing a prosecution can be considered

¹¹⁶⁸ Article 26.

¹¹⁶⁹ A Gallagher, ‘Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments’ (2006) *European Journal of Migration and Law*, Vol. 8, 163-189, 178.

¹¹⁷⁰ Article 8 of the EU 2011 Directive states that ‘Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.’

¹¹⁷¹ *R v O* [2008] EWCA Crim 2835, para 14.

¹¹⁷² Crown Prosecution Service, n 318.

¹¹⁷³ *Ibid.*

¹¹⁷⁴ In doing so, the following factors should be taken into consideration: the role that the suspect has in the immigration offence; was the immigration offence a direct consequence of their trafficked situation; were violence, threats or coercion used on the trafficked victim to procure the commission of the offence; was the victim vulnerable or put in considerable fear. See Crown Prosecution Service, n 318.

¹¹⁷⁵ Crown Prosecution Service, n 318.

carefully.’¹¹⁷⁶ The Court of Appeal noted in *O* that these protocols – although incorporated into the Code for Crown Prosecutors – do not appear in standard criminal law practice books.

Once again, rather tentative language is employed in the Protocols, and the possibility of continuing with the prosecution remains. As the UK action Plan on Tackling Human Trafficking observes: ‘It is difficult to envisage circumstances where it would be in the public interest to prosecute genuine victims of human trafficking for immigration offences.’¹¹⁷⁷

The pre-Convention ratification *O* case is a clear exemplar of the consequences of misidentification. More recent case law, decided post-ratification of the Convention, provides illumination as to whether or not *O* would necessarily be decided differently today. *R v LM*,¹¹⁷⁸ a combined appeal with five appellants, concerned individuals who had previously been trafficked, and were convicted for then playing a part in the ‘controlling of prostitution for gain’¹¹⁷⁹ of other sex workers or trafficked persons.

References were made to Articles 26¹¹⁸⁰ and 10¹¹⁸¹ of the CoE Trafficking Convention, as there were to the CPS protocols¹¹⁸² and the *O* case. The appellants contended a breach of Article 10 of the CoE Trafficking Convention, on the basis that they had never been advised about the relevant referral agency who could have aided their identification as formally trafficked persons, and that this failure had rendered the

¹¹⁷⁶ The Protocol goes on to state that ‘Prosecutors should also be alert to the fact that an appropriate adult in interview could be the trafficker or a person allied to the trafficker. Any youth who might be a trafficked victim should be afforded the protection of our childcare legislation if there are concerns that they have been working under duress or if their well-being has been threatened. In these circumstances, the youth may well then become a victim or witness for a prosecution against those who have exploited them. The younger a child is, the more careful investigators and prosecutors have to be in deciding whether it is right to ask them to become involved in a criminal trial.’

¹¹⁷⁷ Home Office and Scottish Executive, n 254, 57.

¹¹⁷⁸ [2010] EWCA Crim 2327; [2011] 1 Cr. App. R. 12; [2011] Crim. L.R. 425.

¹¹⁷⁹ Contrary to SOA 2003, s 3.

¹¹⁸⁰ Article 26 of the CoE Trafficking Convention provides for the possibility of non-prosecution of trafficked victims for offences committed as a result of having been trafficked.

¹¹⁸¹ Article 10 of the CoE Trafficking Convention provides for the identification of victims of trafficking.

¹¹⁸² Crown Prosecution Service, n 318.

prosecution unlawful. The appeal in *LM* was allowed, but not on this basis. It was instead allowed because the Article 26 duty (to consider non-prosecution) was ignored at the crucial point where the Crown had, at a late stage, accepted a basis of plea that the appellants had been trafficked and violently coerced into prostitution themselves, and that their part in anything comprising or resembling ‘controlling prostitution’ had been done under pressure, i.e. as a result of being trafficked, yet falling short of duress.

It seems that the lessons to be learned from *O* are still being learned now that a formal system is in place, and it is clear that the same mistakes as to referral to relevant agencies etc by counsel is still an issue, consequently raising the need for constant and improved awareness raising and training of all of those involved in the victim identification process. Perhaps, the offence in *O* arguably being of a lesser nature (i.e. immigration offences as opposed to controlling prostitution) mean that had *O* occurred post-ratification of the CoE Convention then the case may possibly have been decided differently at first instance, yet one can only speculate on this matter.

These cases provide evidence that the system has flaws and required ‘kid gloves’ treatment – *LM* in particular illustrates the effects of appearance of consent in an inherently coercive environment, coupled with lack of knowledge and understanding of the legal representatives involved in the case. These cases are illustrative of the deficiencies of the identification system. These cases can at the most - to a limited extent - tell us how future similar cases should be conducted, and at the very least, we can continue to learn from them.

The following Part will discuss the international protection regime available to the victim, beyond the bespoke provisions of the anti-trafficking regime.

VIII. International Protection for the Trafficked Person

International protection may apply to anyone who is in need of it. Specifically in the context of human trafficking, the CoE Trafficking Convention clearly envisages situations where it may be necessary for trafficking victims to remain in the destination State beyond simply taking part in the criminal proceedings against their traffickers. The potential vagueness of the ‘personal situation’¹¹⁸³ referred to in the CoE Trafficking Convention as regards temporary residence permits, for example, may mean that the current standards (of the anti-trafficking regime) are deficient, particularly in the UK context where it was perceived that there was barely a need for implementing legislation. This is not to suggest that the UK Government is legally at fault (although perhaps falling ‘below par’, so to speak,) as regards implementation of the CoE Trafficking Convention, but that the provisions of the Convention itself could have been drafted more conclusively and stringently, so that assistance and protection required owing to a ‘personal situation’ may have more clarity of scope¹¹⁸⁴ and therefore be more inclusively applied.

¹¹⁸³ See Part IV, section A, subsection ii, above.

¹¹⁸⁴ The terms used in the Explanatory Report to the Trafficking Convention as regards the victim’s ‘personal situation’ refer directly to the ‘victim’s safety, state of health, family situation or some other factor’ which can be interpreted broadly, although they do appear to be drafted in a way which relates to human rights standards under, say Articles 3 and 8 ECHR, which were indeed already part of the UK’s human rights obligations under the ECHR.

Such issues i.e. the potential deficiency of the current system, become relevant when considering complementary protective measures, such as those available through international protection regimes. This is particularly so when considering the potential for re-trafficking and re-victimisation on return to the country of origin, as well as the threat of reprisals from the traffickers or persecution from their community as a result of having been a sex worker. The destination State must take various factors into account and make the decision as to whether the best action to take is to expel the victim, or allow them to remain. The same regime would apply to the ‘consensually trafficked’, as it would to any human being in a country where the relevant instruments have been ratified. Such matters undoubtedly invoke human rights concerns, as will be discussed below.

A. Trafficked Victims as Refugees?

The purpose of asylum law and policy, and related matters such as discretionary leave, is twofold. Primarily, there is the focus of giving aid to those who are in need of it. On the other hand, the reduction and control of numbers entering and staying in the UK is also at the heart of this. Any system which is intended to benefit a body of persons will inevitably be subject to abuse; therefore procedures must be in place which aid the determination as to who is, and who is not, genuinely in need.

The first point of call for many persons with a potential need to remain in the destination state would be to claim asylum, relying upon the Convention Relating to the Status of Refugees (Refugee Convention).¹¹⁸⁵ As noted by the JCHR in its Tenth Report, there are ‘human rights issues raised by the treatment of asylum seekers, from

¹¹⁸⁵ Refugee Convention, n 20.

the time when they first claim asylum in the UK, through to either the granting of asylum, or, for asylum seekers whose claims are refused, their departure from the UK.’¹¹⁸⁶ Clearly, efficient application of the Refugee Convention criteria is paramount to securing protection of certain vulnerable persons.

i. The Refugee Convention – Qualifying Criteria

In order to come within the scope of the Refugee Convention, an individual must demonstrate a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’.¹¹⁸⁷ Some such persons may well have sought out the services of traffickers or smugglers in order to leave the origin state where they are being subjected to persecution, in which case they may have grounds to make an asylum claim in the same way that non-trafficked asylum seekers would. It is, however, worth exploring if, how and when the Refugee Convention may apply to trafficked victims, i.e. the circumstances in which such persons may claim asylum because they have been trafficked.

Both the UN Trafficking Protocol¹¹⁸⁸ and the Council of Europe Trafficking Convention¹¹⁸⁹ implicitly recognise the potential for the entitlement of a proportion of trafficked victims to international refugee protection. The conditions contained within the Refugee Convention are somewhat limited, and there is likely to be a body of trafficked persons who may have a need to not be returned to the origin State but fall outside of the scope of the Refugee Convention.

¹¹⁸⁶ Joint Committee on Human Rights Tenth Report (Session 2006 -7) ‘The Treatment of Asylum Seekers’ 5 <<http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf>> accessed 30 January 2011.

¹¹⁸⁷ Article 1(a) 2.

¹¹⁸⁸ Article 14 (1).

¹¹⁸⁹ Article 40 (4).

A trafficked victim or putative victim may make claims for international protection in several circumstances, for example: she may have escaped her traffickers and seek protection in the destination state; she may have been trafficked within national territory, and have fled abroad; or the individual may fear becoming trafficked and therefore flee abroad.¹¹⁹⁰ The victim may also fear persecution on return to the origin state as a result of having worked in the sex trade, albeit unwillingly. If a victim is to make a claim for international protection under the Refugee Convention, then they must fulfil the two-step criteria in order to qualify for refugee protection.

Primarily, they must demonstrate a well-founded fear of persecution. Secondly, there must be a causal link¹¹⁹¹ between this persecution and one of the Convention grounds of ‘race, religion, nationality, membership of a particular social group or political opinion’,¹¹⁹² hence the words ‘for reasons of’ membership of a particular social group, for example. It is not difficult to envisage trafficked persons who do not fall into those categories but nonetheless require some form of help instead of deportation. At present, those who do not qualify for refugee status can be considered for Humanitarian Protection¹¹⁹³ or Discretionary Leave¹¹⁹⁴ if they need to remain in the UK. Nonetheless, there exist some established trafficking cases where refugee status has been attributed to the victim due to, for example, the inability of the origin State to protect the victim from re-trafficking,¹¹⁹⁵ or where trafficked women have been considered to constitute a ‘social group’ for the purposes of the Refugee Convention.¹¹⁹⁶ This is therefore not a novel concept.

¹¹⁹⁰ ‘Guidelines on International Protection’ n 1017, para 13.

¹¹⁹¹ *Ibid*, part f.

¹¹⁹² Article 1(A)(2).

¹¹⁹³ UK Borders Agency ‘Humanitarian Protection’, n 1050.

¹¹⁹⁴ UK Borders Agency ‘Discretionary Leave’, n 1051.

¹¹⁹⁵ See, for example, Alan Travis, n 1025.

¹¹⁹⁶ See, for example, *SB (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002, where it was stated that “‘Former victims of trafficking’ and “‘former victims of trafficking for sexual

ii. The Scope of ‘Persecution’: Trafficking, Re-trafficking, Reprisals and Social Ostracism

Guidelines on International Protection state that ‘persecution’ in the context of the Refugee Convention can involve ‘serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable predicament, as assessed in the light of the opinions, feelings, and psychological make-up of the asylum applicant.’¹¹⁹⁷ With respect to trafficked victims or possible future trafficked persons, harm feared as a result of trafficking or its anticipation may amount to persecution in the context of the Refugee Convention.¹¹⁹⁸

Along the same vein, various characteristics inherent in the trafficking process, such as sexual enslavement, forced prostitution, and rape, may amount to persecution. The ongoing effects of past trafficking, such as psychological trauma, may in extreme cases qualify as persecution and render it sufficient to recognise an individual as a refugee, provided that a causal link with a Convention ground may be established.¹¹⁹⁹

The threat of reprisals, re-trafficking or ostracism from the community in the origin State may also arguably amount to persecution. A recent and somewhat

exploitation” are capable of being members of a particular social group within regulation 6(1)(d) because of their shared common background or past experience of having been trafficked.’

¹¹⁹⁷ ‘Guidelines on International Protection, n 1017, para 14

¹¹⁹⁸ Ibid, para 15

¹¹⁹⁹ Ibid, para 16.

groundbreaking decision taken in the UK High Court recently awarded substantial damages to a Moldovan victim of repeated trafficking, who now has refugee status in the UK, ‘for failing to take steps to protect her and for sending her back to Moldova despite substantial grounds to believe she was at risk from her traffickers.’¹²⁰⁰ Bearing all of the above in mind, it seems clear that persecution as such occur before, during, and post-trafficking.

Of course, evidence will be required to establish persecution or the possibility thereof in terms of asylum applications. In *PO (Nigeria)* it was stated that the ‘AIT erred in law by requiring her to prove by personal evidence that her trafficker had operated as part of a gang in Nigeria as a necessary element in establishing that she would be at risk on return.’¹²⁰¹ Maintaining border integrity is indeed a legitimate concern for States, yet requiring such a level of evidence in asylum claims to be personally provided by the putative trafficked victim seems to be putting the threshold too high, to say the least. Yet, the requirement of providing evidence of fear of risk on return is a necessary part of the asylum process; this case is simply illustrative of the bar being set too high,¹²⁰² particularly with the onus placed directly on the putative victim.

The basis for the requisite ‘well founded fear’ of persecution relates to the circumstances at the time in the country of origin. The United Nations High Commissioner for Refugees (UNHCR) Guidelines on International Protection¹²⁰³ state that:

¹²⁰⁰ See Alan Travis, n 1025.

¹²⁰¹ *PO (Nigeria) v Secretary of State for the Home Department* [2011] EWCA Civ 132, para 10.

¹²⁰² The evidence required was referred to as imposing an ‘unrealistic burden’ on the appellant, *PO (Nigeria)* para 33.

¹²⁰³ ‘Guidelines on International Protection’ n 1017.

... where a state fails to take such reasonable steps as are within its competence to prevent trafficking and provide effective protection and assistance to victims, the fear of persecution of the individual is likely to be well founded. The mere existence of a law prohibiting trafficking in persons will not of itself be sufficient to exclude the possibility of persecution.¹²⁰⁴

Trafficking victims overwhelmingly originate from countries either suffering political upheaval, economic impoverishment or at least with economies in transition;¹²⁰⁵ therefore it is not unreasonable to consider that those originating from such States may be at an increased risk of being trafficked than otherwise. Such States are ideal source countries for trafficked persons as a result of poverty, displacement, and vulnerability to organised crime gangs. Sex trafficking victims are overwhelmingly female. Therefore, this particular body of persons – females from impoverished States with poor employment opportunities – may have significant cause to apprehend, fall subject to, or suffer the after effects of, sex trafficking sufficient for a well founded fear of persecution. Applicability of the Refugee Convention of course depends on satisfying the second stage; that of the causal link between persecution and one of the Refugee Convention grounds.

***iii. Applicability of Refugee Convention Grounds to Victims of Trafficking:
Establishing a Causal Link***

¹²⁰⁴ Ibid, para 23.

¹²⁰⁵ See, Chapter 1, Part I, section A, for discussion of the underlying ‘push’ factors affecting the decision to migrate.

The relevant Convention grounds are ‘race, religion, nationality, membership of a particular social group or political opinion’.¹²⁰⁶ Such grounds may be difficult to establish with respect to asylum claims made by trafficked persons, particularly if trafficking is predominantly motivated by economic motives on the part of the trafficker.

Although it is necessary for one of the above grounds to be satisfied, ‘it is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause.’¹²⁰⁷ Therefore, the existence of economic motives as a central or dominant factor is not necessarily a damning factor, provided a relevant criterion can be satisfied for the purposes of the Refugee Convention.

Various, even numerous, Refugee Convention grounds may apply to victims of sex trafficking. Race and nationality are particularly relevant from the perspective of demand for sexual services from different and ‘exotic’ women. All of the grounds potentially become relevant in the context of internal or cross border conflict in and between countries leading to sex trafficking as a form of ‘weapon’, so to speak, such as took place in the former Yugoslavia, in which context sex trafficking (in a war context) was specifically referred to as a crime against humanity.¹²⁰⁸ The Refugee Convention was designed to be inclusive, rather than exclusive. Of particular interest is the matter of whether women *per se* are capable of constituting a ‘social group’ for the purposes of the Refugee Convention, in the context of human trafficking.

¹²⁰⁶ Article 1A(2), Refugee Convention.

¹²⁰⁷ ‘Guidelines on International Protection’, n 1017, para 29.

¹²⁰⁸ See, for example, T Obokata, n 48.

iv. The Scope of ‘Social Group’

Early discussion during the drafting of Article 1A(2) of the Refugee Convention envisaged narrower scope¹²⁰⁹ than that which was ultimately adopted. ‘Social Group’ as a Convention ground was included on the basis that an exhaustive list proved impossible to achieve.

In order for this element to be satisfied and for the causal link to be established, the actual persecution must not be a defining factor of the social group,¹²¹⁰ i.e. the group must not be defined by reference to persecutory conduct. They are not members of a social group because they are persecuted; they must be persecuted because they are members of a social group. However, it was noted in *Applicant A v Minister for Immigration and Ethnic Affairs* that ‘while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.’¹²¹¹

It is not unreasonable to consider that gender could be an influential factor with respect to the type of persecution suffered.¹²¹² If this analysis succeeds, then those who fear trafficking, and those who fear being re-trafficked, simply because they are women, may have the option to claim asylum on those grounds. Certain social subsets

¹²⁰⁹ Convention relating to the Status of Refugees, ‘1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Travaux Préparatoires)’ <<http://www.unhcr.org/pages/49da0e466.html>> accessed 23 May 2011.

¹²¹⁰ *A v Minister for Immigration and Ethnic Affairs* [1997] 2 B.H.R.C. 143, High Court of Australia.

¹²¹¹ *Ibid*, Justice McHugh.

¹²¹² Guidelines on Gender Issues for Decision-Makers in 1996 (DIMA 1996).

of women in particular may qualify as a social group such as single women, illiterate women, divorced women,¹²¹³ or women who have worked in the sex trade, or as ‘sex slaves’¹²¹⁴ – the latter subset in particular is of note, as this potentially encompasses those who fear social ostracism if returned to their community in the origin state. According to the dicta from *A*, above, ‘trafficked women’ as such may also constitute a ‘social group’, by virtue of having been trafficked,¹²¹⁵ and indeed have been so classed in decided cases – in *SB (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] it was stated that:

Former victims of trafficking” and “former victims of trafficking for sexual exploitation” are capable of being members of a particular social group ... because of their shared common background or past experience of having been trafficked.¹²¹⁶

It follows from this that those at risk of re-trafficking may be ‘persecuted’ for Refugee Convention purposes, therefore establishing both the persecution and the causal link to the Convention ground of ‘social group’.

In order to satisfy this Convention ground in terms of ‘women’ as a social group, women would have to show that they feared persecution, i.e. trafficking, simply by virtue of their gender. The abovementioned ‘former victims of trafficking’ become a ‘social group’ as a result of having been trafficked and being at risk of being re-

¹²¹³ ‘Guidelines on International Protection’, n 1017, para 38.

¹²¹⁴ See, *The Queen on the Application of P v Secretary of State for the Home Department* [2008] EWHC 2447 (Admin).

¹²¹⁵ See, R Piotrowicz ‘Victims of People Trafficking and Entitlement to International Protection’ (2005) 24 Australian Yearbook of International Law, 159, 167 – 170.

¹²¹⁶ *SB (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002, ‘Determination and Reasons’, para 2. See,

<http://www.nrcentre.org.uk/index.php?option=com_content&view=article&id=130:victims-of-trafficking-can-get-refugee-status&catid=13:Policies%20&%20Rulings&Itemid=9> accessed 04 May 2011.

trafficked. This demonstrates ‘after the event’ (i.e. post trafficking) recognition of a ‘social group.’ Yet, can we establish ‘women’ as a freestanding ‘social group’ before the event (i.e. prior to trafficking, because they are at risk of being trafficked?).

In order to constitute a social group, it is necessary that the members of the particular group ‘either share a common characteristic other than their risk of being persecuted or are perceived as a group by society.’¹²¹⁷ Women share unchangeable characteristics i.e. that of being female, and frequently experience different treatment to men; it may therefore be feasible to argue that they constitute a particular social group in this context.¹²¹⁸

‘Women’ as a ‘social group’ may on the face of it be deemed too broad. However, if women of a particular race (thereby satisfying the Convention ground) may be trafficked (and therefore persecuted) because of demand for the sexual services of exotic women, by the same token women as a social group, who share the immutable characteristic of being female, may equally be persecuted i.e. trafficked for sexual exploitation, simply by virtue of being women. Although demand for trafficked women for the purpose of sexual exploitation is ‘often further grounded in social disparities of race, nationality, caste and colour’,¹²¹⁹ the demand is, overall, for women.

The potential for women to be recognised as a ‘social group’ is becoming increasingly evident through examples such as *Canada v Ward*,¹²²⁰ where it was recognised that a ‘social group’ could be constituted in various ways, including

¹²¹⁷ ‘Guidelines on International Protection’, n 1017, para 37.

¹²¹⁸ UNHCR Guidelines on International Protection, “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ para 14 <<http://www.unhcr.org/3d58de2da.html>> accessed 15 Feb 2011.

¹²¹⁹ See Report on the Special Rapporteur on trafficking in persons, especially women and children, Sigma Huda, Addendum, Mission to Bosnia and Herzegovina, ‘Integration of the Rights of Women and the Gender Perspective’ (30 November 2005) UN Doc E/CN.4/2006/62/Add.2 paras 48 and 66.

¹²²⁰ *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689.

primarily '[g]roups defined by an innate or unchangeable characteristic'.¹²²¹ The case goes on to state that 'The first category would embrace individuals fearing persecution on such bases as *gender*, linguistic background and sexual orientation...' (Emphasis added)

Nonetheless, if women as a social group were to be deemed too broad, an argument can still potentially be made in terms of economically impoverished women or unemployed women – particularly in certain geographical regions where the feminisation of poverty is evident - as social subsets; reflecting the fact that many trafficked women come from economically impoverished areas where female unemployment rates are high. Further weight is added to this argument by the judgement in *Islam v Secretary of State for the Home Department* and *R v Immigration Appeal Tribunal, ex parte Shah*¹²²² where a Lords majority found that 'women in Pakistan' and/or 'Pakistani women' constituted a social group for Refugee Convention purposes; clearly this is defined largely by reference to gender.

Difficulties in making such a claim can be envisaged, as it requires a departure from the norm, although the abovementioned examples indicate that there is the potential for claims to be made here.

¹²²¹ Other ways included groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and groups associated by a former voluntary status, unalterable due to its historical permanence.

¹²²² [1999] 2 A.C. 629.

B. Article 3 ECHR - Expulsion / Deportation, and the European Convention on Human Rights

There is undoubtedly a link between non-refoulement and Article 3 ECHR, as indicated by cases such as *Jabari*.¹²²³ In *Kacaj*:¹²²⁴ the Immigration Appeal Tribunal noted that:

We recognise the possibility that Article 3 could be violated by actions which did not have a sufficiently systematic character to amount to persecution, although we doubt that this refinement would be likely to be determinative in any but a very small minority of cases.¹²²⁵

Victims of human trafficking have the potential to expand this ‘very small minority of cases’ – the treatment that they may face on return to their country of origin may fall short of the requisite standard of persecution of a systematic character, yet they may still face serious ill treatment.

¹²²³ See, *Jabari v Turkey* (app no 40035/98) 9 B.H.R.C. 1; [2001] I.N.L.R. 136, where the individual concerned used a false passport to gain entry to Turkey following accusations of adultery in Iran, from where she originated. Initially, she was detained for deportation and refused asylum. Jabari was subsequently granted refugee status under the 1951 Refugee Convention, and she went on to lodge an application against her deportation in a Turkish court. This application was refused. She applied to the ECtHR, on the basis that there had been violations by Turkey of Art. 3 and Art.13 ECHR since if deported to Iran she faced the possibility of death by stoning or flogging, and furthermore that by the Turkish authorities had denied her an effective remedy. Her application was allowed, and violations of both Articles were found.

¹²²⁴ *Kacaj (Article 3 - Standard of Proof - Non-State Actors) Albania v. Secretary of State for the Home Department*, [2001] UKIAT 00018, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 19 July 2001.

¹²²⁵ *Kacaj*, para 19.

As mentioned previously, the Home Office/UKBA judge that, in respect of the issuance of a residence permit owing to the ‘personal situation’ of the victim, ‘a combination of our existing obligations on asylum and human rights and our Discretionary Leave policy already cover situations where an individuals personal circumstances ... make it necessary for them to remain in the UK.’¹²²⁶ Obligations under the ECHR are obviously a relevant factor, where matters such as support or expulsion of victims trafficked for the purpose of sexual exploitation are concerned – most notably Articles 3 and 8.¹²²⁷ Article 4 undoubtedly has significance for trafficking victims, as demonstrated in *Siliadin v France*.¹²²⁸

Article 3 of the ECHR becomes particularly relevant when considering the potential for re-trafficking and re-victimisation on return to the country of origin, as well as the threat of reprisals from the traffickers, or perhaps the more general threat of organised crime, which has known links with human trafficking activity. The Article states that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ This right forms part of the fundamental basis of any democratic society, and this value is enshrined in the ICCPR,¹²²⁹ the American Convention on Human Rights,¹²³⁰ and the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,¹²³¹ the latter of which explicitly states that ‘No State Party shall expel, return ("refouler") or extradite a person to another State

¹²²⁶ Home Office, n 1061, 6.

¹²²⁷ Expulsion could result in breaches of Article 3 where there was risk of ill-treatment on return to the origin state, and of Article 8 where, for example, ‘there was a serious risk of the persons concerned suffering an adverse effect on their health or their physical or moral integrity.’ J McBride ‘Irregular Migrants and the European Convention on Human Rights’ (AS/Mig/Inf (2005) 21) para. 127.

¹²²⁸ *Siliadin v France* (2006) 43 E.H.R.R. 423, and *Rantsev v Cyprus and Russia* (app no. 25965/04) [2010].

¹²²⁹ Article 7.

¹²³⁰ Article 5(2).

¹²³¹ United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by the General Assembly of the United Nations on 10 December 1984 (resolution 39/46) entered into force on 26 June 1987).

where there are substantial grounds for believing that he would be in danger of being subjected to torture.’¹²³²

Invoking Article 3 in the context of victims of trafficking involves consideration of the existence of potential¹²³³ as well as actual violations. The country of proposed return would have to be unable to provide sufficient protection itself to the victim.¹²³⁴

Liability under the ECHR concerns the deporting State, as it is the direct consequence of the action of deportation which will lead to exposure of the individual concerned to treatment contrary to Article 3, albeit in the receiving State. The JCHR observes that repatriation into a situation of poverty does not bode well for victims of trafficking, who may fall subject to the same conditions or organised criminals who facilitated their trafficking in the first place.¹²³⁵ Such measures are therefore counter-productive. Those who have been trafficked may even by their own actions fall back into the hands of traffickers, through seeking out a ‘migration broker’ to help them migrate, in the belief that either they could not be unlucky enough for it to happen a second time, or that they have learned enough from their experience to avoid making the same mistakes again.

When considering this issue transplanted into a trafficking context, it is useful to look to the standard set down in the *Soering*¹²³⁶ case, in which it was stated that Article 3 comes into play ‘where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.’¹²³⁷ Although

¹²³² Article 3(1).

¹²³³ See, *Soering v UK* (1989) 11 E.H.R.R. 439.

¹²³⁴ See, for example, *The Queen on the Application of P v Secretary of State for the Home Department* [2008] EWHC 2447 (Admin), where it was alleged on behalf of the applicant that if she were returned to Cyprus, she would suffer ill treatment on the basis that she was a trafficked victim and had therefore worked as a ‘sex slave’, para 9.

¹²³⁵ Joint Committee on Human Rights Twenty-Sixth Report, n 31, para 49.

¹²³⁶ See, *Soering v UK* (1989) 11 E.H.R.R. 439.

¹²³⁷ *Soering*, para 91.

originally applied to extradition, it has been established in subsequent case law that the *Soering* principle extends to expulsion.¹²³⁸ A ‘mere possibility’ of ill treatment is insufficient to satisfy this standard.¹²³⁹ Analogies can be brought where trafficking is concerned. After all, ‘the Convention is a living instrument which ... must be interpreted in the light of present day conditions.’¹²⁴⁰ Therefore, a modern day application of Article 3 may indeed be stretched to accommodate victims of trafficking, who are at risk of ill-treatment on return to the origin state, where necessary.

However, the high standard of proof required by the ECtHR means that Article 3 may have limited applicability in practice.¹²⁴¹ In its *Cruz-Varas*¹²⁴² judgment, the Court noted several principles with regard to the assessment of the risk of ill treatment. Primarily, in determining whether the *Soering* principle is satisfied, the Court will assess the issue in light of all of the material placed before it. Secondly, the existence of the risk of ill treatment must primarily be assessed with reference to the facts which were known, or ought to have been known, by the Contracting state at the time of the expulsion. Finally, the assessment of the risk of treatment in breach of Article 3 must be a rigorous one, given ‘the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.’¹²⁴³

The Commission in *Soering* noted that ‘[i]t is only in exceptional circumstances that the removal of a person will give rise to an issue under Article 3 and the burden

¹²³⁸ See, for example, *Cruz-Varas v Sweden* (1992) 14 E.H.R.R. 1.

¹²³⁹ See, for example *Vilvarajah and Others v United Kingdom*, para.111. On the point of ‘mere possibility’ being insufficient, this includes situations where there is some risk to some people but no evidence to single out the applicant from a group, only a small (and unidentified) proportion of whom are at risk – here, they may be considered to be no or insufficient ‘real risk’.

¹²⁴⁰ *Tyrer v United Kingdom*, (1979-80) 2 E.H.R.R. 1, para. 31.

¹²⁴¹ See, S Egan, n 1048.

¹²⁴² *Cruz-Varas v Sweden* (1992) 14 E.H.R.R. 1, paras 75 – 76, and 83.

¹²⁴³ *Vilvarajah and Others v. United Kingdom*, para.108.

lies on the applicant to substantiate his fear that he will be exposed to treatment or punishment falling under that Article.’¹²⁴⁴ The Court stated in that case that:

As is established in the Court’s case-law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.¹²⁴⁵

Dicta from subsequent case law has added to this.¹²⁴⁶ The language used in the abovementioned paragraph, coupled with part of the actual basis of *Soering*’s claim i.e. the ‘increasing tension and psychological trauma’¹²⁴⁷ that would be suffered as a result of the ‘death row phenomenon’,¹²⁴⁸ opens the door to consider the relevance of the mental state of the trafficked victim.

As mentioned previously, the Trafficking Convention envisages the granting of residence permits as a result of the victims ‘personal situation’, which may include their

¹²⁴⁴ Opinion of the Commission in *Soering*, para 94.

¹²⁴⁵ See *Ireland v. United Kingdom* 2 E.H.R.R. 25, para. 162; and *Tyrer v. United Kingdom* 2 E.H.R.R. 1, paras. 29 and 80. At para 167, the Court goes on to state that ‘Treatment has been held by the Court to be both "inhuman" because it was premeditated, was applied for hours at a stretch and "caused, if not actual bodily injury, at least intense physical and mental suffering", and also "degrading" because it was "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance"’.

¹²⁴⁶ See, *Tyrer v. United Kingdom* 2 E.H.R.R.1 paras 29 and 30, where it was stated that ‘[i]n order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment.’

¹²⁴⁷ *Soering*, para 105

¹²⁴⁸ See, Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, DJ Harris, M O’Boyle, E P Bates, C M Buckley (eds) (Oxford 2009) 79 – 90 for discussion of *Soering* and subsequent case law.

‘state of health ... or some other factor which has to be taken into account.’¹²⁴⁹ Further, according to the two CPS Protocols addressing prosecutorial discretion where offences were committed by trafficked persons as a result of having been trafficked,¹²⁵⁰ where there is evidence such as medical reports, relating to one who is suspected of committing immigration offences, which indicate post-traumatic stress as a result of their being trafficked, the prosecutor should consider whether prosecution is in the public interest or whether it should be discontinued.¹²⁵¹ Evidently, the mental state of the trafficked victim is a very real concern. This, coupled with the potential for reprisals or re-trafficking,¹²⁵² arguably constitutes ‘substantial grounds’ and ‘real risk’ for the purposes of the *Soering* principle. It would appear that the mental state of the victim on return would be insufficient alone to qualify for the standard set down in *Soering*.¹²⁵³ The danger of re-trafficking and reprisals is assessed by the host state, and is a matter of degree and judgement.

The cases cited have required the applicant to bring evidence of the potential for treatment contrary to Article 3 to occur in the receiving state, and so would any victim of trafficking or ‘consensually trafficked’ person who was seeking to rely on this Article. Previous Article 3 jurisprudence indicates that a wealth of evidence is necessary.¹²⁵⁴ An IOM study indicates that many trafficking organisations operate in

¹²⁴⁹ Explanatory Report to the CoE Trafficking Convention, n 248, para 184.

¹²⁵⁰ Crown Prosecution Service, n 318.

¹²⁵¹ *Ibid.*

¹²⁵² A string of cases clarifies here that the risk of ill-treatment may come from individuals or private groups as well as public authorities – see *HLR v France* [1997] 26 EHRR 29, *Ahmed v Austria* [1996] 24 EHRR 278.

¹²⁵³ See, for example, *Cruz-Varas v Sweden* (1992) 14 E.H.R.R. 1.

¹²⁵⁴ See, for example, *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413, *Vilvarajah and Others v The United Kingdom*. 45/1990/236/302-306.

the same countries of origin,¹²⁵⁵ which could go toward providing evidence for the potential for reprisals and re-trafficking.

There is even the potential for Article 2 ECHR to be invoked,¹²⁵⁶ as ill-treatment on return might be that a victim risked being killed by the traffickers, organised criminals operating in the area, or even by their own community. Evidence of threats to the trafficking victim or their family, or with respect to re-victimisation on return, would need to be brought forward, coupled with evidence that the receiving state was not able to adequately protect the victim from said threats or re-victimisation. Evidence of high rates of organised crime, high trafficking rates from the victim's origin state, and/or proof that the origin state is a known source country, could be cited.

The UN High Commissioner for Human Rights has expressed the view that:

... safe and, as far as possible, voluntary return must be at the core of any credible protection strategy for trafficked persons. A failure to [provide] for safe (and to the extent possible) voluntary return would amount to little more than an endorsement of the forced deportation and repatriation of trafficked persons. When trafficking occurs in the context of organised crime, such an endorsement presents an unacceptable safety risk to victims.¹²⁵⁷

The links between trafficking and organised crime are undeniable, therefore this is a very real concern. It must be borne in mind as well that as well as the substantive tests

¹²⁵⁵ International Organization for Migration, 'Changing Patterns and Trends of Trafficking in Persons in the Balkan Region' (2004) 105 http://publications.iom.int/bookstore/free/Changing_Patterns.pdf accessed 21 June 2011.

¹²⁵⁶ Links between Articles 2, 3 and 14 ECHR in terms of gender-based violence were made in the recent judgment in *Opuz v Turkey* [2009] (Application no. 33401/02).

¹²⁵⁷ United Nations General Assembly, 'Informal note by the United Nations High Commissioner for Human Rights' UN Doc. A/AC.254/16, para 20.

for refugee status and human rights protection being different, there are also important procedural differences. No procedure is specified in the Refugee Convention, and so it is up to States as to what to provide.¹²⁵⁸ The ECHR at least provides the right to an Article 13 remedy, and the Article 6 right to a fair trial may be relied upon where relevant. Furthermore, unlike all the other instruments considered, the ECHR provides an international mechanism of accountability, the ECtHR, to which individuals have access.

There is real difficulty in obtaining reliable statistics about this clandestine activity, as regards, for example, incidences of re-trafficking from certain regions, or evidence of reprisals from traffickers against other victims and/or their families. A victim may also be known to traffickers or trafficking networks who operate in that area, which could increase their chances of being re-trafficked or subject to threats and reprisals. Increased protection for victims will be necessary if they do qualify for a right to remain in the destination state in order to cooperate in criminal proceedings, as a result of the threat of reprisals from traffickers. An empirical study conducted in Rimini, Italy, whereby the head of the investigative office of *Polizia di Stato* in Rimini was interviewed, drew conclusions that verify this.¹²⁵⁹

The threat of reprisals against victims or their families is very real and constitutes one of the many issues which stem from and perpetuate the human trafficking phenomenon. Victims may agree to and begin to take part in the criminal process, and disengage at a later point due to fear of reprisals. Article 28 of the CoE Trafficking Convention calls for States to ‘adopt such legislative or other measures as may be necessary to provide effective and appropriate protection from potential retaliation or

¹²⁵⁸ Information on the UK Asylum Appeals Process can be found at: Information Centre about Asylum and Refugees (ICAR) ‘Asylum Appeals Process: Thematic Briefing prepared for the Independent Asylum Commission’ (September 2007) <<http://www.icar.org.uk/download/Appeals.pdf>> accessed 08 Dec 2009.

¹²⁵⁹ M Ventrella, n 1039, 82.

intimidation in particular during and after investigation and prosecution of perpetrators' as regards victim, witnesses, and other relevant persons. The Metropolitan Human Trafficking Team has recently been running an initiative along with the Poppy project in order to communicate sensitively with women who choose to disengage in order to gain a better understanding of their reasons for doing so,¹²⁶⁰ assumedly with a view to better meet the needs of victims who take part in criminal proceedings provide better support in order to encourage continued engagement.

With respect to the delicate balance between maintaining border integrity, immigration control, and adequate protection of victims, the public interest must lie primarily in providing for victims of trafficking and exploitation. When weighing up a balance of interests, one might consider the potential harm to the UK resulting from abuse of the system by those falsely claiming to be victims of trafficking, yet how problematic this will actually be remains to be seen,¹²⁶¹ particularly given that the residence permit is not automatically granted; there are many steps to the process.

If a trafficked victim has not been granted the one-year residence permit and is not in a position to apply for asylum, the next point of call is to consider whether they qualify for Humanitarian Protection. The qualifying criteria under paragraphs 339C and D of the Immigration Rules¹²⁶² states that Humanitarian Protection may be granted to an individual in the UK who is not a refugee if 'there are substantial grounds for believing that the person would face a real risk of suffering serious harm in the country of return (this refers to a country or territory listed in paragraph 8(1)(c) of Schedule 2 to

¹²⁶⁰ Home Office/Scottish Government, n 1140, 25.

¹²⁶¹ See, Alan Travis, n 1025. Damian Green reacted to this case by stating that the rights of victims have been strengthened, and that 'This very disturbing case shows why our approach to human trafficking has changed significantly since 2003' – see Home Office, 'Damian Green reacts to 'disturbing' trafficking case' 12 April 2011 <<http://www.homeoffice.gov.uk/media-centre/news/trafficking-case?version=1>> accessed 29 April 2011. Also see *SB (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002.

¹²⁶² Home Office/UK Border Agency, 'Immigration Rules', available at <<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>> accessed 10 April 2011.

the Immigration Act 1971); and the person cannot obtain effective protection from the authorities of that country (or will not because of the risk of suffering serious harm).¹²⁶³ ‘Serious harm’ in this context includes, most poignantly for victims of human trafficking, ‘torture or inhuman or degrading treatment or punishment in the country of return’,¹²⁶⁴ thereby mirroring the language of Article 3 ECHR. Humanitarian Protection once granted does not imply permanence - it will be revoked or not renewed once the Secretary of State is satisfied that the conditions which led to the granting of Humanitarian Protection in the first place have ceased to exist or improved to an acceptable degree so that protection is no longer needed.¹²⁶⁵

A final category under which a trafficked victim may be able to qualify for the right to remain is Discretionary Leave. This category comes into play where Humanitarian Protection is not available to an individual, simply because they are not in need of ‘protection’ *per se*. Discretionary leave may be granted in limited situations, such as where severe humanitarian conditions in the country of origin or an individual’s serious medical condition¹²⁶⁶ would render return contrary to Article 3. The threshold is, predictably, very high indeed, and severe mental stress as a result of having been trafficked and forced to work in the sex industry would be unlikely to suffice. Similarly, poor humanitarian conditions on return would have to be exceptionally severe for Discretionary Leave to be granted; therefore this category is only of use to a very small group of persons.

C. Consequences of not granting Asylum, Humanitarian Protection, or Discretionary Leave

¹²⁶³ UK Borders Agency, ‘Humanitarian Protection’, n 1050.

¹²⁶⁴ *Ibid.*

¹²⁶⁵ Home Office/UK Border Agency, ‘Immigration Rules’, n 1262.

¹²⁶⁶ See, *D v United Kingdom* [1997] 24 E.H.R.R. 423.

Delays in processing asylum claims are not uncommon, and such delays can result in the asylum seeker becoming destitute in the interim period. One would hope that this situation would not occur with respect to trafficked victims, given the strict deadlines in the identification procedure, i.e. 5 days from initial contact to decide whether 'reasonable grounds' to believe that an individual is a victim of trafficking exist, followed by the 45 day recovery and reflection period during which decisions about the future of the victim and any right to remain on their part will be made.

As well as Article 3 concerns, those who are awaiting a decision as regards a right to remain for any period of time may also have concerns which are capable of invoking Article 8, which includes the right to respect for physical or moral integrity.¹²⁶⁷ Egan observes that:

Given that the rights in the Convention apply to all persons within the jurisdiction of the contracting states, it could well be argued that a failure by any contracting state to provide adequate shelter to a trafficked person, to fail to meet his or her psychological or physical needs or to supply emergency medical assistance would be a failure to respect that person's physical or moral integrity.¹²⁶⁸

It would appear that, under the conditions of the CoE Trafficking Convention, support and medical assistance will at first be available to trafficked victims, although delays in procedures could raise issues here.

¹²⁶⁷ See, *X & Y v Netherlands* [1986] 8 E.H.R.R. 235.

¹²⁶⁸ S Egan, n 1048, 117.

Those trafficked victims who are not granted any right to remain beyond the 45 day recovery period due to the fact that they are neither useful to the criminal process or do not meet the criteria with respect to their ‘personal situation’ do not appear to be entitled to any support by the State. Trafficked persons often may not comply with the asylum system, and may ‘disappear’ soon after making asylum applications.¹²⁶⁹ Refusal of asylum, humanitarian protection or discretionary leave does not necessarily result in expulsion, although the individual may be expected to leave the UK. This opens up the potential for a proportion of trafficked victims to ‘fall through the cracks’ and become homeless or destitute – a problem which is not unknown as regards asylum seekers,¹²⁷⁰ and, according to the JCHR, the Government’s treatment of individuals may in some cases amount to inhuman and degrading treatment within the scope of Article 3 ECHR.¹²⁷¹ It is those trafficked victims who are not ‘useful’ to any criminal proceedings, and who do not qualify for any right to remain yet who do not choose to leave, who will suffer. Failed asylum seekers – some of whom will be genuine, but could not bring forward sufficient proof of their situation - slip through the net and become destitute. This is well known. Some of them will be trafficked victims, who have only sought help from NGOs and charities long after their asylum claim has failed, and are afraid to give basic information about themselves which would help them to obtain such support.¹²⁷²

¹²⁶⁹ Statement by Kate Smart, Director of Policy, Communications and Advocacy, Welsh Refugee Council, (personal communication, 3 March 2009).

¹²⁷⁰ See, *R (Limbuella, Tesema, Adam) v Secretary of State for the Home Department* (2005) UKHL 66 (2006) 1 A.C. 396, also see *Asylum seekers ‘living off hand-outs’*, BBC NEWS UK, 14 May 2009, available at <<http://news.bbc.co.uk/1/hi/uk/8049300.stm>> accessed 14 May 2009.

¹²⁷¹ Joint Committee on Human Rights Tenth Report, n 1186, 5.

¹²⁷² Kate Smart, Director of Policy, Communications and Advocacy, Welsh Refugee Council, (personal communication, 3 March 2009).

The Asylum Support Programme Inter-Agency Partnership (ASP)¹²⁷³ conducted a Destitution Tally in January 2008¹²⁷⁴ and a Second Destitution Tally in May 2009,¹²⁷⁵ and recognised a substantial¹²⁷⁶ number of asylum seekers – either refused or at some point in the asylum process. It is estimated that more than 40% of people using refugee support agencies are destitute.¹²⁷⁷ It is inevitable that there is the potential for the same to happen to trafficked persons or ‘consensually trafficked’ persons who are unable to bring the requisite proof of a need to remain and therefore do not qualify for any right to remain. A previous ASP representative states that, primarily, ‘ASP experience ... is not with those who have admitted that they have been trafficked and then not been granted leave, but with those that we suspect have been trafficked but who don't admit to it’.¹²⁷⁸ The ASP recognises an individual as destitute who is ‘currently with no access to benefits/BIA support/ income and are either street homeless or staying with friends only temporarily’.¹²⁷⁹ A less stringent definition is provided within s. 95(3) of the Immigration and Asylum Act, 1999.¹²⁸⁰

¹²⁷³ The Asylum Support Programme Inter-Agency Partnership (IAP) consists of five agencies: Refugee Council, Refugee Action, Migrant Helpline, Scottish Refugee Council and Welsh Refugee Council.

¹²⁷⁴ K Smart and S Fullegar ‘Refugee Agencies Policy Response, ‘The Destitution Tally: an indication of the extent of destitution among asylum seekers and refugees’, January 2008, 2
<http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/policy_responses/IAP_Destitution_Tally_Jan08.pdf> accessed 01 July 2011.

¹²⁷⁵ See, Kate Smart, Asylum Support Partnership Policy Report: The Second Destitution Tally, ‘An indication of the extent of destitution among asylum seeker, refused asylum seekers and refugees’, Policy and Development Advisor, May 2009
<http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/policy_responses/Second_Destitution_Tally.pdf> accessed 01 July 2011.

¹²⁷⁶ The first Destitution Tally recognised 1,524 destitute cases recorded in 4 weeks – see K Smart and S Fullegar, n 1274, 5.

¹²⁷⁷ Ibid, 2.

¹²⁷⁸ Kate Smart, Director of Policy, Communications and Advocacy, Welsh Refugee Council, (personal communication, 3 March 2009).

¹²⁷⁹ K Smart and S Fullegar, n 1274, 1.

¹²⁸⁰ Immigration and Asylum Act 1999, s 95(3) states that ‘... a person is destitute if – (a) he does not have adequate accommodation or any means of obtaining it (whether or not his essential living needs are met); or (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs...’

Although ‘A general duty to house the homeless or provide for the destitute cannot be spelled out of Article 3’,¹²⁸¹ inaction in the face of conditions which are deemed unacceptable can suffice with respect to the Article 3 standard.¹²⁸² In order for any claim to be made, destitution must be the result of State action as opposed to the individual’s own volition. Failed asylum seekers may also be denied access to NHS treatment.¹²⁸³ Phil Woolas, Border and Immigration Minister, gave the following response to the ASP report on destitute asylum seekers:

If someone has no right to be here they must return home. I do not believe the taxpayer should be funding those with no grounds to stay in the United Kingdom. Our policies ensure that no person who has sought protection need be destitute whilst they have a valid reason to be here – everyone is entitled to apply for support at every stage of the process. Our asylum process is fair and humane, with oversight by the independent courts, decisions made quicker than ever, and those in genuine need of protection offered refuge.¹²⁸⁴

And so, with respect to those trafficked persons who cannot satisfy the relevant criteria or bring forward the relevant proof that they are at risk on return of ill-treatment, we reach a stalemate, as is the case with failed asylum seekers divorced from a trafficking

¹²⁸¹ *Limbuella*, para. 7, also see *O’Rourke v United Kingdom* (Application No 39022/97 (unreported) 26 June 2001.

¹²⁸² See, *Napier v Scottish Ministers* (2004) Scot CS 100.

¹²⁸³ See, *R (on the application of A) v Secretary of State for Health* (2009) EWCA Civ 225.

¹²⁸⁴ UK Borders Agency ‘Asylum Support Partnership report on destitute asylum seekers – UK Border Agency Response’, (14 May 2009) <<http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/asp-report-ukba-response>> accessed 01 June 2009, link no longer live.

context. Failed asylum seekers may be eligible for section 4 or ‘hard case’ support, but only as long as one of the following conditions apply:¹²⁸⁵

- 1) S/he is taking all reasonable steps to leave the UK or place her/himself in a position in which s/he is able to leave the UK, or
- 2) S/he is unable to leave the UK because of a physical impediment to travel or for some other medical reason, or
- 3) S/he has applied for judicial review of the decision on his/her asylum claim and s/he has been granted permission to proceed, or
- 4) There is no viable route of return.

Once again, the conditions are – perhaps necessarily with respect to immigration control – very stringent. Evidence suggests that section 4 is not providing an adequate safety net for failed asylum seekers.¹²⁸⁶ Some destitute, failed asylum seekers remain because they genuinely feel that they will be subject to serious ill-treatment or that their lives will be threatened on return to their country of origin, but have not been able to meet the standard of proof required for a successful claim.¹²⁸⁷ This situation will undoubtedly occur with respect to a proportion of trafficked victims if they do not consider returning home to be ‘safe’. There seems no simple way around this real problem, short of adopting an all encompassing *Rimini*-style outright granting of a right to remain.¹²⁸⁸

¹²⁸⁵ See, Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005.

¹²⁸⁶ See, Kate Smart, Asylum Support Partnership Policy Report: The Second Destitution Tally, n 1275, 9.

¹²⁸⁷ See, for example, Welsh Refugee Council Press Release, ‘Down But Not Out: Refused Asylum Seekers in Wales Choose Years of Destitution Over Return to Their Unsafe Homelands’ <http://www.welshrefugeecouncil.org/documents/pressreleases/May_09/Press%20Release%20Destitution%20Tally.doc> accessed 24 Jan 2010, link no longer live.

¹²⁸⁸ See, M Ventrella, n 1039.

Some destitute trafficked victims who do not qualify for any right to remain yet who have chosen to remain in the destination state may simply end up being re-trafficked within or out of the destination state, or simply fall back into sex work independently, or perhaps become ‘pimped’, because they have nowhere else to turn. Some form of resolution for this unsatisfactory situation must be achieved.

With respect to destitute failed asylum seekers, the Asylum Support Partnership requests specific action or conditions to be taken or imposed by the UKBA.¹²⁸⁹ The suggestions made raise some interesting issues with respect to the potential for trafficked persons to become destitute, particularly the requested actions that States:

... explore solutions to destitution for those currently not entitled to support. Options made available should include provision of support, the right to work and regularisation of status, depending on circumstances; and

¹²⁸⁹ These are: 1) To accept the evidence that destitution does not lead refused asylum seekers to return to their country of origin; 2) To adopt the principle that destitution should not be a feature of the UK asylum system; 3) To explore solutions to destitution for those currently not entitled to support. Options made available should include provision of support, the right to work and regularisation of status, depending on circumstances; 4) To regularise the status of destitute refused asylum seekers from the most frequently occurring countries of origin; 5) To provide cash support without delay for all destitute refused asylum seekers with dependent children regardless of whether the children were born after the asylum application was refused (See Refugee Council ‘More Token Gestures’ London: Refugee Council (2008)); 6) To significantly improve processes to end destitution among those with entitlements to support, by implementing various measures. See K Smart, Asylum Support Partnership Policy Report: The Second Destitution Tally, ‘An indication of the extent of destitution among asylum seeker, refused asylum seekers and refugees’, Policy and Development Advisor, May 2009. With respect to the 6th point made above, ‘various measures’ include: Enable asylum claims to be lodged locally in order to avoid destitution among those who wish to claim asylum but cannot travel to the Asylum Screening Unit; Simplify procedures for applying for asylum support and Section 4 support, in particular, ensure that eligibility for support does not require evidence, which is impossible for applicants to provide; Set tight timescales for processing asylum support applications and Section 4 support applications and introduce management systems to ensure that these are met; Ensure that there are effective procedures for providing temporary emergency support and accommodation to counteract delays in processing support applications; Ensure that there are effective channels of communication for applicants and voluntary agencies to resolve queries about the handling of asylum support applications; Ensure seamless transition between support for asylum seekers and support for refused asylum seekers; Ensure seamless transition to mainstream benefits for those granted refugee status or leave to remain.

... regularise the status of destitute refused asylum seekers from the most frequently occurring countries of origin.¹²⁹⁰

As regards the first point above, destitution among asylum seekers and failed asylum seekers is a very real problem, and this body of destitute persons has the potential to be added to by trafficked persons who do not qualify for any right to remain, but who are afraid to return because of risk of ill-treatment. As regards the second point, there are known source countries for many trafficked victims,¹²⁹¹ therefore it must be recognised that victims from these countries are going to continue to appear in destination countries.

IX. Recommendations for Dealing with Trafficked, Smuggled and Exploited Persons

A. Formally Trafficked Persons

As regards formally trafficked persons, the main downfalls of the UK approach to implementation of the Council of Europe Trafficking Convention concern the flawed NRM, and the right of the victim to remain in the host state owing to their ‘personal situation.’ The statement by the UK Government that it was already largely compliant with Convention provisions¹²⁹² indicates that largely, everything that was needed was already in place, which explains a lack of clear implementing legislation. Therefore, the phrase ‘personal situation’ in this context has the potential to be (or perhaps already has been) interpreted stringently, even to the point that implementation of the Trafficking

¹²⁹⁰ See, K Smart, Asylum Support Partnership Policy Report: The Second Destitution Tally, n 1275.

¹²⁹¹ See, Chapter 1, Part I, section B, subsection ii.

¹²⁹² Home Office, n 294, 6.

Convention in this respect will lead to little or no change or improvement at all with respect to the treatment of trafficked victims in the UK.

Progress in terms of rest and recovery periods and temporary residence permits can logically follow one of three paths. Primarily, at a minimum, the recovery and reflection period should be longer for all victims of trafficking, once discovered. 30 days as a minimum standard (or even 45, as offered by the UK) is not an unfair starting point in terms of obtaining signatures and ratifications, but realistically it still does not offer a particularly sympathetic approach. Three months would potentially be a more appropriate standard, and the added time could prove invaluable in terms of securing co-operation by the victim in criminal proceedings against traffickers.

Secondly, a middle-of-the-road approach could see ratifying States, such as the UK, providing all victims of human trafficking with temporary residence permits, if so desired by victims. Such a model would allow for increased opportunity for recovery, and encourage participation in criminal proceedings.

Finally, the most accommodating proposal, and therefore most likely to be rejected in favour of immigration control and border integrity, would be to grant permanent residence permits for all. This would involve taking a *Rimini*-style approach further than in the country where it was pioneered.

Of these suggestions, the first and second are more workable and therefore preferable. In terms of any of the recommendations, there are potentially other gains to be made from allowing temporary residence. It is not impossible to conceive of victims coming forward in order to help initiate or aid with criminal proceedings against traffickers once they have been allowed to remain in the host state for a period of time (exceeding the minimum of 30 days stipulated by the Convention) and have had the

benefit of a period of recovery without an imminent expiry date stamped on their forehead.

Perhaps more pertinently, there is the issue of victim identification, the mechanism in the UK for which – as identified by the Anti Trafficking Monitoring Group¹²⁹³ - appears to be deficient. It does not seem unreasonable at this point to require a more encompassing system which does not ostensibly discriminate on the basis of origin State (of the victim),¹²⁹⁴ and also uses the widest feasible interpretation of the ‘means’ element of trafficking, which will be assessed through the current UKBA ‘indicators’ as to whether an individual has been trafficked or not.

B. The ‘Consensually Trafficked’

Beyond the reach of ordinary human rights law, can we ask for more for the ostensibly ‘consensually trafficked’? The fact that the trafficking definition states that ‘consent will be irrelevant where.... (the ‘means’ are used)’ still potentially leaves room for consideration of cases where there is consent or at least the appearance of consent due to lack of objective proof of coercion i.e., where consent may in fact be ‘relevant’. It was alluded to in the thesis¹²⁹⁵ that it may be possible to sketch out a *prima facie* case for the ‘consensually trafficked’ to have access to more favourable treatment than if they were simply categorised as economic migrants. The bases for making this argument are various, and will be discussed in the following section.

¹²⁹³ The Anti Trafficking Monitoring Group, n 306.

¹²⁹⁴ See, The Anti Trafficking Monitoring Group, n 306, where it was suggested that the lower identification statistics relating to third country nationals was not probative of discrimination, yet, a sceptical approach might consider that discrimination here is indeed a possibility and that border integrity is being placed above the concerns of the trafficked victim.

¹²⁹⁵ See, Chapter 2, conclusion.

i. The Consideration of Concessions for the ‘Consensually Trafficked’ – Can Such an Approach be Justified?

There are various rationales for considering the potential for concessions to be made by States as regards the ‘consensually trafficked’, who constitute body of persons whom can be viewed as being in a ‘special position’: that of ‘more than smuggled, but less than trafficked’. Primarily, it is necessary to recognise the role that economic hardship clearly plays in situations of migration and trafficking, and this therefore cannot be ignored – many smuggled or trafficked persons may have been ‘pushed’ to search out migration channels through severe economic need, or because the position of vulnerability resulting from said economic need has been abused by the trafficker.¹²⁹⁶

Secondly, the issue that – as was demonstrated in Chapter 3 – the realities of the coercion/consent spectrum in a trafficking context are that determinations of consent/lack thereof (and therefore status as ‘trafficked’ or not) as regards each putative victim can be difficult and may not always be correct – there will be genuine ‘hard cases’ and there will be instances where those charged with identifying victims simply get it wrong and incorrectly identify an individual as ‘not trafficked’ when in reality she has been – misidentification may occur due to various reasons - ineffective procedures,¹²⁹⁷ preconceptions about the amount of ‘voluntary’ women,¹²⁹⁸ potential discrimination on the basis of nationality (particularly in terms of third country nationals),¹²⁹⁹ and UKBA quotas which have to be met.

¹²⁹⁶ As discussed in Chapter 2, Part III, section B, subsection v.

¹²⁹⁷ As evidenced by the *O* and *LM* cases discussed above – see Part VI, section A and Part VII of this Chapter.

¹²⁹⁸ As appears to be the case following research conducted in Birmingham, which identified that police there have preconceptions as to the level of ‘complicity’ of the ‘victims’ - See Statement by Sarah Garrat (Personal Communication on 14 February 2008, following research conducted by the Asylum and Immigration Research Team, Birmingham, into the treatment of victims of human trafficking once discovered in the destination state).

¹²⁹⁹ See, The Anti Trafficking Monitoring Group, n 306.

Finally, that the conditions of ‘exploitation’ experienced by those identified as ‘consensually trafficked’ individuals (i.e. those who fall short/appear to fall short of the ‘means’ threshold provided within the trafficking definition) may in reality be comparable to those experienced by formally trafficked persons. As noted by the Anti Trafficking Monitoring Group:

... one of the key problems is the incorrect application of the trafficking definition when assessing a victim. Too often the authorities fail to apply the (CoE Trafficking) Convention and do not define as victims all those who were subject to the crime of trafficking. Instead, the system creates a narrow, legally dubious, interpretation of a victim, and attaches conditions that have been proven to impede identification, and have also been found to undermine prosecution in some cases. For example, in numerous cases reviewed by the research, the authorities concluded that as the person concerned agreed to come to the UK for work, they could not have been trafficked despite the fact that the deception and abuse should, according to the Convention, render such consent irrelevant.¹³⁰⁰

This research indicates that application of the current UK system is indeed deficient, despite broadly incorporating the standards laid down and obligations imposed by the CoE Trafficking Convention. It also compounds the possibility that there are a proportion of misidentified victims who will have needs as regards support and assistance yet will not have access to it.

¹³⁰⁰ See, The Anti Trafficking Monitoring Group, n 306, 12.

Furthermore, there is the issue of those who fall below the standards of coercion required by the trafficking definition – either through misidentification, or through genuinely (or ostensibly) not having been subject to a comparable level of coercion as a formally identified trafficked person. Jordan notes that ‘[e]ven if a person agrees to work in very bad conditions, for very little money, with very little freedom, he would still be a victim of trafficking if the trafficker intended to hold him in debt bondage, involuntary or forced conditions.’¹³⁰¹ But, what if they did not hold her in debt bondage, or similar? These ‘very bad conditions’ alluded to still exist. Should we really, on an international legal level, deem this acceptable? True autonomy in a sex work context is the ability ‘to say that she alone can define the nature of her relationships with others-except to the extent that the state is prepared to exercise its coercive regulatory authority by forcing her into, or redefining, such relationships.’¹³⁰² The situation of consensual exploitation resulting from facilitated migration may constitute such a situation – there may be, in order to achieve full protection of the exploited and vulnerable, a need for the State to ‘redefine’ such relationships and deal with the exploited ‘victim’ accordingly.

The figures relating to the identification of individuals discovered in the UK and identified as ‘trafficked’ vary significantly according to where the individual originates from – the Anti Trafficking Monitoring Group Report has proven this,¹³⁰³ as it transpired through the Report’s findings that a much higher percentage of UK nationals were positively identified as trafficked (in the UK) when compared to, in particular, third-country nationals discovered in the UK.¹³⁰⁴ The Report goes on to state that:

¹³⁰¹ A D Jordan, n 450, 11.

¹³⁰² P H Schuck, n 385, 901.

¹³⁰³ See, The Anti Trafficking Monitoring Group, n 306, 9.

¹³⁰⁴ Ibid.

This research suggests the UK is creating a ‘hierarchy’ of victims, and allows, intentionally or not, discrimination against certain categories of victims, such as those who were trafficked before the Convention came into force (but identified after), or those coming from particular countries or regions. The research indicates that the system fails to treat those who have been trafficked as victims of crime and places too much emphasis on judging them, rather than bringing traffickers to justice.¹³⁰⁵

States which have no wish to tolerate the continued presence on their territory of those they perceive to be economic migrants, nor to have any restrictions placed on their power of peremptory removal, have no incentive to be generous in identifying as putative victims those not formally victims of trafficking. These kinds of policies, which are common, do not bode well for the protection of some of those women who are certainly in need of it.

In assessing the reasons not to opt into the EU 2011 Directive, Damian Green stated that:

... the European Parliament might propose changes to the draft Directive which could affect UK interests, such as expanding ... *the support to be provided to individuals not yet identified as victims of trafficking*.¹³⁰⁶

(Emphasis added)

¹³⁰⁵ Ibid, 13.

¹³⁰⁶ House of Commons European Scrutiny Committee, Twenty-fourth Report of Session 2010 – 11 (Ordered by the House of Commons to be printed on 30 March 2011) at 3.7 <<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-xxii/428xxii.pdf>> accessed 01 June 2011.

Clearly, supporting those who ostensibly do not merit bespoke assistance is a somewhat touchy subject with the UK Government. Nonetheless, the ostensibly ‘consensually trafficked’ individuals clearly exist – the consensually smuggled and exploited sex worker, or the unfortunate who displays insufficient ‘indicators’ to be identified as trafficked, even though she may have been severely coerced. In fact, it has been reported by NGOs in Europe that:

... traffickers use the work permits to bring foreign women into the Dutch prostitution industry, masking the fact that women have been trafficked, by coaching them to describe themselves as independent “migrant sex workers.”¹³⁰⁷

Bakirci notes that trafficked persons are, first and foremost, victims and witnesses¹³⁰⁸ – victims of exploitation and witnesses of the criminal activity which comprises the trafficking process. There are ‘workers’, trafficked victims, and the ‘consensually trafficked’ and exploited individuals who come somewhere in between. Those who are exploited through the sheer awfulness of the conditions of work – albeit to which they may have ostensibly agreed – are still victims and witnesses. Unfortunately, but realistically, they may also be criminals, particularly in terms of the voluntary breach of immigration laws.

The evidence considered throughout this section and indeed this thesis point toward deficiencies in the identification system and possible discriminatory treatment of putative trafficked victims. Consequently, it seems justifiable to consider specifically what concessions may be considered for the ‘consensually trafficked.’

¹³⁰⁷ J Raymond, n 1163, 315.

¹³⁰⁸ K Bakirci, n 879, 165.

ii. What Concessions Can Justifiably be Considered?

States have a clear right to criminalise and to deport those non-nationals who unlawfully enter their territories. However, as the CPS Protocols show,¹³⁰⁹ the power to prosecute¹³¹⁰ may be exercised under discretion and some discretionary factors affect those who are the victims of trafficking. It is suggested here that those discretions ought to be extended from beyond ‘trafficked’ women - it is, after all, ‘sound utilitarian theory to confine the imposition of sanctions to circumstances where they will secure some benefit.’¹³¹¹ This is not to argue for a policy of non-prosecution, but for a policy for prosecutorial discretion with respect to the ‘consensually trafficked’, to be considered on a case-by-case basis. Any reason for doing so is in answer to the humanitarian need of those engaged in the sex industry and takes into account the considerable difficulties of the definition of ‘trafficking’ and the evidential problems with respect to certain of its elements. It is conceded, though, that governments might not be easily persuaded to give the benefit of any doubt to a group of women, some of whom almost certainly will be ‘mere’ economic migrants.

Domestic case law underpins this point – in *Kibunyi*,¹³¹² the appellant had initially been sentenced to 12 months imprisonment for possession of false identity documents. It was argued for the appellant that ‘even if she were outside the trafficking definition, the circumstances as described were so close to trafficking as to constitute mitigation,

¹³⁰⁹ See, Crown Prosecution Service, n 318.

¹³¹⁰ For offences committed as a result of having been trafficked, such as immigration offences – for example - possession of a forged passport or documents under section 5 of the Forgery and Counterfeiting Act 1981. The CPS guidance states that ‘Where there is clear evidence that the suspect has a credible defence of duress, the case should be discontinued on evidential grounds’ indicating that there should be a causal link between the victim’s offence and the action (of, say coercion) of the trafficker. See Crown Prosecution Service, n 318.

¹³¹¹ A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, (Hart Publishing, 2010), 725.

¹³¹² *R v Kibunyi (Jacinta)* [2009] EWCA Crim 9; (2009) 173 C.L. & J. 94.

so substantial that it causes her case to fall outside the conventional sentencing structure.’¹³¹³ This ground of appeal was dismissed,¹³¹⁴ as the appellant’s ‘indicators’ (as to trafficking for exploitation) fell short of the ‘exploitation’ threshold which forms part of the trafficking definition, and on that basis that she had therefore effectively agreed to commission of the immigration offence.

The recently released Project Acumen Report¹³¹⁵ includes an analytical section which focuses on 17,000 migrant women working in the UK off-street sex sector. Their findings clearly identify a 3-tier diaspora.¹³¹⁶ Of the 17,000 subjects, the report identifies 2,600 as trafficked. This body of persons is identified by the Report as ‘highly vulnerable’, and states that ‘[a]lthough most are not subject to violence themselves, many are debt-bonded and strictly controlled through threats of violence to family members.’¹³¹⁷ The second category – consisting of 9,600 women – are considered to be ‘vulnerable’. The Report notes that:

Although they have elements of vulnerability to trafficking, most are likely to fall short of the trafficking threshold. They tend to have day to day control over their activities, and although they may have large debts, they generally do not consider themselves to be debt-bonded.¹³¹⁸

The final category consists of 5,500 who are considered to meet the ‘trafficked’ or ‘vulnerable’ thresholds.¹³¹⁹ The Report notes that there is no ‘single story’ as regards

¹³¹³ *R v Kibunyi (Jacinta)* [2009] EWCA Crim 9; (2009) 173 C.L. & J. 94, para 14.

¹³¹⁴ In making this decision the court applied *R v Kolawole (David Oladotun)* [2004] EWCA Crim 3047, [2005] 2 Cr. App. R. (S.) 14.

¹³¹⁵ Project Acumen, n 92.

¹³¹⁶ *Ibid.*, 5.

¹³¹⁷ *Ibid.*

¹³¹⁸ *Ibid.*

¹³¹⁹ The Report states that ‘[t]hese women were aware before leaving their home country that they would likely become involved in prostitution, live and work largely independently of third-party influence, keep

those involved in sex work – ‘[s]ome are subject to kidnap, rape and imprisonment, some enter the sector independently and are effectively self-employed within it, and others fit somewhere between these extremes.’¹³²⁰ It is those who ‘fit somewhere between’ who are the chief concern of this thesis.

It has been discussed throughout this Chapter that not only are there bespoke provisions for formally identified trafficked victims resulting from obligations placed on States by the anti-trafficking regime, but there are also options for international protection which are available to any human being in need of protection. This is the basis of a humanitarian and human rights-orientated regime which respects the dignity of the human. As noted earlier,¹³²¹ those who fall short of, say, the strict requirements of the Refugee Convention criteria have recourse to various discretionary remedial concessions on humanitarian grounds, including exceptional rights to remain in the territory. These concessions acknowledge the potential for genuine ‘hard cases’, which discretionary measures mitigate, to a degree, without undermining the integrity and aims of the refugee regime.

A comparable humanitarian response to marginal or questionable cases of trafficked women, even of women who have not formally been trafficked but who have been identified as ‘exploited’ and/or ‘vulnerable’ to trafficking might be appropriate, in light of the circumstances in which these women are recruited into the trade in humans and the severity of the conditions in which they find themselves in the destination States. Consequently, it is submitted here that individual Governments may be able to adopt a more encompassing approach. This could include, for example, a policy parallel to a humanitarian right to remain which complements the international anti-trafficking

a significant proportion of the money they earn and are not subject to debt-bondage or threats of violence.’ See Project Acumen, n 92, 5.

¹³²⁰ Ibid, 5.

¹³²¹ See, Part VIII, section B, above.

legal regime, as this would indeed constitute a response to the trafficking phenomenon which must be seen within context and addressed from a perspective which not only aims to criminalise the traffickers, but also to protect their victims. This parallel policy should include access – assessed on a case by case basis – to the bespoke rights currently available to formally trafficked persons, including the granting of rest and recovery periods and residence permits owing to the ‘personal situation’ of the ‘consensually trafficked’ woman.

In context, the thesis has established that the definition of human trafficking is technical and may be mechanical in its application. The unclear (or basic lack of) implementing legislation in the UK further muddies the waters, as does the use of ‘indicators’ by those charged with identifying victims,¹³²² such as the requirements of ostensible signs of physical or psychological harm or debt bondage, fear or anxiety, and as regards the testimony of the potential victim in terms of whether elements of coercion, deception or threat are reported.

It has been discussed in Chapter 3 that an ostensible consent does not necessarily equate to a genuine valid consent, and also that a valid consent can be difficult to establish. This, coupled with the clandestine nature of trafficking and exploitative activity having the potential to mask the coercive realities of some cases, paves the way for genuine consideration of adoption of policy which deals with borderline cases or where the individual is identified as having been exploited, or as ‘vulnerable’ to trafficking, on a case by case basis and which assesses the needs of those involved.

¹³²² Such as evidence of physical or psychological harm or debt bondage, signs of fear or anxiety, and whether the testimony of the potential victim includes elements of coercion, deception or threat. See Home Office/UK Borders Agency, ‘Enforcement Instructions and Guidance, Chapter 9 – Identifying Victims of Trafficking’ <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectiona/cha/pter9?view=Binary>> accessed 3 April 2009.

At the ‘strong’ end, this may go so far as to, in some cases, protect against peremptory removal, particularly where there is, say, the potential for re-trafficking, or where the individual is clearly vulnerable and in need of assistance, such as psychological or basic health assistance. Where the individual case is borderline or unsure, a preferable position to adopt is that of a presumption of ‘trafficked’ as opposed to ‘not trafficked’, and at least minimum concessions as regards health treatment or counselling be considered for the ‘victim’ prior to any consideration of peremptory removal. This should not be interpreted as an open-door policy to consensual economic migrant sex workers, but instead as something more than simply a nod to the notion that there is not a clean line to be drawn – evidentially or factually – between the formally trafficked and ‘consensually trafficked’ individual.

In its Tenth Report, the JCHR noted that ‘[m]any asylum seekers and refused asylum seekers are vulnerable individuals who are reliant on protection and support from others.’¹³²³ In the way that the system dealing with refused applicants is deficient, similarly this may be the case with ‘refused’ trafficked victims unless positive State action is taken to make some concessions where necessary and appropriate. Those who are not formally identified as ‘trafficked’ yet who have been subjected to awful conditions of work or who are unable to leave the UK for some reason (such as fear of reprisals from traffickers or smugglers) are the ones who will suffer.

At the ‘weak’ end, it may be desirable to amend or add to the anti-trafficking regime, at least to provide for States to consider offering more favourable treatment to those who are borderline cases or are not formally identified as trafficked, yet who are still in need of some form of assistance or support, using tentative language such as that

¹³²³ Joint Committee on Human Rights Tenth Report, n 1186, 5.

used within the Trafficking Protocol as regards actual trafficked victims.¹³²⁴ At the ‘hard’ end, the relevant instruments could be amended to include an obligation to provide a system – potentially skeletal – which assesses the individual needs of any migrant sex worker who appears to be vulnerable and who may (ostensibly or genuinely) fall short of the scope of the trafficking definition.

Of course, there is an issue as regards measuring a standard of ‘exploitation’¹³²⁵ against accepted labour standards while the UK does not recognise sex work as a ‘legitimate’ (i.e. formally legalised and regulated) form of labour, yet this does not have to be an absolute barrier to the application of these standards. Victim protection of the ‘consenting’ trafficked victims currently has to be drawn from human rights, labour rights or a new, bespoke system. Since in the UK sex work is not legally regulated and ‘legitimised’, a bespoke system for dealing with exploited yet ostensibly consenting sex trafficking victims seems the preferable way to proceed. According to such a system, the needs of the individual victim – who can legitimately be referred to as a ‘victim’ due to the exploitation suffered – could be assessed on a case-by-case basis which realistically takes into account the fact that coercion and sexual exploitation are very real problems, nationally and globally, which may be masked by the appearance of consent or the incorrect application of victim identification and assistance procedures.

Conclusion

The flaws identified in the current victim identification system highlight the need for training of those who may come across victims of trafficking, such as immigration authorities and legal representatives. The UK Borders Agency provides guidance on

¹³²⁴ I.e. that State may ‘consider’ implementing more favourable provisions. See, Article 6(3), CoE Trafficking Convention, n 9.

¹³²⁵ Such as that suggested in Chapter 3, Part VI, section B.

identifying victims of trafficking for sexual exploitation, which states that ‘During operations, enquiries into whether a person is a victim of trafficking should take precedence over enquiries into the individual’s immigration status.’¹³²⁶ Adequate victim protection requires that putative victim status be accepted primarily at face value, with sanctions or prosecution being pursued later if victim status is not accorded. Immediate detention is likely to be inappropriate for potential trafficked victims.

Particular reference was made in the *O* judgment to paragraph 134 of the Twenty-Sixth Report of the JCHR, which states that that ‘the main criticism levelled against the Government’s approach by witnesses to our inquiry is that the first arm of the “twin-track” approach, the protection of victims, has not been promoted and implemented effectively.’¹³²⁷ In order for victims of human trafficking to have access to the rights to which they are entitled under the CoE Trafficking Convention such as a period for recovery or temporary residence rights, then clear implementing legislation may be necessary which clarifies that victims of trafficking have these specific rights in English law which are in accordance with what is required by the CoE Trafficking Convention.

The importance of correct and timely identification of victims is clear, so that the process of recovery might begin as soon as is possible. The focus of British policy has been on criminalisation and prosecution of traffickers for far too long, with victim protection often falling well short of any acceptable minimum standard. The CoE Trafficking Convention represents a welcome – and long overdue - step in the right direction, and although it has not currently been ratified by a large number of countries, those who have ratified it must now provide the minimum standard of treatment to victims of trafficking who are discovered in their territory, which includes identification of victims of human trafficking at the earliest possible juncture. Neither

¹³²⁶ Home Office/UK Borders Agency, ‘Enforcement Instructions and Guidance, Chapter 9 – Identifying Victims of Trafficking’ 9.1.

¹³²⁷ Joint Committee on Human Rights Twenty-Sixth Report, n 31, para 134.

implementation of the CoE Trafficking Convention nor reliance on the Human Rights Act can do all that is required to provide an effective regime for the protection of victims of human trafficking, nor can the matter be left entirely to the courts.

Procedures allowing for correct and timely identification of victims of human trafficking are key, but beyond that there is a host of issues to be dealt with. Trafficking victims and victims of serious exploitation (even in the face of what is, or may appear to be, consent) are a highly vulnerable body of persons, as are asylum seekers and others in need of assistance, support, and protection. They need to be given an appropriate level of treatment and care, as necessary, and repatriation while trafficking activity and organised crime is still rife in the country or specific area of origin serves little purpose other than the immediate immigration control interests of the destination State.

Governments will have to tread very carefully indeed when trying to repatriate women. It is clear from the considerations made during the determinations of asylum cases that conditions in the country of origin can change, and that this is considered by the courts – wars end, political shifts occur, safe areas emerge and a level of ‘peace’ can sometimes be achieved, thereby facilitating the return of the individual who has claimed asylum. Similarly, considerations will be made in determining the fate of identified trafficked victims – as long as trafficking and organised crime continues in the origin state, there will be risks on return of varying degree to the trafficked victim, including to those who may have ‘consented’ to the process.

Trafficking is arguably like slavery, servitude and about profit, and less the result of conflict and persecution. At the extreme, some of these trafficked victims face risks of slavery or ill treatment on return, and the State has to consider this. Victims should not have to be shoehorned into a pre-existing and therefore inappropriate legal

framework which was not designed to suit their needs. In stating that everything that is needed is already in place, this is what the UK may have done.

The *Rimini* method, has not, as Ventrella asserts, ‘defeated’ human trafficking.¹³²⁸ It has simply provided safe havens for victims who have been trafficked, yet such victims will continue to appear unless a multi-pronged, global attack on this abhorrent activity continues and succeeds. Victim protection is the closest thing to a ‘cure’, but with effective prevention, there is no need for cure. The demand for sold sex will not go away simply because victims are granted leave to remain, rights to work etc in the destination state. So long as the criminal law aspects of the regime do not eliminate trafficking, it will be necessary that the victim protection aspects are taken equally seriously as the criminalisation ones - so long as there is trafficking, there will be victims.

In order to adopt a more accommodating approach to treatment and protection of victims of human trafficking, it is necessary to weigh up the public interest concerns of immigration control versus giving immediate protection and sympathetic treatment to victims, and protecting victims from ill-treatment on return to the destination state, regardless of whether they can show sufficient evidence to be granted some form of leave to remain in the UK. Adopting a *Rimini*-style method is extreme in that it does not depend upon considering the merits of individual cases, yet it is evident that a more accommodating approach than that currently envisaged and in place may be needed - therefore, some sort of balance must be struck.

On the face of it, consent will render trafficked victims outside of the protective confines of the CoE Trafficking Convention. However, if determinations as to whether one is a possible victim of trafficking are indeed made rapidly (within 5 days, as

¹³²⁸ M Ventrella, n 1039, 64.

envisaged) there is the possibility that even those who may have consented or whose status is unsure may at least initially fall within the ‘possible trafficked victim’ category, although certain sources cited throughout this Chapter clearly indicate that the opposite may indeed be the case,¹³²⁹ and it is a possibility which increases in ‘grey area’ cases. In any event, they should fall within this category, until there is sufficient proof to indicate that they are truly irregular migrants, rather than a ‘victim’, whether formally trafficked or a ‘consensually trafficked’ victim.

Case law examples indicate how serious the ramifications of misidentification or late identification can be of victims of human trafficking can be,¹³³⁰ and the need for a legal and administrative framework which offers protection to victims or those who might become victims.¹³³¹ The Council of Europe Convention on Action against Trafficking in Human Beings defines a ‘victim’ in a trafficking context as ‘... any natural person who is subject to trafficking in human beings as defined in this article.’¹³³² The Oxford English Dictionary offers a range of definitions as to what constitutes a ‘victim’ including that of ‘One who perishes or suffers in health, etc., from some enterprise or pursuit voluntarily undertaken,’¹³³³ thereby suggesting that in a general sense, harm – such as exploitation – which results from even a consensual situation, does not preclude an individual being attributed some form of victim status and catered for accordingly.

Beyond the formally trafficked, it has been argued that concessions may be made for the ‘consensually trafficked’ – this is not entirely unprincipled in the face of serious sexual exploitation which takes place on a global scale on a daily basis, and the fact that

¹³²⁹ See, for example The Anti Trafficking Monitoring Group, n 306.

¹³³⁰ See, *R v O* [2008] EWCA Crim 2835, and *R v LM* [2010] EWCA Crim 2327; [2011] 1 Cr. App. R. 12; [2011] Crim. L.R. 425, and J Elliott n 1117.

¹³³¹ *Rantsev v. Cyprus and Russia* [2010] (application no. 25965/04).

¹³³² Article 4.

¹³³³ Oxford English Dictionary <<http://www.oed.com/>> accessed 27 June 2011.

the question of consent/lack thereof will continue to negatively affect not only those who have been consensually transported and exploited, but also those who have in fact been formally trafficked.

It is necessary to make an explicit acknowledgement that arguing for further protection of women who fall outside the present trafficking frameworks (and may include some women who are simply economic migrants) is not likely to be a politically favourable cause at a time when many governments are trying to impose limits on entry and residence of non-nationals. The question is political because either we need new agreements (or unilateral national legislation) or the exercise of administrative discretions in favour of women in the 'grey area', neither of which may be forthcoming. However, the courts may not be wholly without the means to help – a more relaxed approach to the meaning of consent might be possible, perhaps; human rights obligations might be interpreted strictly, and so on, and ultimately, the political tide might turn.

Conclusion

‘[Th]e problem of consent is unlikely to vanish whatever means are adopted to deal with it.’¹³³⁴

This research set out to investigate the legal nature of human trafficking, and it rapidly recognised the centrality of consent in the trafficking of women for sexual exploitation. Coercion and lack of consent are the essential elements to distinguish the trafficking of people from people smuggling. Once trafficking is established, a lot follows - the criminality of the trafficker, the obligation of State to cooperate in anti-trafficking measures and the identification of victims of trafficking and specific measures for their protection, as a necessary condition for determining who are the victims of trafficking and how they should be treated. ‘Consent’, though, turns out to be a far from simple notion. The problematic nature of the inclusion of a ‘means’ or ‘lack of consent’ element of the definition of human trafficking is analysed and criticised in the thesis, firstly on the basis that consent is an inherently problematic and mutable concept, and secondly because inclusion of this element renders identification of trafficked victims difficult and creates a loophole in the protections offered to those who are transported and exploited.

The following sections (I – IV) will consider and discuss the conclusions drawn throughout each Chapter of the thesis, to be followed by an overarching conclusion (Part V) which draws together and consolidates ‘the thesis’.

¹³³⁴ J Tempkin, *Rape and the Legal Process*, 2nd Ed. (Oxford 2002) 176.

I. The Contextual and Legal Background

Chapter 1 provides the contextual and legal background to set the scene for the remaining three substantive Chapters of the thesis. As a necessary starting point, Chapter 1 opens with consideration of the factors underlying the continuance of the transnational trade in women for sexual exploitation. This involved recognition of the point that, since a proportion of trafficking at least begins on a voluntary footing, the ‘push’ factors are the same as regards economic migrants, victims of human trafficking, and those who have entered a situation of ‘facilitated migration for the purpose of exploitation’, i.e. the ‘consensually trafficked’.

The ‘push’ factors identified highlight the fact that voluntary and involuntary transportation into working in the sex sector takes place against a complex backdrop of socio-economic factors which underpin and perpetuate the global sex trade. The inquiry conducted in Chapter 1 provided a snapshot of these ‘push’ factors and other relevant issues such as the involvement of organised crime, in order to illustrate the contextual nature of smuggling and trafficking. Poverty, lack of opportunity, unemployment, and gender discrimination feature highly in discourse surrounding migration push factors, and therefore play a central role in the continuance of the migration and trafficking phenomenon. These factors work together to render women particularly vulnerable to the exploitative transnational sex trade market.

The transnational aspect of human trafficking and the need to combat the spectrum of exploitative activities that it involves requires a comprehensive regime which targets traffickers and provides for victims. This was outlined in Chapter 1, which identified

the central transnational criminal law and human rights anti-trafficking regime at a UN, Council of Europe, and European Union level, and the corresponding obligations imposed upon the State as regards the criminalisation of trafficking offences, provision for prosecution and punishment, monitoring mechanisms and preventative measures such as demand sanctions.¹³³⁵

Furthermore, and central to the thesis, the provisions relating to providing support, assistance and protection to victims are outlined in Chapter 1. These include the ordinary human rights obligations addressed to States as regards any individual (as opposed to solely trafficked persons) and also a brief outline of the bespoke provisions of the anti-trafficking regime which are directly applicable and available to solely victims of human trafficking. As was further discussed in Chapter 4, there is some variation as regards State obligations between the three main instruments considered in this thesis, and as discussed throughout Chapters 3 and 4, the ‘lack of consent’ requirement of human trafficking can render problematic the identification (and therefore the subsequent treatment) of victims.

The final Part of Chapter 1 outlined the basic conditions for a valid consent; that consent must be freely given; that it must be informed; that the consenting agent must have the capacity to consent; and that the timing of consent is a relevant factor. This Part of the Chapter explored and drew upon the meaning, role and effect of consent in different areas of the law, and drew conclusions that there are differences as to the

¹³³⁵ As regards demand sanctions, the corresponding UK provision imposes an evidential burden comparable to that located in the trafficking definition thereby creating the same problem of identifying who is, and who is not, a ‘victim’ in this context. Neither criminalisation nor regulation are particularly likely to reduce the demand for sexual services, yet opting for regulation ought to reduce exploitative conditions and the coercion/lack of consent issue as regards trafficked women may also be reduced, although it seems realistic to conclude that coercion/lack of consent will continue to play a part in the trafficking of women for sexual exploitation, and in turn traffickers and migration facilitators will play a part in meeting this demand. See, for discussion of these issues: J Elliott, n 275; Home Office, ‘Tackling the Demand for Prostitution: A Review’ (November 2008): G Ekberg, n 270; V Clausen, ‘An Assessment of Gunilla Ekberg’s account of Swedish prostitution policy’, (January 2007) <http://www.sexworkeurope.org/site/images/PDFs/ekberg_kritik.pdf> accessed 03 July 2008, link no longer live.

effect of the giving of consent in different situations, and that a higher standard of free and informed consent may be required where the act consented to concerns physical integrity and close personal relationships as opposed to more ‘arms length’ commercial transactions. This analysis served to introduce and define the notion of consent, which is central to this thesis, at a sufficiently early stage in order to lay the foundations for specific analysis of the role of consent in human trafficking in Chapter 3, and to draw upon the different sources of the law relating to discussed in this Part of Chapter 1 in order to establish and justify why some are more persuasive to the argument maintained throughout the latter part of the thesis.

II. Human Trafficking: The Evolution of an International Legal Definition

As noted in the Introduction to the thesis,¹³³⁶ as with all transnational criminal projects it is necessary to begin with a comprehensive definition of the activity to be targeted. Chapter 2 analyses the elements of the trafficking definition provided within the instruments considered throughout the thesis,¹³³⁷ in terms of it being a tripartite process comprising of an ‘action’, ‘means’ and ‘purpose’.

The ‘action’, of recruitment, transportation etc is the least problematic aspect of the definition and is sufficient to cover all methods of – for want of a better word – obtaining the putative victim. It is established that although theoretically the international instruments considered could cover ‘internal’ trafficking,¹³³⁸ this may

¹³³⁶ See, Introduction, Part III.

¹³³⁷ The UN Trafficking Protocol, the CoE Trafficking Convention, and the 2011 EU Directive.

¹³³⁸ Bearing in mind the requirement of the UN Trafficking Protocol that the offences must be ‘transnational in nature’.

frequently be dealt with according to national laws. Furthermore, it is established that border-crossing need not be illicit.¹³³⁹

The ‘means’ aspect is the more recent and most controversial element of the definition – a wide range is envisaged, from direct physical force to psychological coercion, and the scope of the ‘means’ elements – which are not always wholly separable - are analysed. This element, which was not present in the previous relevant anti-trafficking instrument,¹³⁴⁰ is problematic on the basis that the many and varied ‘means’ envisaged are open to varying interpretations, and it may at times be difficult to tell at which point on a spectrum of consent or coercion (or some other ‘means’) a particular case may fall.¹³⁴¹

The ‘means’ Part of Chapter 2 considers in some detail the role of economic ‘push’ factors, as are outlined in Chapter 1, in terms of their influence on the decision to migrate, and the potential for recognition of ‘economic coercion of circumstances’ as a ‘means’ element is discussed. Women leave because of the pressure of economic circumstances – either because of the opportunity to economically better themselves or because their home situation is sufficiently dire to leave them no effective choice. This therefore places them at various points on a spectrum of economic coercion. The degree of severity of their economic situation renders it something from influential to severely coercive. Ultimately, it is conceded that States would not respond positively to such a departure from the norm, the orthodox criminal law position being that any form of coercion would necessarily have to come directly from the trafficker. Nonetheless, the role of economic factors in the decision to enter a smuggling/trafficking situation cannot be underestimated and clearly has a role to play in the consent/coercion debate,

¹³³⁹ To have such a requirement in place would be to render the legal instruments considered inapplicable to, for example, those trafficked within the EU.

¹³⁴⁰ I.e. the 1949 Trafficking Convention.

¹³⁴¹ Where no such objective proof (of, say, coercion) is evident, this renders correct victim identification inherently problematic. The issue of victim identification was discussed in Chapter 4, Part VI.

and accordingly traffickers/migration facilitators taking advantage of the most economically marginalised section of society in the origin States – that of women – may be capable of constituting ‘abuse of a position of vulnerability’ as contained within the trafficking definition.

As regards the third element of the trafficking definition, the thesis clearly highlights that the central ‘purpose’ aspect of this phenomenon is ‘exploitation’, with the definition envisaging a non-exhaustive range of possible activities which are included, at a minimum, within the scope of ‘exploitation’, such as slavery, forced labour, and the exploitation of prostitution. A specific section on the interrelation of treaty obligations justifies the use of International Human Rights law instruments to elucidate the meanings of the terms used where possible.¹³⁴²

Sexual exploitation, prostitution in particular, is the central focus of this thesis, and the discussion in Chapter 2 recognises that these exploitative activities are frequently treated as - but are not necessarily – separable: sex work can be viewed through a labour paradigm¹³⁴³ and therefore as a form of labour,¹³⁴⁴ and, further, that this ‘purpose’ element of human trafficking, i.e. sexual exploitation, can amount to slavery if the relevant conditions of the 1926 Slavery Convention are met. Clearly therefore, human trafficking according to current accepted international legal definition, consists of transportation into an exploitative situation (or the intention to exploit) against a backdrop of coercion or some other ‘means’, and therefore lack of consent.

¹³⁴² See, Chapter 2, Part IV, section B.

¹³⁴³ B E Hernandez-Truyol, and J E Larson, n 551, 391.

¹³⁴⁴ That of ‘sexual labour’.

III. The Role of Consent in Human Trafficking

The legal framework renders human trafficking an activity which is characterised by lack of consent (on the part of the putative victim), the role of which is considered in depth in Chapter 3. The controversial consent element goes against the grain of early international anti-trafficking instruments and leaves one with the impression that a central focus of the inclusion of this element was recognition of the rise in voluntary illicit migration, facilitated by globalisation i.e. improved ease of movement and communication. Indeed, the rise in such migration may have altered the face of trafficking as previously understood, and the legal response reflects this. To see trafficking just as an aspect of economic migration does not provide adequately for victims of trafficking and severe exploitation.

Consent is transformative yet it is a problematic notion, uniform application of which is difficult to achieve. Furthermore, uniform application of this concept which is not a normative or empirical constant would not necessarily be appropriate in all situations anyway. The conditions for a valid consent which were discussed in Chapter 1 are revisited, and discussed in the context of human trafficking. The distinction is reiterated as regards consent to ‘arms length’ agreements and those which involve bodily integrity and/or personal relationships.¹³⁴⁵

¹³⁴⁵ This is initially discussed in Chapter 1, Part III, section A, subsection ii, and the point that a high standard of informed consent might be required where, for example, bodily integrity, personal relationships or harm or exploitation is concerned, is reiterated and discussed in the specific context of human trafficking and facilitated migration for the purpose of sexual exploitation in Chapter 3, Part I, section B.

The ‘dichotomy’ approach taken by some commentators to consent/coercion is rejected, and instead a notion of a spectrum of consent/coercion is recognised. Furthermore, the ‘Autonomy v Paternalism’ approaches to consent in the context of sex work are discussed, and although the autonomy of the consenting sex worker is recognised, it is considered that in situations such as where exploitative sex work is undertaken, that there are limits to the justificatory scope of consent.

The legal response also leaves open the matter of consent to prostitution and sexual exploitation on the basis that different States view these matters differently and, therefore, attempts to adopt a single approach, whether hostile or sympathetic to the prostitution aspect would in some instances stand in the way of ratification of the anti-trafficking instruments. Although some view sex work as inherently exploitative, or as an act of violence against women,¹³⁴⁶ prostitution itself is decriminalised or legalised in various States.¹³⁴⁷ The argument is made that prostitution can indeed constitute a legitimate form of labour, in a philosophical if not always legal sense.¹³⁴⁸

The central argument is therefore that, in a trafficking and migration context, there may in some circumstances be consent (or at least the appearance thereof) on the part of the putative victim to transportation for exploitation, or that pressure to migrate as a result of severe economic circumstances in the origin State (i.e. ‘economic coercion’) means that those individuals who fall into either of these categories may fall without of the scope of trafficking definition. It follows from this that some women who are transported for sexually exploitative purposes or for prostitution may not be accorded the status of a trafficked ‘victim’, and that those who facilitated their migration into a situation of exploitation (for gain, therefore taking them beyond the scope of ‘smuggling’, at least in a moral if not legal sense) may not be prosecuted for trafficking.

¹³⁴⁶ As is the position in Sweden.

¹³⁴⁷ Such as the Netherlands.

¹³⁴⁸ See, Chapter 3, Part IV, section B.

There is, therefore, a loophole between smuggling and trafficking according to current international legal definition. Smuggling constitutes an ‘action’.¹³⁴⁹ Trafficking constitutes an ‘action’, ‘means’ and ‘purpose’. The existence of ostensible consent (or lack of ‘indicators’ such as objective evidence of force) leaves the putative trafficked victim somewhere between the two; ‘more than smuggled, less than trafficked’. In response to this loophole created by the definitions of smuggling and trafficking, it is proposed that the ‘gaps’ identified in the anti-trafficking regime be supplemented by provisions which restrict the effect of ‘consent’ on the status of the putative ‘victim’ and the potential for a defence to criminality on the part of the trafficker who has nonetheless engaged in exploitative conduct.

IV. The Treatment of Victims

Chapter 4 primarily critiques the lack of a victim-centred focus in the UK anti-trafficking legislative regime, and goes on to consider a more encompassing approach using the example of Italy. This followed by a critical analysis of the current victim-specific provisions of the three main legal instruments considered throughout this thesis.

The ‘means’ or ‘lack of consent’ element of the trafficking definition has been clearly established to be problematic. Although the difference between trafficking and smuggling can be difficult to maintain, it is submitted that not only may the current international standards for assistance and protection for trafficked victims be deficient, but also that the requirements of the anti-trafficking regime have not necessarily been

¹³⁴⁹ ‘[O]f transporting an individual from one location to another for ‘financial or other material benefit.’ Article 3, Smuggling Protocol, n 5.

implemented and used to the best possible effect (from the victim perspective) in the UK.¹³⁵⁰

On the basis that valid consent can be so difficult to determine, it is argued in Chapter 4 that women who seek out the services of traffickers or migration facilitators because of lack of opportunity in the origin state, or in the case where there is no ostensible coercion/lack of consent, should, in some cases, be treated as ‘victims’ and therefore entitled to some favourable treatment and/or protections in the destination State. There can be little doubt that this proposal will not appeal to destination States, which see these women in the same light as ordinary illicit economic migrants, who are not entitled to any special rights or protections in the destination State and who can therefore be subject to deportation. This would place the women firmly back in the category of ‘smuggled’ rather than ‘trafficked’ persons. Yet, to return to the point made above, they may still have been subjected to severe exploitation which cannot be rendered justifiable by ostensible consent.

In response to the anticipated responses of States to taking such an encompassing approach, one can look to the treatment of those discovered in the destination State. Certain persons are entitled to certain rights and protections, in terms of, for example, protection against removal to a destination where there is a real risk of serious ill treatment,¹³⁵¹ or protection against removal to a State where they will be subjected to persecution as a result of falling within the certain categories of persons recognised by the Refugee Convention. Certain obligations are therefore placed upon the State as a result of the provisions of the relevant instruments, such as the ECHR and the Refugee Convention.

¹³⁵⁰ As discussed in Chapter 4, Part VI.

¹³⁵¹ Article 3, ECHR.

There have been indications that refugee applicants and failed asylum seekers have been exposed to conditions which constitute violations of their human rights during the periods while they are awaiting decision or awaiting removal.¹³⁵² These conditions are clearly not restricted to putative victims of human trafficking; they may affect anyone. Certain categories of persons may have particular needs which require particular treatment and responses, such as trafficked and sexually exploited women, who it has been demonstrated constitute a particularly vulnerable¹³⁵³ body of persons, and remain so throughout the trafficking/exploitative facilitated migration process, whether or not they can strictly be deemed to have been coerced, or to have given consent.

Furthermore, it is argued that not only should the widest possible interpretation of the ‘means’ element be adopted so that the highest possible number of exploited victims may have access to the bespoke rights attributed by the anti-trafficking regime, but also that there is room for consideration of concessions to be made by States, considered on a case by case basis, for those who have been subject to exploitation but who fall short of the requirements of the technical trafficking definition. The global sex trade is gendered, and takes place against a backdrop of exploitation, and on a spectrum of coercion and consent of those caught up in it. These themes are explored as part of an attempt to address the central enquiry of the thesis. Nonetheless, it is recognised that there may indeed be reluctance on the part of Governments to concede to much for the ‘consensually trafficked.’

¹³⁵² See, Chapter 4, Part VIII, section C.

¹³⁵³ On the point of state responses to the vulnerable subject, Martha Fineman states that ‘Vulnerability is posited as the characteristic that positions us in relation to each other as human beings and also suggest a relationship of responsibility between state and individual. The nature of human vulnerability forms the basis for a claim that the state must be more responsive to that vulnerability.’ Women who have been trafficked, or smuggled and exploited constitute a body of vulnerable persons to which the State owes some responsibility, and this should be reflected in the transnational anti-trafficking, anti-exploitation regime. See M Fineman, ‘The Vulnerable Subject and the Responsive State’, *Emory Law Journal*, Vol. 60, No. 2 (2010) Emory Public Law Research Paper No. 10-130, 9.

V. Conclusions – The Way Forward

The question of ‘means’ or ‘lack of valid consent’ highlights a category of persons who will have been determined – sometimes incorrectly – not to have been trafficked. Furthermore, the international anti-trafficking regime does not provide for those who have consented to be transported into a situation of exploitative sex work, yet who have been subjected to an unacceptable level of exploitation. The voluntary undertaking of conduct does not, of itself, render it harmless, and should not leave the putative ‘victim’ beyond the reach of specific aid. Interpreted too strictly, the consent question may mean that traffickers have a defence and that exploited persons do not have adequate remedy for their treatment. As regards those who are, by definition, trafficked, and also those who are so similar to individuals who have been trafficked or who have been misidentified as ‘not trafficked’, such differential treatment as is envisaged by the fallacious coercion/consent dichotomy, which is far from a clear-cut divide, cannot be easily justified.

As has been established, there is a distinction, well-understood by the law, between smuggling people and trafficking people.¹³⁵⁴ A substantial group of such people are smuggled in order to work in the destination State. Some of these will know full-well the conditions in which they will be working but are content to do so, even if those conditions would not be lawful in the destination State, e.g. minimum wage legislation, health and safety conditions.

These people may be driven by press of economic circumstances in their home State, but this is not enough to affect their consent to the cross-border transfer (and nor

¹³⁵⁴ See, Introduction (to the thesis), Part II.

will it affect their criminal liability for any immigration offences which they may commit). In some cases, the exact conditions in which they will be working are not explained to the persons involved – very poor wages, very harsh working conditions, high fees to gang-masters, *de facto* no right to leave the employment. Here, though it will be a case-by-case inquiry, we might sometimes conclude that the worker did not consent to be moved to these (exploitative) conditions, so that we should say that she had been trafficked, rather than smuggled. But to maintain the distinction between smuggling and trafficking, we should have to concede that the conditions must be very bad, approaching or even attaining those of *de facto* servitude. Not to do so, would not accord with the claims States make to be able to remove forthwith smuggled workers, including those smuggled to conditions not compliant with national law (quite apart from the formal unlawfulness of an illegal immigrant working at all).

This is a distinction which is accepted for women transferred to work in the sex trade. The thesis has argued that some women consent to doing so, the transaction for them being no different from the worker smuggled to pick vegetables or build roads. Such women could not, by reason of their trade alone, claim the benefits which would apply to the treatment of trafficked women (for whatever purpose but including the sex trade). The categories of ‘willing’ sex workers included those who made the economic calculation that this was a viable work choice (the ‘Belles de jour’) and those who were motivated to travel by reason of their desperate economic plight at home, who also exist on a spectrum of ‘choice’.

Just as for the vegetable picker, any failure by his employer to meet local labour standards was a matter for local law enforcement authorities and the worker’s removal was a simple application of immigration law, so it should be for the sex worker. A problem, of course, is that prostitution is not, in the UK, subject to a comparable regime

of work place regulation as most other trades – though some might say that the regulation and its enforcement against pimps and madams are sometimes harsher than they are against farmers and road builders. However, the immigration consequence is the same – the sex worker is liable to peremptory removal to her national State, and to face the consequences of willingly breaching immigration laws.

Empirical studies show that the conditions of workers in the sex trade are more likely to reach those of exploitation than simple, mere illegality for a large proportion of those involved.¹³⁵⁵ These awful circumstances are relevant in two different contexts. The first goes to the responsibility of the destination State. It has positive obligations to respond to servitude under human rights treaties, whatever the nationality (including its own) of the women involved. But it also has obligations with respect to foreign women, the deportation of whom may cause a return to the unacceptable conditions or subject them to a real risk of other harsh treatment in their national State, factors which should influence any deportation decision (though not necessarily their prosecution for immigration offences, if they were smuggled into the country).

But, the exploitative nature of their work may be relevant to another matter – it is hardly likely that any ‘smuggler’ would reveal these conditions to any woman seeking to be transported to another State, so that there would be no consent to the transaction: the woman would have been trafficked, not smuggled, and would be entitled to the protection provided by trafficking law, in addition to the protection of her human rights (which might include the application of the criminal aspects of immigration law to her). The evidence¹³⁵⁶ seems to be that a significant proportion of women transported and who work in the sex trade fall into this last category but there is no justification for

¹³⁵⁵ n 931.

¹³⁵⁶ See, for example, L Brown, n 120, which is based upon an empirical study conducted by Brown and includes numerous accounts and excerpts of the experiences of trafficked victims and the deception and exploitation which they have experienced.

saying that they all do, even if one went so far as to say that all prostitution were exploitative (which the thesis does not), we might find that some women were prepared to accept this, so bad were their own conditions at home and, if they did, they would not have been trafficked.

Nonetheless, as regards those identified as formally trafficked, it appears the international regime relevant to these women is deficient – particularly in terms of implementation of the victim-centred obligations into the UK legislative regime. It has been identified that there are deficiencies in the UK NRM,¹³⁵⁷ particularly in terms of the identification of victims, which clearly undermines the object and purpose of the anti-trafficking regime. Mistakes have also been made as regards returning formally trafficked victims to the origin State where she was at risk of ill-treatment, such as re-trafficking, on return.¹³⁵⁸ Misidentification can have severe adverse consequences for those who actually have been trafficked.¹³⁵⁹

Furthermore, lack of access to assistance and support to those who fall short of the threshold of the trafficking definition, yet who have still been subject to severe exploitation, creates an unacceptable situation where tolerance of consent to exploitation is evident. There is a need for a paradigmatic shift in attitude (by those involved in the victim identification regime) toward the trafficked victim or exploited migrant – indeed, investigation into whether an individual is a putative victim of trafficking should take precedence over concerns regarding the individual's immigration status.¹³⁶⁰

¹³⁵⁷ The Anti Trafficking Monitoring Group, n 306.

¹³⁵⁸ See, for example, Alan Travis, n 1025.

¹³⁵⁹ Such as in the case of *R v O* [2008] EWCA Crim 2835, although decided pre-ratification of the CoE Trafficking Convention, this case is illustrative of the consequences of misidentification – see J Elliott, n 1117, also see *OOO et al v Commissioner of Metropolitan Police* [2011] EWHC 1246 QB.

¹³⁶⁰ Home Office/UK Borders Agency, n 1326.

In practice, it might be that the proportion of transported women working in the sex trade, whose circumstances are exploitative is so great, that we should reasonably accept a presumption that they have been trafficked and should be protected accordingly (even though local woman working in the same conditions would have no similar, mandatory protection). If the State were able to rebut the presumption in a particular case, we might want to make the argument that the effect of the conditions of her ‘work’ and the uncertainty of the risk to the woman if returned to her national State were so great that, as a matter of humanitarian concession, the State should allow the benefits (or at least a minimum level of similar benefits) afforded to trafficked women on a general basis (analogous to the humanitarian right to remain sometimes accorded to failed refugee applicants) – but this would not necessarily be a matter of obligation for the State, which might very well want to retain its power to remove at once, any foreign ‘Belles de jour’ who came to its attention.

Along the same vein, the consideration of a policy of prosecutorial discretion as regards offences committed by the ‘consensually trafficked’ as regards, say, immigration offences, as is available for the formally trafficked, is suggested. Furthermore, it is considered that the policy of prosecutorial discretion as regards offences committed by victims identified as formally trafficked (and having been committed as a result of having been trafficked) should be a more definite and less discretionary policy of non-prosecution – it is difficult to sustain a ‘public interest’ argument in favour of prosecuting such persons.¹³⁶¹ It is, however, more difficult to sustain the same argument as regards the ‘consensually trafficked’, who – if third country nationals – may have ostensibly consented or willingly flouted immigration laws.

¹³⁶¹ To reiterate what was said in the UK Action Plan on Tackling Human Trafficking, ‘It is difficult to envisage circumstances where it would be in the public interest to prosecute genuine victims of human trafficking for immigration offences.’ Home Office and Scottish Executive, n 254, 57.

It must be recognised that asking for such concessions, particularly as regards the ‘consensually trafficked’, may not be popular with States – the UK for example stressed that, as regards the decision whether or not to opt in to the EU 2011 Directive, that it was of great importance that the UK could ‘still maintain control over our criminal justice system’.¹³⁶² This can be related directly to the preceding paragraph – the UK is clearly keen to avoid interference with its interests in terms of criminal law offences and corresponding sanctions.

The arguments advanced throughout the thesis are not intended to be about removing, undermining or threatening autonomy, or about doubting the validity of human agency to give genuine consent. This is about recognising the tensions caused by the need to determine consent - or lack thereof - in an incredibly sensitive and potentially coercive situation which is, by nature, clandestine. Accordingly, this is about providing a response which takes all of those things into account, and properly provides for not only victims of trafficking, but victims of transportation into exploitation.

It is recognised that the thesis asks for a lot. Yet, it is argued that such a position is justified, due to the ‘special position’ of ‘consensually trafficked’ persons, whose conditions of ‘work’ may be comparably as bad as those faced by the formally trafficked person, or who may be misidentified due to failings of the authorities charged with identifying them. The type of changes requested for consideration are not uncontroversial and would, if deemed acceptable, likely take a long time to actually be brought into effect, due to such concessions being somewhat of a departure from the

¹³⁶² Malcolm Harbour, West Midlands Conservative MEP, quoted in The Shuttle (Kidderminster Shuttle) ‘UK Government’s opt-in to trafficking directive welcomed’ 3 April 2011 <http://www.kidderminstershuttle.co.uk/news/8946640.UK_Government_s_opt_in_to_trafficking_directive_welcomed/> accessed 15 June 2011.

norm. Yet, these concessions are asked for solely within the isolated situation of ostensibly consenting transported and severely exploited individuals – it does not ask for an ‘open door’ policy for all smuggled sex workers.

The central focus of the anti-trafficking (and therefore anti-exploitation) regime should be exploitation, rather than consent. This thesis has argued that either consent should be deemed irrelevant, or – as is the preferred argument here - the middle category of persons who can be referred to as ‘less than trafficked, more than smuggled’ should be provided for by a bespoke system, considered on a case by case basis, so that victims are not left without access to necessary and appropriate rights and protections, and so that traffickers cannot rely upon consent as a defence to their criminality as a trafficker.

The destination State must tread carefully. Showing proof of coercion, determining the timing of consent, and/or exactly what has been consented to may at times serve to make an arbitrary distinction between ‘consenting’ and non-consenting trafficked persons, when the reality is that the cases may be so alike that little purpose beyond immigration control (although an important concern on the part of the affected State) is served by treating these individuals differently.

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